



Cabinet Office

Defence Procurement Policy Note 01/20 Responding to COVID-19 – Defence Update to CO PPN 01/20

Information Note DPPN 01/20

March 2020

Issue

1. This Defence Procurement Policy Note (DPPN) sets out information and associated guidance on the public procurement regulations and responding to the current coronavirus, COVID-19, outbreak. The exact response to COVID-19 will be tailored to the nature, scale and location of the threat in the UK, as our understanding develops. However, it is already clear that in these exceptional circumstances, authorities may need to procure goods, services and works with extreme urgency. Authorities are permitted to do this using regulation 32(2)(c) under the Public Contract Regulations 2015 (PCR) or regulations 16(1)(a) (iii) or (iv) of the Defence and Security Public Contract Regulations 2011 (DSPCR).

Dissemination and Scope

2. This DPPN is applicable to all defence and security authorities and supersedes the PPN 01/20 issued by Cabinet Office.

3. Please circulate this DPPN across your organisation and to other relevant organisations that you are responsible for, drawing it to the specific attention of those with a commercial and procurement role.

Timing

4. With immediate effect.

Background

5. There will be a range of commercial actions that must be considered by contracting authorities in responding to the impact of COVID-19. In such exceptional circumstances, authorities may need to procure goods, services and works with extreme urgency.

6. This DPPN and associated guidance covers options that may be considered in relation to procurements under the PCR and the DSPCR (for the current financial thresholds, see PPN 06/19):

- direct award due to extreme urgency, see regulations 32(2)(c) (PCR) or 16(1)(a)(iv) (DSPCR);

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- direct award to urgency related to a crisis, see regulation 16(1)(a)(iii) (DSPCR);
- direct award due to absence of competition or protection of exclusive rights or for technical reasons;
- call off from an existing framework agreement or dynamic purchasing system;
- call for competition using a standard procedure with accelerated timescales;
- extending or modifying a contract during its term.

7. Contracting authorities procuring under the Defence and Security Public Contracts Regulations 2011, the Utilities Contracts Regulations 2016, the Single Source Contract Regulations 2014 and the Concession Contracts Regulations 2016 will need to check similar provisions in those regulations.

8. The COVID-19 outbreak is likely to give rise to supply chain disruption and contracting authorities may need to take action in response to supplier claims of 'force majeure' or contract 'frustration'. These and other issues will be covered in future PPNs.

Contact

9. Further guidance on COVID-19 for individuals, employers and organisations is available on GOV.UK.

10. Enquiries about this DPPN should be directed to the commercial policy helpdesk: DefComrclPol-HelpDesk@mod.gov.uk.

11. Enquires about the Single Source Contract Regulations should be sent to DESComrcl-SSAT-1@mod.gov.uk

PUBLIC CONTRACT REGULATIONS - RESPONDING TO COVID-19

Introduction

There will be a range of commercial actions that need to be considered by contracting authorities in responding to the impact of COVID-19. In such exceptional circumstances, authorities may need to procure goods, services and works with extreme urgency. This is permissible under current public procurement regulations.

If you have an urgent requirement for goods, services or works due to COVID-19, and you need to procure this under the Public Contract Regulations 2015 (PCR) or the Defence and Security Public Contract Regulations (DSPCR), there are various options available. These include:

- direct award due to extreme urgency;
- direct award to urgency related to a crisis (DSPCR only)
- direct award due to absence of competition or protection of exclusive rights or technical reasons;
- call off from an existing framework agreement or dynamic purchasing system;
- call for competition using a standard procedure with accelerated timescales;
- extending or modifying a contract during its term.

Depending on the specific nature of your requirement there may be further options under the PCR and DSPCR. Such as the additional delivery of supplies from an existing supplier (regulation 32(5) and 16(1)(b)), additional similar works or services from an existing supplier (regulation 32(9) and 16(1)(d)), or using the services of a subsidiary of another contracting authority (regulation 12 of the PCR). These are not covered in this guidance and do have their own specific requirements.

If the direct award contract you are letting is for defence purposes and worth more than £5m then it will usually fall under the Single Source Contract Regulations (SSCRs). If you think that the contract may not be for defence purposes, you should seek advice from the Single Source Advisory Team (SSAT).

You should ensure you keep proper records of decisions and actions on individual contracts, as this could mitigate against the risk of a successful legal challenge. If you make a direct award, you should publish a contract award notice (regulation 50 and regulation 32) within 30 days (48 days in the case of the DSPCR) of awarding the contract.

Specific grounds within the Public Contract Regulations 2015

Direct award due to reasons of extreme urgency

COVID-19 is serious and its consequences pose a risk to life. Regulation 32(2)(c) of the PCR is designed to deal with this sort of situation.

Regulation 32(2) sets out the following:

The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases: ...

(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

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... the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

Therefore, in responding to COVID-19, contracting authorities may enter into contracts without competing or advertising the requirement so long as they are able to demonstrate the following tests have all been met:

- 1) There are genuine reasons for extreme urgency, e.g.
 - you need to respond to the COVID-19 consequences immediately because of public health risks, loss of existing provision at short notice, etc;
 - you are reacting to a current situation that is a genuine emergency - not planning for one.
- 2) The events that have led to the need for extreme urgency were unforeseeable, e.g.
 - the COVID-19 situation is so novel that the consequences are not something you could have predicted.
- 3) It is impossible to comply with the usual timescales in the PCRs, e.g.
 - there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation;
 - there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.
- 4) The situation is not attributable to the contracting authority, e.g.
 - you have not done anything to cause or contribute to the need for extreme urgency.

Contracting authorities should keep a written justification that satisfies these tests. You should carry out a separate assessment of the tests before undertaking any subsequent or additional procurement to ensure that they are all still met, particularly to ensure that the events are still unforeseeable. For example, as time goes on, what might amount to unforeseeable now, may not do so in future.

You should limit your requirements to only what is absolutely necessary both in terms of what you are procuring and the length of contract.

Delaying or failing to do something in time does not make a situation qualify as extremely urgent, unforeseeable or not attributable to the contracting authority. This is because:

- the PCR expect a contracting authority to plan its time efficiently so that it is able to use a competitive procedure;
- competitive alternatives (e.g. an accelerated open procedure) can be completed quickly;
- case law has held that knowing that something needs to be done means it is foreseeable;
- a contracting authority's delay or failure to do something is likely to mean that the situation is attributable to the contracting authority.

It is important that contracting authorities continue to achieve value for money and use good commercial judgement during any direct award. Whilst prices may be higher than would be

expected in a regular market, any abnormally high pricing should be approved by the appropriate commercial director. Additionally, contracting authorities are encouraged to consider contractual mechanisms to ensure that they have the ability to secure pricing reductions through the life of the contract. Where this is not possible, it is recommended a log should be kept and reasoning provided for future auditing.

The Single Source Contract Regulations are the MOD's default means of assuring value for money on non-competed work and will apply to most contracts awarded directly due to extreme urgency. They are especially useful in urgent cases, because they allow costs to be effectively assured after contract award.

Direct award due to absence of competition or protection of exclusive rights

Regulation 32(2) of the PCR also sets out that the negotiated procedure without prior publication may be used:

(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: ...

(ii) competition is absent for technical reasons,

(iii) the protection of exclusive rights, including intellectual property rights,

... but only where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

Therefore, a contracting authority may make a direct award where the works, goods or services needed to respond to COVID-19 can only be supplied by a particular supplier because:

- competition is absent for technical reasons, e.g. there is only one supplier with the expertise to do the work, produce the product or with capacity to complete on the scale required; or
- the protection of exclusive rights, including intellectual property rights e.g.
 - the supplier owns those rights (including intellectual property rights);
 - it has the exclusive right to exploit intellectual property rights.

But this is only when:

- there is no reasonable alternative or substitute available; and
- the contracting authority is not doing something which artificially narrows down the scope of the procurement e.g. by over-specifying the requirement.

Contracting authorities should keep a written justification that satisfies these tests. You should carry out a separate assessment of the tests before undertaking any repeat procurement to ensure these tests have been met.

As stated above, if your direct contract award is over £5m and does not meet a specified exclusion from the Single Source Contract Regulations (SSCRs) then it will be subject to those Regulations. In these circumstances, you should seek advice from the Single Source Advisory Team (SSAT).

Call off from an existing framework agreement or dynamic purchasing system

Central purchasing bodies, such as the Crown Commercial Service, offer public bodies access to a range of commercial agreements including framework agreements and dynamic purchasing systems (DPS).

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It is possible to use one of these commercial agreements as long as:

- your contracting authority was clearly identified as a permitted customer in the original OJEU notice or the invitation to confirm interest;
- the goods, services or works to be procured fall within the scope of those covered by the contract, framework agreement or DPS;
- the contract, framework agreement or DPS was procured in accordance with the PCR;
- the terms of the contract, framework agreement or DPS are suitable and meet your requirements without the need for significant changes.

A framework agreement will provide for direct awards, mini-competitions or both. You must follow the procedure for awarding a call off contract set out in the framework agreement. An award under a DPS has to be by mini-competition and the minimum time for receipt of tenders is 10 days.

The Single Source Contract Regulations may apply to some contracts over £5m even if they are call offs from an existing framework. You should seek advice from the Single Source Advisory Team (SSAT).

Using a standard procedure with accelerated timescales due to urgency

Contracting authorities can reduce the minimum timescales for the open procedure, the restricted procedure and the competitive procedure with negotiation if a state of urgency renders the standard timescales impracticable. The minimum time limits vary (see regulations 27(5), 28(10) and 29(10) respectively). For procurements under the open procedure, timescales can be reduced to 15 days for receipt of tenders plus the minimum 10 days for the standstill period.

There is no express requirement for the situation to be unforeseeable or not attributable to the contracting authority but you should set out in your OJEU notice a clear justification e.g.

“The COVID-19 outbreak has given rise to an urgent need for the supply of [description of what is being procured] because [explanation of urgency]. This does not give [name of contracting authority] sufficient time to comply with the standard [open procedure / restricted procedure / competitive procedure with negotiation] timescales for this procurement. [Contracting authority] considers this to be a state of urgency which it has duly substantiated. Accordingly, [contracting authority] is using the accelerated time limits permitted under the Public Contract Regulations 2015 (regulation [27(5) for the open procedure / 28(10) for the restricted procedure / 29(10) for the competitive procedure with negotiation]) in respect of this procurement”.

Contracting Authorities can also consider the use of the Light Touch Regime for specific health and social care related services (see regulation 74-77). While contracting authorities are required to advertise contracts in OJEU and publish contract award notices, you are free to use any process or procedure you choose to run and are not required to use the standard procurement procedures (open, restricted, etc). You are also free to set your own timescales as long as they are reasonable and proportionate.

Extending or modifying a contract during its term

Regulation 72(1) sets out the following:

Contracts ... may be modified without a new procurement procedure ... in any of the following cases:

(c) where all of the following conditions are fulfilled:

- (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;*
- (ii) the modification does not alter the overall nature of the contract;*
- (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.*

Contracting authorities should keep a written justification that satisfies these conditions, including limiting any extension or other modification to what is absolutely necessary to address the unforeseeable circumstance. This justification should demonstrate that your decision to extend or modify the particular contract(s) was related to the COVID-19 outbreak with reference to specific facts, e.g. your staff are diverted by procuring urgent requirements to deal with COVID-19 consequences, or your staff are off sick so they cannot complete a new procurement exercise. You should publish the modification by way of an OJEU notice to say you have relied on regulation 72(1)(c).

Multiple modifications are permissible, however each one should not exceed the 50% of the original contract value. You should also consider limiting the duration and/or scope of the modification and running a procurement for longer-term/wider scope requirements alongside it.

There are other grounds available under regulation 72 for extending contracts, including: if the proposed variation has been specifically provided for in the contract (regulation 72(1)(a)); where a change of contractor cannot be made for economic or technical reasons (regulation 72(1)(b)), and where the modifications are not substantial (regulation 72(1)(e))

If more than one ground is applicable this may lower the legal risk and therefore you should ensure all relevant grounds are included in your written justification.

Some extensions to existing contracts are, in effect, new contracts and as such will fall under the Single Source Contract Regulations if they meet the relevant criteria. Under these circumstances you should seek advice from the Single Source Advisory Team (SSAT).

If you are making a single source amendment to a contract which is not already a Qualifying Defence Contract, it is MOD policy that you should bring the contract under the Regulations unless there are compelling reasons not to do so. You must speak to SSAT if you are looking not to convert a contract to a Qualifying Defence Contract on any amendment over £5m.

Contracting Authorities will need to also ensure that any amendment to a Qualifying Defence Contract is made in accordance with the relevant Single Source Contract Regulations

Statutory Reporting Obligations under the SSCRs

Both contractors and MOD have legal obligations to make sure reports under the SSCRs are completed and submitted on time. However, given the current circumstances, MOD recognises that there may be limitations in the ability of some suppliers to comply with reporting requirements. Therefore, when it comes to the practicalities of complying to deadline MOD is

prepared to make reasonable adjustments on a case by case basis to take account of the situation.

Specific grounds within the Defence and Security Public Contract Regulations 2011

Direct award due to reasons of extreme urgency

COVID-19 is serious and its consequences pose a risk to life. Regulation 16(1)(a)(iv) of the DSPCR is designed to deal with this sort of situation.

Regulation 16(1) sets out the following:

A contracting authority may use the negotiated procedure without the prior publication of a contract notice in accordance with this regulation and regulation 18(1), (2), (9) and (10) in the following circumstances and must give reasons for the use of this procedure in the contract award notice—

(iii) when the periods laid down for the restricted procedure and negotiated procedure with the prior publication of a contract notice, including the shortened periods referred to in regulations 17(6), 17(19) and 18(8), are incompatible with the urgency resulting from a crisis;

(iv) when (but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority, the time limits specified in— (aa) regulation 17 for the restricted procedure, or (bb) regulation 18 for the negotiated procedure, cannot be met;

Therefore, in responding to COVID-19, contracting authorities may enter into contracts without competing or advertising the requirement so long as they are able to demonstrate the following tests have all been met:

- 1) There are genuine reasons for extreme urgency, e.g.
 - you need to respond to the COVID-19 consequences immediately because of public health risks, loss of existing provision at short notice, etc;
 - you are reacting to a current situation that is a genuine emergency - not planning for one.
 - The events that have led to the need for extreme urgency were unforeseeable, e.g.
 - the COVID-19 situation is so novel that the consequences are not something you could have predicted.
- 2) It is impossible to comply with the usual timescales in the DSPCRs, e.g.
 - there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation;
 - there is no time to place a call off contract under an existing commercial agreement such as a framework agreement.
- 3) The situation is not attributable to the contracting authority, e.g.
 - you have not done anything to cause or contribute to the need for extreme urgency.

Further information on use of regulation 16(1)(a)(iii) and (iv) can be found at paragraphs 82-87 of [chapter 8 of the DSPCR guidance](#).

Contracting authorities should keep a written justification that satisfies these tests. You should carry out a separate assessment of the tests before undertaking any subsequent or additional procurement to ensure that they are all still met, particularly to ensure that the events are still unforeseeable. For example, as time goes on, what might amount to unforeseeable now, may not do so in future.

You should limit your requirements to only what is absolutely necessary both in terms of what you are procuring and the length of contract.

Delaying or failing to do something in time does not make a situation qualify as extremely urgent, unforeseeable or not attributable to the contracting authority. This is because:

- the DSPCR expect a contracting authority to plan its time efficiently so that it is able to use a competitive procedure;
- competitive alternatives (e.g. an accelerated restricted procedure) can be completed quickly;
- case law has held that knowing that something needs to be done means it is foreseeable;
- a contracting authority's delay or failure to do something is likely to mean that the situation is attributable to the contracting authority.

It is important that contracting authorities continue to achieve value for money and use good commercial judgement during any direct award. Whilst prices may be higher than would be expected in a regular market, any abnormally high pricing should be approved by the appropriate commercial director. Additionally, contracting authorities are encouraged to consider contractual mechanisms to ensure that they have the ability to secure pricing reductions through the life of the contract. Where this is not possible, it is recommended a log should be kept and reasoning provided for future auditing.

Direct award due to absence of competition or protection of exclusive rights or technical reasons

Regulation 16(1) of the DSPCR also sets out that the negotiated procedure without prior publication may be used:

(a) in the case of a contract—: ...

(ii) when, for technical reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;.

Further information on use of 16(1)(a)(ii) can be found at paras 88-90 of the [DSPCR guidance](#). If your contract is above £5m and on a single source basis, you should also consider the impact of the single source contract regulations.

Therefore, a contracting authority may make a direct award where the works, goods or services needed to respond to COVID-19 can only be supplied by a particular supplier because:

- competition is absent for technical reasons e.g. there is only one supplier with the expertise to do the work, produce the product or with capacity to complete on the scale required; or
- the protection of exclusive rights, including intellectual property rights e.g.

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- the supplier owns those rights (including intellectual property rights);
- it has the exclusive right to exploit intellectual property rights.

Contracting authorities should keep a written justification that satisfies these tests. You should carry out a separate assessment of the tests before undertaking any repeat procurement to ensure these tests have been met.

Call off from an existing framework agreement or dynamic purchasing system

Advice in this area is the same as for the PCR above.

Using a standard procedure with accelerated timescales due to urgency

Contracting authorities can reduce the minimum timescales for the restricted procedure and the negotiated procedure if a state of urgency renders the standard timescales impracticable. The minimum time limits vary (see regulations, 17(6) and 18(8) respectively).

There is no express requirement for the situation to be unforeseeable or not attributable to the contracting authority but you should set out in your OJEU notice a clear justification e.g.

“The COVID-19 outbreak has given rise to an urgent need for the supply of [description of what is being procured] because [explanation of urgency]. This does not give [name of contracting authority] sufficient time to comply with the standard [restricted procedure / negotiated procedure] timescales for this procurement. [Contracting authority] considers this to be a state of urgency which it has duly substantiated. Accordingly, [contracting authority] is using the accelerated time limits permitted under the Defence and Security Public Contract Regulations 2011 (regulation 17(6) for the restricted procedure /18(8) for the negotiated procedure) in respect of this procurement”.

If a contractor believes it is facing difficulties in meeting its obligations, they should inform the relevant Delivery Team. The Delivery Team should then engage with SSAT to ensure that a pragmatic approach to any enforcement or penalties is adopted.