Central Procurement Directorate

Stiúrthóireacht Lárnach Soláthair

Department of Finance

An Roinn Airgeadais

www.finance-ni.gov.uk

Procurement Guidance Note

PGN 01/12

(as amended)

Contract Management Principles and Procedures

Issued: 24 July 2017

ea Education Authority · HSC Business Services Organisation · Housing Executive · northern ireland water · Translink · transportni

PROCUREMENT GUIDANCE NOTES

Northern Ireland Public Procurement Policy (NIPPP) was approved by the Northern Ireland Executive in 2002. In approving the policy, the Executive took the decision that legislation was not necessary to ensure that Departments, their Agencies, Non Departmental Public Bodies and Public Corporations complied with the policy. Instead, it considered that compliance could be achieved by means of administrative direction.

Procurement Guidance Notes (PGNs) are the administrative means by which Departments are advised of procurement policy and best practice developments. They apply to those bodies subject to NIPPP and also provide useful guidance for other public sector bodies.

PGNs are developed by the Central Procurement Directorate (CPD), in consultation with the Centres of Procurement Expertise (CoPEs), and are subject to the approval of the Procurement Board.

Once endorsed by the Procurement Board, they are issued to the Departments for implementation and copied to CoPEs to develop, if necessary, underpinning procedures supporting the implementation of this guidance in their particular sector. PGNs are also published on the Department of Finance (DoF) website.

The following PGN was endorsed by the Procurement Board with effect from 24 July 2017 for use by those bodies subject to NIPPP.

Revision History

First issued as a Procurement Guidance Note PGN 05/10	12 November 2010
Reissued as PGN 01/12	16 January 2012
Revised	24 July 2017

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Definition of Terminology

In the preparation of this guide, the term **contractor/supplier** has been used to denote an organisation that contracts directly with a Department, whether it is a supplier, a service provider or a construction contractor.

The term **Department** has been used to refer to those bodies subject to Northern Ireland Public Procurement Policy including Departments, Non-Departmental Public Bodies and Public Corporations. A full list of such bodies is available in Annex A of Northern Ireland Public Procurement Policy.

1 PURPOSE

1.1 The purpose of this procurement guidance note is to provide Departments, CoPEs and those responsible for the day to day management of goods, works or services contracts with guidance on best practice principles. It covers both straightforward and more complex contracts. It also describes how consistently poorly performing suppliers should be dealt with.

1.2 The guidance takes due cognisance of the National Audit Office (NAO) report 'Transforming government's contract management'[1] published in September 2014 which looked at how government had responded to internal reviews of contracts carried out by Whitehall departments including the Ministry of Justice, the Home Office and Department for Works and Pensions.

2 WHAT IS CONTRACT MANAGEMENT AND WHY IS IT IMPORTANT?

2.1 In 2014/15 Northern Ireland central government spent a total of £2.6bn on the procurement of goods, services and works. It is therefore important that contracts be adequately managed to ensure that they deliver in line with contract commitments and that value for money is achieved for the tax payer. The reputation of a Department and contractor can be damaged by a poorly managed contract that does not deliver the expected outcomes.

2.2 Successful contract management is an extension of the tendering/contract award phase and should be planned for from the start of the procurement process. It comprises a variety of activities ranging from core administration, such as paying invoices and the inspection of goods on receipt, to more developmental and strategic activities such as supplier relationship management, supplier development management and market management. Ensuring the delivery of social clauses also forms part of contract management.

2.3 Contract management becomes more important as contract risk, value and duration increases. A proportionate approach is recommended as a contract that has little

[1] Report findings at Annex A

inherent risk attached to it and little opportunity for additional value would not warrant a large amount of contract management resource, as the benefits that could be achieved from greater contract management would be small. However, even if contract risk is low, the potential to generate additional value from the contract should never be overlooked and could, on occasions, justify increasing levels of contract management resources and activities, possibly for short or intermittent periods. Extra value could come, for example, from cost reduction through process development or from encouraging and helping a contractor to increase service levels without additional cost.

2.4 Good contract management aims to achieve continuous improvement throughout the life of the contract. This will involve the Department and contractor building an effective working relationship. Both parties approach to managing the relationship is critically important in ensuring successful contract delivery. The relationship, however, must also maintain an appropriate degree of commercial tension and be maintained in a professional manner.

3 STANDARDS EXPECTED OF THOSE INVOLVED IN CONTRACT MANAGEMENT

3.1 It is important that those involved in contract management adhere to the principles underlying probity. Their behaviour should be consistent with Northern Ireland Public Procurement Policy, the Principles of Public Life, the NICS Code of Ethics and any ethical standards governing the particular professions of those involved in the process. Staff should not accept gifts or hospitality from contractors and comply with DAO (DFP) 10/06 – Revised guidance on acceptance of gifts and hospitality – September 2009.

3.2 It is the Department's responsibility to ensure that there are no conflicts of interest or the perception of bias at any stage of the relationship with the contractor. Regulation 24 of the Public Contracts Regulations 2015 (PCR15)[2] clearly states

[2] Regulation 42 of the Utilities Contracts Regulations 2016 (UCR16) and Regulation 35 of the Concession Contracts Regulations 2016 (CCR16). Where the Procurement Regulations are paraphrased or referenced the full provisions of the Regulations should be considered and legal advice sought where necessary.

appropriate measures should be taken to prevent, identify and remedy such action. Any connections between a member of staff and a contractor must be formally disclosed and documented at the earliest possible opportunity. The Department should then take (and record) action deemed appropriate in each particular circumstance.

3.3 Staff involved in contract management should be aware of the Department's anti-fraud policies and fraud response plans and should be encouraged to undertake fraud awareness training. Fraud is not a victimless crime and public servants are entrusted with taxpayers' money. Departments should take a zero tolerance approach to fraud, reporting instances of fraud to the police as necessary, and taking all appropriate steps to recover monies lost as a result of fraud. All staff should be familiar with the guidance issued by the Department of Finance – https://www.finance-ni.gov.uk/topics/finance/accountability-and-financial-management and guidance issued by the Northern Ireland Audit Office – https://www.niauditoffice.gov.uk/.

4 SUPPLIES AND SERVICES CONTRACTS

4.1 Day to day management

4.1.1 Some CoPEs will be responsible for all aspects of contract management on behalf of Departments. However, in other cases the Department will be responsible for its own contract management. In these cases, the CoPE will still offer support and advice post contract award and may in particular become involved:

- at agreed review dates; or
- when there are problems of a contractual or commercial nature that put at risk the delivery of the supplies or services to the quality, standard or timelines contracted for; or
- where there are problems of persistent poor performance, including failure to deliver sustainability requirements or commitments given in tender documents.

4.1.2 Crown Commercial Service (CCS), part of the Cabinet Office, has developed a Contract Management Checklist (Annex B) which provides a useful guide to best practice. It is broken into four areas: preparation; managing service delivery; managing the relationship; and contract administration.

4.2 Preparation

4.2.1 The foundations for contract management are laid in the stages before contract award. There should be a plan for actively managing the contract, which should include ensuring the right people are in place to manage all aspects of it. If possible key contract management staff should be involved in contract development. It may be necessary for complex or high value contracts to appoint a full-time contract manager or contract management team to develop and deliver a contract management plan in line with the Conditions of Contract.

4.2.2 Consideration should be given to what training is required for contract management staff. The skills and experience required will vary from one contract to the next. Similarly, the skills and experience required to manage service delivery may be different from those required to manage the relationship between the parties. To be effective, contract managers should have the necessary commercial skills.

4.2.3 It is important that the right contract is put in place. The contract should include (as appropriate):

- a definition of what is to be provided and requirements to be met;
- agreed service levels and mechanisms for payment reduction if not met;
- means to measure performance including key performance indicators (KPIs);
- pricing mechanisms including where appropriate, milestone payments, incentivisation/rewards, retentions;
- a plan to cover implementation/transition/rollout;
- acceptance strategy/test plan;
- ownership of assets and intellectual property;

- escalation and alternative dispute resolution procedures;
- change control procedures;
- invoicing arrangements;
- communication routes, typically at three levels:
    - operational (end users/technical support staff);
    - business (contract manager and relationship manager on both sides);
    - strategic (senior management/board of directors);
- agreed exit strategy and agreed break options;
- sub-contractor details;
- the Department's responsibilities; and
- contract management, oversight and review arrangements.

4.2.4 A good contract not only identifies clearly the obligations of the contractor, but identifies key performance indicators against which the contractor must perform throughout the contract.

4.3 Managing service delivery

4.3.1 During the contract delivery phase Departments should ensure the agreed service levels are maintained. Service level management is the process of managing the contractor's performance as specified in contractual performance metrics. However, where specific service levels have been set, it may sometimes be appropriate to take a flexible approach to enforcement particularly in the early stages of contract performance.

4.3.2 Qualitative metrics are measurements that allow the quality of a service to be measured. Qualitative measures might include assessing aspects such as completeness, availability, reliability and timeliness among others. Some aspects of a service may be measurable by quantitative means while others may require subjective assessment (eg customer satisfaction surveys).

4.3.3 It is important to ensure that the contract continues to achieve value for money over its life. Benchmarking is the practice of making like for like comparisons between similar contracts with the aim of ensuring this as well as getting better performance from the contractor and improving business practices. Price comparisons offer a quick and effective way of gauging whether value for money is being obtained.

4.3.4 Some contracts may cover long periods of time and have options to extend after the end of the initial contract period (eg the option to extend for a period of a year after a three year initial contract period). Properly managing the supplier's performance will help Departments decide whether or not the optional extension represents value for money or whether the contract should be put out to tender.

4.3.5 Risks must be identified and managed as they arise. They can relate to many aspects of the contract including fluctuation in demand, lack of contractor capacity, modification in requirement and transfer of skilled staff (on either side). Where appropriate a risk register should be maintained and constantly reviewed to ensure those best placed to manage the associated risks do so.

4.3.6 A major part of contract management is considering service continuity/contingency – what will happen if the service fails or is interrupted. It will normally be the contractor's responsibility to manage service continuity and this will be stipulated in the contract. Those aspects of a service identified as critical will require careful consideration and the creation of a business continuity plan. The risks associated with service interruption or failure should be identified and formally recorded in a risk register so they can be more effectively managed. The financial health of contractors should be regularly monitored eg by using databases such as Dun and Bradstreet.

4.4 Managing the relationship

4.4.1 The Department's relationship with the contractor should be managed as well as the more formal aspects of the contract. It is in the Department's interest to make the relationship work.

4.4.2 Good two-way communication is always key to managing any relationship. This allows problems to be identified and resolved early and builds an atmosphere of mutual trust and appreciation of each other's priorities.

4.4.3 However good the relationship between the Department and contractor and however stable the service being delivered, problems may arise. These should be dealt with promptly. The contract should define the procedures for undertaking corrective action if, for example, target performance levels are not being achieved.

4.5 Contract administration

4.5.1 Contract administration is concerned with the mechanics of the relationship between the Department and the contractor. Clear administrative procedures ensure that all parties to the contract understand who does what, when and how.

4.5.2 The elements that need managing are likely to include:

- ordering procedures;
- payment procedures;
- charges and cost monitoring;
- contract maintenance and change control;
- notice period, contract closure or termination;
- budget procedures;
- resource management and planning
- management reporting; and
- asset management.

4.6 Contract modifications

4.6.1 It is important for contracts to evolve over time in response to changing needs. This may include unforeseen additional requirements; extension of a collaborative contract to new bodies; or when a supplier is taken over. For above threshold contracts, such modifications are made under Regulation 72 of the PCR15[3]. Annex C sets out the range of allowable modifications.

4.6.2 Contract modifications may have an effect on service delivery and costs, and on whether the contract represents value for money. Appropriate structures need to be in place with representatives of both the Department and contractor for

[3] Regulation 88 of the UCR16 and Regulation 43 of the CCR16.

reviewing and authorising modification requests. Departments need to be careful that any modifications comply with Regulation 72. There should therefore be CPD/CoPE involvement in any modifications.

4.6.3 Regulation 72(1)(a) in particular allows for modifications whose possibility was provided for in the initial procurement documents in "clear, precise and unequivocal" terms. Such provisions need to cover both the scope and nature of the potential modification, and the conditions under which it may be used. Modifications may not alter the overall nature of the contract. As well as allowing for necessary modifications, Regulation 72 provides opportunities to identify better approaches, encourage continuous improvement and innovation, and thus obtain better value for money. For example, provisions under this Regulation could allow for a mid-term review of how a service contract is being delivered, with a view to jointly identifying leaner methods of delivery with the service provider. It could provide for changes to take account of the potential of new technologies or other innovations which were not available at the time the contract was originally signed.

4.6.4 Commissioners should consider drafting appropriate review provisions at an early stage of preparations for any contract, in consultation with CPD or their CoPE, and should take legal advice as appropriate on suitable provisions for inclusion in the contract document.

4.6.5 Maintaining contract documentation is an important activity, especially where there are any modifications to the contract, including modifications to services and procedural modifications. Formal agreement to any contract modification should be recorded, and all contract documentation must be kept up to date.

5 COMPLEX AND HIGH VALUE CONTRACTS

5.1 The '[NAO Good practice contract management framework]' is a guide for managing a broad range of contracts[4]. It is particularly relevant for contracts where services are delivered over a long period (five years plus).

5.2 The framework consists of four blocks:

- structure and resources;
- delivery;
- development; and
- strategy.

5.3 The four blocks comprise eleven areas that Departments should consider when planning and delivering contract management, together with the key activities that fall under each. Not all of the eleven areas are equally relevant to all contracts. Generally, the more developmental and strategic areas and activities (areas 8 -11) become increasingly important the higher the contract risk and the greater the opportunity to add value. Below is a summary of the eleven areas.

5.4 Structure and resources

Area 1: Planning & governance

- Contract ownership, management processes and governance mechanisms are clear with defined roles and responsibilities. There is a clear contract management plan that involves appropriately senior and experienced people at each level.

Area 2: People

- Contract management is adequately resourced in proportion to the importance of the contract and the skills make-up of the team reflects the nature of the contract. The team have the range of

[4] The NAO has also published 'Commercial and contract management: insights and emerging best practice'. This interactive publication draws on their audits of government contracts and engagement with government to provide practitioners with insights on the new, emerging higher standard for government contracting.

skills, capability and experience to effectively and efficiently discharge their roles and responsibilities and are appropriately performance managed.

<u>Area 3: Administration</u>

- An up to date (annotated with relevant agreed modifications) copy contract is stored, logged and easily accessible with an operating manual where appropriate. All relevant correspondence in relation to contract modifications is stored and easily accessible.

5.5 Delivery

<u>Area 4: Managing relationships</u>

- The relationship between both parties is clear and well defined, responsibilities are documented, there are structural and informal communication routes that include other stakeholders outside the contract manager (users of the contract, technical experts etc).

<u>Area 5: Managing performance</u>

- There is a comprehensive performance management framework in place with meaningful metrics and suppliers receive regular and routine feedback on their performance both formal and informal.

- Clear documented processes are in place for managing problems efficiently and effectively. There is clear documentation of any disputes and their resolution.

<u>Area 6: Payment & incentives</u>

- There are appropriate defined mechanisms and processes to ensure that payments are made to the supplier in line with the contract including validation such as spot checks on invoices.

- There are defined mechanisms and processes that are managed to ensure appropriate incentives relating clearly to outcomes. Where open-book or similar financial/pricing mechanisms are used open-book accounts can be mapped to real accounting events and internal reports in the supplier organisation.

Area 7: Risk

- There is a risk management policy and risks are subject to ongoing review and assessment in line with organisational risk management processes. There is clear understanding by both parties of who is best placed to manage risks.

5.6 Development

Area 8: Contract development

- Contract management staff understand the contractual terms including contract extension (services and duration), termination warranties, indemnities, insurance, security, confidentiality, and dispute resolution.

- Clear documented processes and governance are in place to manage contract modifications and any modifications are communicated and understood by both parties. If the contract involves the processing of personal data this will include any modifications that will be necessary as a result of the implementation of the General Data Protection Regulation (GDPR)[5] on 25 May 2018.

Area 9: Supplier development

- Processes are in place that clearly set out how supplier development activities will be planned, managed and governed. Clear processes for benefits measurement and capture are in place to ensure that supplier development is focused on continuous improvement and achieving value.

[5] For a general overview of the GDPR go to the ICO website at: https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/

- There is an understanding of what motivates and drives the supplier and development is aligned with the supplier’s goals. Joint working or shared activities between the two parties benefit both. There are shared risk reduction programmes or activities and shared management activities to drive performance improvement.

5.7 Strategy

Area 10: Supplier relationship management

- A supplier relationship management programme is planned and structured with appropriate governance and senior ownership. The programme considers all the supplier’s interactions across the organisation and across government. There is a focus on continuous improvement and capturing innovation with a clear sense of what value is to be generated for both parties.

Area 11: Market management

- Market intelligence is used to maintain an understanding of the market and of alternative suppliers to inform benchmarking, contingency planning and strategies for future delivery. Exit planning and a strategy for when the contract ends are put in place in a timely manner and include input from the contract manager.

5.8 PFI/PPP contracts

5.8.1 Guidance on the procurement and management of PFI/PPP contracts has been published by Infrastructure UK part of HM Treasury. It can be found on the GOV.UK website at: https://www.gov.uk/government/publications/procurement-and-contract-management.

6 CONSTRUCTION WORKS AND SERVICES CONTRACTS

6.1 The [Construction Procurement Policy Framework] outlines the policy principles that are fundamental to construction procurement. It contains sections on construction contracts and contract management that reference relevant policy guidance. It also highlights the principles of the 'Achieving Excellence in Construction' initiative as good practice.

6.2 A key principle of Achieving Excellence is robust proactive contract management. CoPEs have agreed to adopt the NEC suite of contract documents for procurement of construction works and services. It is a flexible, collaborative form of contract intended to reduce the risk of time or cost overruns and poor performance of completed projects. To ensure these objectives are achieved contract management procedures must be dynamic and in the spirit of the contract.

6.3 Another key principle of Achieving Excellence is the establishment of roles. The documented project management procedures used by Departments must identify the client roles of Investment Decision Maker, Project Owner (or Senior Responsible Owner) and Project Sponsor. The procedures must also draw a clear distinction between the client roles and the provider roles. The latter roles are those of the Project Manager, the design team and the works contractors. The provider roles are dictated by the professional appointment and construction contracts.

6.4 Whereas the client roles can be undertaken by lay-persons with appropriate training, the Project Manager must have relevant technical expertise in construction. The Project Manager is the person appointed by the Project Sponsor to be responsible for managing the project on a day-to-day basis. He or she must ensure that the Department's agreed systems and procedures are adhered to and that the consultant or contractor complies with the requirements of the contract. The Project Manager reports progress to the Project Sponsor at agreed intervals.

6.5 Northern Ireland Public Procurement Policy for construction and the NEC suite of contract documents combine to require the Project Manager to ensure that:

- subcontracts are only accepted where the payment terms are no less favourable that those in the main contract;

- the main contractor completes and submits monthly sustainability returns reporting on economic, social and environmental requirements of the contract including subcontractor payments and social clause provision;
- the programme is reviewed regularly with the contractor;
- costs are monitored and 'early warnings' and 'compensation events' are processed within defined timescales;
- a robust process is in place to monitor design quality and conformity with the specification and works information (for works contracts) and the scope (for professional service contracts);
- risks are identified, reviewed and managed throughout the process;
- the ten Government Construction Client Group headline KPIs are completed and recorded for performance measurement and benchmarking purposes; and
- the agendas for monthly project meetings include a review of:
  - (i) Health and Safety;
  - (ii) Subcontractor payments (in line with the Fair Payment Charter); and
  - (iii) Progress on sustainability requirements.

6.6 The Project Manager shall be responsible for the day-to-day management of the contract, (or the Project Sponsor in the case of a professional services contract). Where a contractor or a consultant fails to comply with any requirements under the contract, or fails to provide progress reports required during the contract, and the issue cannot be resolved by the Project Manager/Project Sponsor within a reasonable time, the issue should be escalated, through line-management, to ensure resolution.

6.7 Routine monitoring must occur throughout the period of each contract ensure satisfactory performance of the contract and to highlight a contractor's poor or unsatisfactory performance.

6.8 There are particular issues for the management of property maintenance contracts that are highlighted in PGN 01/14 - Best Practice in the Management of Property Maintenance Contracts. The above guidance should be followed for these contracts.

7 DETERMINING CONTRACT MANAGEMENT ACTIVITIES

7.1 The type of contract management activities to undertake will be dependent upon the contract value and risk (including the complexity of the contract and its importance to the client). CCS has developed a useful Contract Tiering Tool[6] which, based on these factors, can be used to identify a contract category/tier. This helps define the frequency and scope of related contract management activities.

7.2 The tool identifies three contract categories:

- **Category 1**. These are high value, high risk contracts which require key contract management with a focus on development and strategy.
- **Category 2**. These are contracts of lower value and risk than category 1 which require mid-level contract management with focus on risk, challenge and relationships.
- **Category 3**. These are low value, low risk contracts which require basic contract management with a focus on administration and performance.

7.3 Contract management activities for each category

7.3.1 Table 1 gives a quick, at-a-glance indication of the recommended activities resulting from the contract category. More detailed guidance is provided in the CCS Contract Management Standards.

[6] The tool can be found in the CCS contract management standards spreadsheet. The tool is Template #30 in the 'B. Templates' tab.

Table 1 Contract management activities by category

Ref No.	Contract Management Activity	Category 1	Category 2	Category 3
1	Supplier performance meetings	Monthly	Quarterly	N/A
2	Supplier performance reporting	Monthly	Monthly	As dictated by KPIs/ SLA in terms of frequency, if there are KPIs/ SLAs in contract
3	Customer satisfaction surveys (supplier Performance)	Annual (if automated/ online helpdesk system is in use, short questionnaire should be sent at call resolution to every user)	Annual (if automated/ online helpdesk system is in use, short questionnaire should be sent at call resolution to every user)	At end of contract (if automated/ online helpdesk system is in use, short questionnaire should be sent at call resolution to every user)
4	Supplier liaison meeting (innovation/ relationship/ forward planning)	6 Monthly	Annual	N/A (can be initiated by contract manager, if they see potential for service improvement)
5	Customer meetings	6 Monthly	Annual	As necessary
6	Operations Manual	Produced and reviewed annually	Produced and reviewed annually	N/A

Ref No.	Contract Management Activity	Category 1	Category 2	Category 3
7	Contract Management Planner	Produced and reviewed / actioned monthly	Produced and reviewed / actioned monthly	Produced and reviewed / actioned in accordance with the most frequent activity listed. (Single Contract Management Planner can be used across multiple contracts managed by same contract manager)
8	End User Handbook	Produced by supplier and updated annually	Produced by supplier and updated annually	End user guide produced by supplier and updated as required (only for contracts with service provided to a large group of end users)
9	Contract Change Controls	Change Control Register and change control forms used for all contract/ specification changes	Change Control Register and change control forms used for all contract/ specification changes	Change Control Register and change control forms used for all contract/ specification changes and extensions (Single Change Control Register can be used across multiple contracts managed by same contract manager)

Ref No.	Contract Management Activity	Category 1	Category 2	Category 3
10	Budget Controls	Budget monitor in place and updated monthly	Budget monitor in place and updated quarterly	Check invoice/s sum/s match the procured contract sum. If not, query with P2P/client lead
11	Benchmarking	Benchmarking review carried out every 2 years during the contract	Benchmarking review carried out once during the life span of the contract	N/A
12	Supplier financial and business standing review	Annual	Annual	By exception (only if alerts received from category/ market intelligence tool)
13	Contingency and Business continuity plans	In place and reviewed annually, or in case of increased risk	In place and reviewed every two years, or in case of increased risk	N/A
14	Benefit Realisation update	Annual	Annual	Ensuring contract deliverables have been delivered and is it in line with customer expectations (done under 3 above)
15	Risk Register	Produced and updated annually	Produced and updated annually	N/A

Ref No.	Contract Management Activity	Category 1	Category 2	Category 3
16	Exit Plan	Produced at start of contract and updated annually, with final version in place 1 year before end of contract	Produced at start of contract and finalised 6 months before contract end	List of transition data and documentation agreed with supplier at start of contract, with contract manager ensuring all relevant data and documentation is provided by supplier before end of contract
17	Soft Market Testing	To be carried out one year before contract end	To be carried out one year before contract end	N/A (can be initiated by contract manager, if client needs or market conditions changed significantly since original contract was procured)
18	Dealing with escalations, disputes and complaints (indicative, as will depend on type of provision and number of stakeholders involved)			

7.3.2 The recommended extent and frequency of these contract management activities should be applied only in case these are not defined in the relevant contract documentation.

7.4 Assessing the contract risk

7.4.1 When evaluating the contract risk you should consider the following:

- How strategically important is the contract to the Department?
  - Would failure of that contract or serious under performance be likely to create any significant and far reaching reputational, economic, political, security or health and safety issues?
  - Would failure or serious under performance cause only very minor issues?
  - Would failure prevent the Department achieving its strategic objectives?
- How complex is the contract?
  - Is there a large number and type/variety of stakeholders?
  - Is there a large number of different goods/services, with different payment and monitoring requirements for each category?
  - Does the contract contain complex payment provisions? (for example fixed and variable payments requiring regular verification of invoices/and issue of multiple/updated POs; regular price changes due to contract variations/benchmarking) How transparent is the costing model?
  - Does a complex incentive mechanism exist? (combination of deductions/ratchets/withholding parts of payment for partial under-performance/non-provision; incentive payments; profit share)
  - Have there been or are there likely to be a large volume of contract changes? (major regular changes and/or large number of smaller changes)
  - Are there any expected/existing large volume of disputes and escalations? (eg in case of provision of high impact goods/ services to large numbers of end users, such as IT support or FM provision)
  - Is benchmarking built into the contract?
  - Is the supplier expected to deliver continuous innovation/development, which requires regular adjustments to contract/specification/scope/payment regime?
  - Does the contract involve the processing of personal data and subject

to the Data Protection Act 1998 (from 25 May 2018 the General Data Protection Regulation)?

8 DEALING WITH POOR CONTRACTOR PERFORMANCE

8.1 Continued poor performance cannot be ignored and Departments should, through increased monitoring and management, work with the contractor in order to ensure they do meet contract requirements. Annex D contains a Protocol for Dealing with Poor Contractor Performance. It sets out the steps that Contract Managers should take in monitoring a contractor's performance and any subsequent steps CoPE Senior Management may need to take when a supplier's poor performance has been escalated to it as a result of its failure to deliver a *substantive contract requirement*[7]. It also explains how Contracting Authorities should take *Notices of Written Warning* and *Notices of Unsatisfactory Performance* into account in future procurement competitions. A template for each of the *Letters* and *Notices* associated with the Protocol, together with a flowchart, is available in the Appendices attached to Annex D.

9 TRAINING

9.1 It is important staff involved in contract management receive proportionate training commensurate with their roles. This, for example, could take the form of on the job and face to face training. CPD in conjunction with the Centre for Applied Learning (CAL) has developed a training course for the NICS. Staff from NDPBs and the wider public sector may also avail of this training. Their organisations should contact CAL[8] if they wish their staff to attend the course.

[7] A **substantive contract requirement**, in the context of this guidance, is a requirement that gives the Department/Contracting Authority the right to terminate the contract at the supplier's expense if it fails to meet the requirement.

[8] Tel: 028 9054 1700; Email: NICSHR.LearningandDevelopment@finance-ni.gov.uk

10 FURTHER INFORMATION

10.1 Any queries on this guide should be addressed to:

Procurement Policy Branch
Central Procurement Directorate
2nd Floor East
Clare House
303 Airport Road West
Belfast, BT3 9ED
Phone: 028 9081 6518
Email: procure.policy@finance-ni.gov.uk

Construction Procurement Policy Branch
Central Procurement Directorate
2nd Floor East
Clare House
303 Airport Road West
Belfast, BT3 9ED
Phone: 028 9081 6871
Email: ConstructionProcurementPolicy@finance-ni.gov.uk

ANNEX A

PROBLEMS WITH CONTRACT MANAGEMENT

The National Audit Office (NAO) report 'Transforming government's contract management' responded to internal reviews of contracts carried out by Whitehall departments including the Ministry of Justice, the Home Office and Department for Works and Pensions. 60 of these contracts were tested for overbilling, 34 of which had issues in the amount billed, and 73 were tested against Areas 1-8 of the NAO 'Good practice contract management framework' Issues were found in all eight areas, for example:

- Planning and governance
  Departments lack visibility of contract management at board level and lacked senior-level involvement.

- People
  Government does not have the right people in the right place for contract management. There were gaps between the numbers and capability of staff allocated to contract management and the level actually required.

- Administration
  Contract management is not operating as a multi-disciplinary function. There was often limited interaction between finance, commercial and operational contract management functions.

- Payment and incentives
  Government is not fully using commercial incentives to improve public services. Levels of payment deductions allowed by contracts are often insufficient to incentivise performance. Open-book clauses were rarely used.

- Managing performance
  Contractual performance indicators are often weak and government is too reliant on data supplied by contractors.

- Risk
  Government does not have sufficient understanding of the level of risk it is retaining on contracted-out services. None of those in the cross-government review shared

risk registers with the contractors to ensure all understood who was managing what.

- Contract development
  Departments are paying insufficient attention to the impact of contract modification. For example, departments made modifications at operational level in isolation from other service areas. Systems for maintaining up-to-date versions of contracts remain weak.

- Managing relationships
  Not all departments have had a strategic approach to managing supplier relationships. Senior management engagement with suppliers has not been widespread across government. A lack of meaningful incentives for innovation can inhibit shared approaches to problem solving and service improvement.

ANNEX B

CONTRACT MANAGEMENT – CHECKLIST

Preparation

This section deals with laying good foundations before a contract is let. The contract should be actively managed. You should have a plan for doing this, which must include ensuring the right people are in place to manage all aspects of the contract.

What you need to do	Points to consider
Ensure the right contract is in place The foundations for contract management are laid in the stages before contract award. These formal contract aspects form a framework around which a good relationship can grow. If the contract was poorly constructed, it will be much more difficult to make the relationship a success	**The contract should include as appropriate** • A definition of what is to be provided and requirements to be met • An agreed level of service and mechanism for payment reduction if not met • Means to measure performance • Pricing mechanisms including where appropriate, milestone payments, incentivisation/rewards, retentions and price variation mechanisms (avoid variation of price clauses in contracts of less than two years' duration see Managing Public Money Northern Ireland A.4.4.13) • A plan to cover implementation/transition/rollout • Acceptance strategy/test plan • Ownership of assets and intellectual property • Escalation and alternative dispute resolution procedures • Change control procedures

	• Invoicing arrangements
	• Communication routes, typically at three levels
	  o Operational (end users/technical support staff)
	  o Business (contract manager and relationship manager on both sides)
	  o Strategic (senior management/board of directors)
	• Agreed exit strategy and agreed break options
	• Premises (where the goods/services will be delivered)
	• Sub contractor details
	• Authorities responsibilities
	• A good contract not only identifies clearly the obligations of the provider, but also forms the foundation for a productive relationship built on communication and trust

Be prepared to manage all aspects of the contract Contract management activities can be divided into three areas: service delivery management; relationship management; and contract administration	• All three areas must be actively managed • Decide how to organise your people to manage each of the areas. You might assign a group or individual to each area or a single individual may cover two or more areas • Bear in mind that different areas will require different skills and knowledge

Put the right people in place to manage the contract Contract management forms the interface between demand (the customer organisation) and supply (the provider organisation) The individual or team responsible for contract management must have adequate knowledge (business, contractual and technical) to understand both sides of the arrangement	• If possible involve key contract management staff in contract development. Consider developing a contract guide or commentary explaining why the contract was developed • Consider whether training is required for contract management staff • The skills and experience required to manage the relationship may be different from those required to manage service delivery • If you do not have expertise in house to manage a contract consider training existing staff or recruiting an experienced professional contract manager
Assign adequate resources to manage the contract	• There will be an overhead of in house resource to manage the contract • The financial resource required to manage a major contract has been estimated at 2% of the contract value. This proportion increases for contracts of lesser value.
Managing the supply chain Once a supplier or suppliers are chosen and the contract awarded, the tender process is completed. At this point, there is considerable scope to work with suppliers to develop supply chain capabilities	• Effective contract management is critical in ensuring that good supply chain management is implemented over the duration of the contract

Ensure there is mechanism for feedback on client performance	• Feedback from suppliers (as well as the client's perspective on the supplier's performance) increases the likelihood of problems and issues being promptly

Managing service delivery

This section deals with establishing service levels and ensuring they are maintained. You may need to strike a balance between quality and cost to ensure a value for money outcome. This should include benchmarking to establish a "should cost" estimate. During this phase risks should be managed and business continuity plans should be in place should service failure or interruption occur.

What you need to do	Points to consider
Establish what levels of service are required, and ensure they are maintained Service level management is the process of managing the performance provided to the customer as specified in contractual performance metrics It balances cost and quality of services in order to provide the customer with value for money	• There should be a detailed agreement of the required service levels and thus expected performance and quality of service to be delivered • However, where specific service levels have been set, it may sometimes be appropriate to take a flexible approach to enforcement, particularly in the early stages of contract performance
Measure quality as well as quantity The quality of the service being delivered must be assessed This means creating and using quality metrics – measurements that allow the quality of a service to be measured	• Quality measures might include assessing aspects such as completeness, availability, capacity, reliability, flexibility and timeliness, among others • Some aspects of a service may be measurable by numerical means;

	others may require subjective assessment
Ensure value for money Ensuring value for money is about the balance between service quality and cost A key objective for contract management is to ensure that it continues to achieve value for money over its life	• Aim to optimise the ratio between value and cost • Value for money is not synonymous with lowest cost • Carefully consider all the benefits that the contract provides in relation to the ongoing investment it requires • All costs associated with the contract must be taken into consideration, including: set up costs, recurring costs, fixed costs, unit costs and the organisation’s own overheads in managing the contract
Compare prices and learn from others Benchmarking is the practice of making like for like comparisons between organisations with the aim of ensuring continuing value for money, getting better performance and improving business practices	• Price comparisons offer a quick and effective way to gauge whether you are getting value for money • Providers could be obliged to benchmark their own costs or those of their sub-contractors by the contract • Compare the value for money you are getting with what other organisations are getting • Compare the way you manage contracts with the way other organisations manage theirs
Managing Risks Risk is defined as uncertainty of outcome, whether positive opportunity or negative threat In contract management, managing risk means identifying and controlling factors that	• Risks can relate to many aspects of the contract, including fluctuation in demand, lack of provider capacity, change in requirement and transfer of skilled staff (on either side)

may have an impact on fulfilment of the contract	• All risks must be identified and managed • Risks should be placed with the party best placed to manage them – possibly the provider, although they will want compensation for this • Risks placed with providers are referred to as transferred risks • Business risk cannot be transferred to the provider. The final responsibility for achieving outcomes remains with the customer
Ensure service continuity A major part of contract management is considering service continuity – what will happen if service fails or is interrupted	• Barring force majeure, it will normally be the provider's responsibility to manage service continuity, and this will be stipulated in the contract but it will need to be taken into account in the organisation's wider business continuity plan • Where contracts are interrupted due to force majeure, such as natural disasters or terrorist attacks, contract managers should work with the provider to identify the best way to enable the services to resume • Those aspects of a service identified as critical require careful consideration and the creation of a business continuity plan • The risks associated with service interruption or failure should be identified, formally recorded in a risk register, assigned to an individual

	owner and actively managed in accordance with good risk management practice

Managing the relationship

This section deals with building up mutual trust and understanding so that there is openness in communication and a joint approach to managing delivery. When problems arise they should be dealt with promptly, which requires good communications channels with the aim of delivering "win/win" outcomes.

What you need to do	Points to consider
The relationship must be managed as well as the more formal aspects of the contract It is in the organisation's interest to make the relationship work	The three key factors for success are: • Mutual trust and understanding • Openness and excellent communications • A joint approach to managing delivery
Communication is crucial Good communications are always the make or break in managing a relationship They allow problems to be identified and resolved early, and build an atmosphere of mutual trust and appreciation of each other's priorities	• The routes and media through which information will flow during the contract should be defined and ideally tested before the contract commences • There are three levels of communication in a contractual arrangement: strategic (senior management/board of directors); business (contract managers on both sides); and operational (technical and frontline staff) • Communication between supplier and client should be peer to peer; that is operational problems are resolved by staff at the operational level, not discussed with business managers

Culture, attitude and behaviour are as important as the terms of the contract There will always be some tensions between the different perspectives of customer and provider Contract management is about resolving or easing such tensions to build a win/win relationship	• Consider whether the culture of the organisation will support the kind of arrangement that is sought • The right attitudes will engender the right behaviours. Both sides' objectives must be shared and understood, the arrangement directed to achieving them • Adversarial approaches will increase the distance between customer and provider
Deal with problems promptly However good the relationship between customer and provider and however stable the services being delivered, problems may arise	• The relationship managers should ensure that the provider has problem management procedures in place, including escalation procedures within the providers organisation and that these are used when needed • These procedures should seek to prevent problems as well as resolve them • The contract must define the procedures for undertaking corrective action if, for example, target performance levels are not being achieved • If a dispute cannot be managed at the level at which it arises it will be necessary to escalate to a higher level of authority. This escalation process needs to be managed

Contract Administration

This section deals with the mechanics of the relationship between the customer and provider. In particular contract documentation must be maintained, especially where any changes to services, requirements, procedures or contracts are concerned. Senior management should be kept informed through a clear reporting mechanism.

What you need to do	Points to consider
Administration of the contract is important Contract administration is concerned with the mechanics of the relationship between the customer and provider Its importance should not be underestimated Clear administrative procedures ensure that all parties to the contract understand who does what, when and how	The elements that need managing are likely to include: • Contract maintenance and change control • Notice periods, contract closure or termination • Charges and cost monitoring • Ordering procedures • Payment procedures • Budget procedures • Resource management and planning • Management reporting • Asset management
Maintain the contract documentation The contract will have to evolve to reflect changes in arrangements Contract maintenance means keeping the documentation up to date and relevant to what is happening on the ground Maintaining contract documentation is an important activity.	• Establish procedures to keep contract documentation up to date and ensure that all documents relating to the contract are consistent and that all parties have the correct version
Changes must be controlled Changes to services, procedures or contracts may have an effect on service delivery, performance, costs and on whether the	• Appropriate structures need to be in place with representatives of both customer and provider management for

contract represents value for money The specification and administration of change control is an important area of contract administration	reviewing ad authorising change requests • Be careful that changes do not fall outside the scope of the original OJEU advertisement and conflict with procurement regulations – seek advice if you’re unsure • It is particularly important that additional demands on the service provider should be carefully controlled • Formal authorisation procedures will be required to ensure that only those new requirements that can be justified in business terms are added to the service contract • A single change control procedure should apply to all changes
Make sure management understands what is happening Management reporting procedures ensure that information about problems with a contract reaches those with power to act as soon as it is possible	• Requirements for service performance reports and management information should be built into the contract and confirmed at the tender stage • Where possible, use should be made of the provider’s own management information and performance measurement systems • For many business managers a summary of the service they have received along with a note of exceptions is normally sufficient • Information requirements may change over the life of a contract

Seeking Improvements

This section deals with seeking to make improvements principally through providing incentives to the provider; usually these are built into the contract itself. The aim is to have a continuous improvement in performance or value for money

What you need to do	Points to consider
Give providers reasons to improve The aim of incentives is to motivate the provider to improve by offering increased profit, or some other desirable benefit, as a reward for improved performance and/or added value	• Types of provider incentive include guaranteed levels of capacity, revenue sharing and commercial opportunities • Incentives to improve are normally built into contract terms • It is important that incentives are balanced. They should not emphasise one aspect of performance at the expense of other, perhaps less visible, aspects • Financial incentives should offer rewards to both parties that fairly reflect any investment they have to make to achieve the saving in the first place • Seek to bring down costs, not margins, to allow a supplier a reasonable return to cover such items as training and development

Public sector managers are under constant pressure to improve. In contract management this translates into a need for continuous improvement in the performance or value for money of providers' services	• A requirement for continuous improvement can be built into the contract, for example through a price decreasing year on year • It is important that continuous improvement is seen as being desirable and beneficial to both parties rather than as a means to drive down prices

ANNEX C

MODIFICATIONS TO CONTRACTS

Regulated[9] contracts

Regulation 72 of PCR15[10] sets out the rules concerning modifications/changes to regulated contracts/framework agreements. There are a number of steps which should be taken when approaching the question as to whether a modification will be lawful.

When considering a change, you should first of all determine whether the change is '**substantial'**. If it is not substantial then that is the end of the matter. There may be situations where, for example, a modification for additional works does not actually amount to a 'substantial' change. The modification may lawfully be made and there will be no need to apply any of the gateways, as set out under Regulation 72[11]. Those gateways outline some limited situations where a modification, which is substantial, may nevertheless be made without a new procurement competition being necessary (ie without re-advertisement in OJEU).

<u>What is a substantial change?</u>

A substantial change is defined in Regulation 72(8) of the PCR15[12] as any change, irrespective of value, which meets one or more of these conditions:

- Materially alters the character of the original contract.
- Would have allowed other potential suppliers to be selected, or another tender to be accepted, or have attracted additional participants to the procurement procedure.
- Changes the economic balance in favour of the contractor.
- Extends the scope of the contract "considerably".

[9] Those above the applicable EU threshold to which the Regulations fully apply.

[10] Regulation 88 of the UCR16, Regulation 43 of the CCR16

[11] Regulation 88 of the UCR16, Regulation 43 of the CCR16

[12] Utilities should refer to Regulation 88(7) of the UCR16. For concession contracts please refer to Regulation 43(9) of the CCR16.

- A new contractor replaces the original contractor, other than where the change arises from a review or option clause in the original contract or from corporate changes such as merger, takeover or insolvency.

Gateways that allow a substantial change without a new procurement competition being necessary

If a change to a contract is substantial, this will render the modification unlawful (and require that a new procurement competition be commenced) unless the proposed change can fit through one of the gateways under Regulation 72(1)(a)(b)(c) or (d).

The gateways are:

Regulation 72(1)(a)

- The change is provided for in the initial procurement documents in a clear, precise and unequivocal review or option clause, which specifies the conditions of use and the scope and nature of the change; and ensures that the overall nature of the contract/framework is not altered.

Regulation 72(1)(b)

- Additional works, services or supplies "have become necessary" and were not included in the initial procurement and a change of supplier would not be practicable (for economic, technical or interoperability reasons**) and** would involve substantial inconvenience/duplication of costs **-** provided the change does not exceed 50% of the value of the original contract.

Regulation 72(1)(c)

- The need for the change could not have been foreseen by a "diligent" Department provided the changes do not affect the overall nature of the contract or exceed 50% of the value of the original contract value.

Regulation 72(1)(d)

- Certain corporate changes have occurred in the supplier such as merger, takeover or insolvency, provided:
    - The new contractor meets the original qualitative selection criteria; and

- Other substantial modifications are not made to the contract.

Note: With respect to Regulation 72(1)(b) and (c), in theory more than one such change could be made during the life of the contract even if, in total, the value is more than 50% of the original contract value, however, the successive changes must not be made in order to circumvent the regulations.

In addition a contract modification notice must be sent to the OJEU for any change under Regulation 72(1)(b) or (c).

Changes which fall below certain monetary values (minor changes)

Aside from the provisions above, which concern only ‘substantial’ modifications to a contract, there are times when a proposed modification **falls below a certain monetary value** (a ‘minor’ change)**.** Regulation 72(5)[13] deals with this situation.

A ‘minor’ change is one that does not:

- exceed the relevant threshold;
- exceed 10% (services/supplies) or 15% (works) of the initial contract value; and
- affect the overall nature of the contract. (Care is needed, as to the extent to which the minor change may affect the nature of the contract).

It should also be noted that where several successive minor changes are made the value is calculated to be the net CUMULATIVE value of the successive modifications. This is different to the modifications under Regulation 72(1)(b) and (c) where the value is permitted to be calculated separately for EACH modification.

Below threshold modifications

Changes to below threshold contracts/frameworks fall outside the PCR 2015. It is important to note however, that if there is deemed to be **cross-border interest** in the contract/framework, the **Treaty principles** of transparency, equality, non-discrimination etc will apply.

[13] For concession contracts please refer to Regulation 43(5) of the CCR16.

ANNEX D

PROTOCOL FOR MANAGING POOR SUPPLIER PERFORMANCE

1 INTRODUCTION

1.1 In delivering its contracts, Government operates with a wide number of suppliers and it is important that it works with these firms to resolve any problems or difficulties that arise during the contract. Occasionally, and despite efforts by the public body to engage with a supplier to resolve problems, a supplier's performance can fall below the level required under the contract.

1.2 This Protocol sets out the steps that Contract Managers should take in monitoring a supplier's performance and any subsequent steps CoPE Senior Management may need to take when a supplier's poor performance has been escalated to it as a result of its failure to deliver a *substantive contract requirement*[14]. It also explains how Departments should take *Notices of Written Warning* and *Notices of Unsatisfactory Performance* into account in future procurement competitions.

1.3 A template for each of the *Letters* and *Notices* associated with this Protocol, together with a flowchart, is available in the Appendices attached to this Annex.

1.4 Substantive contract requirements are generally obvious: for example, the provision of suitable food under a catering contract or construction of a building element under a construction contract. However, there may be aspects of contracts that are substantive to a Department that may not be obvious to a tendering supplier: for example, the provision of employment opportunities through social clauses included within the contract.

1.5 It is important that the status of less obvious substantive requirements is drawn to suppliers' attention in the Invitation to Tender and contract documents and again during routine monitoring of the contract. To remedy a breach of contract provisions, a Department may use the following measures provided within this Protocol:

[14] A **substantive contract requirement**, in the context of this guidance, is a requirement that gives the Department/Contracting Authority the right to terminate the contract at the supplier's expense if it fails to meet the requirement.

- the issue of Letters warning suppliers that performance is unsatisfactory; (Stages 2 and 3)
- the issue of a *Notice of Written Warning* (Stage 4);
- the issue of a *Notice of Unsatisfactory Performance* (Stage 5); or
- the termination of the contract (see Section 7).

1.6 However, details of this Protocol must be included in tender and contract documents and reference to it should be included in advertisements of potential contracts.

2 ROUTINE MONITORING OF SUPPLIER PERFORMANCE

2.1 Stage 1

2.1.1 The Contract Manager must routinely monitor the contract and assess the supplier's performance (on substantive requirements) on a regular basis.

2.1.2 At commencement of the contract, the Contract Manager shall hold a *Contract Management Initiation Meeting* to ensure that the supplier clearly understands its contract requirements. The Contract Manager should keep a written record of this meeting, including any substantive requirements that must be met.

2.1.3 In the event that the Contract Manager assesses that a supplier's delivery of a substantive requirement of the contract is deficient, the Contract Manager shall make the supplier aware of its unsatisfactory performance at regular review meetings and define a period for improvement.

2.1.4 If a major problem arises legal advice should be sought immediately and it may be necessary to bypass some of the stages described below. The terms and conditions should contain provisions that deal with this and the contractor should be reminded of these at the Contract Management Initiation Meeting.

2.2 Stage 2

2.2.1 At the end of this period, if the Contract Manager assesses the supplier's performance as again unsatisfactory, the Contract Manager shall notify the supplier of this, in writing. It will do so by issuing **Letter 1: First Written Warning of Unsatisfactory Performance** (Appendix 1). Within this letter, the Contract

Manager shall define another period for improvement in accordance with the Conditions of Contract (letter to specify which clauses), thereby giving the supplier a further opportunity to improve its performance.

2.2.2 If, at the end of this period, the Contract Manager assesses that the supplier is now meeting this substantive contract requirement, the Contract Manager shall issue **Letter 2: Improved Performance** (Appendix 2), and the matter need not be raised with the CoPE Senior Management, but the supplier's performance should continue to be routinely monitored.

2.3 Stage 3

2.3.1 Should the Contract Manager assess that the supplier's performance is still unsatisfactory, the matter should be escalated by the Contract Manager to CoPE Senior Management for further action. In this case, the Contract Manager should issue **Letter 3: Second Written Warning of Unsatisfactory Performance** (Appendix 3) advising the supplier that, in light of its continued poor performance, it is being referred to the CoPE Senior Management for further action**.**

3 ESCALATION TO CoPE SENIOR MANAGEMENT

3.1 Following its receipt of **Letter 3: Second Written Warning of Unsatisfactory Performance**, the CoPE Senior Management should arrange a *Poor Performance Meeting* with the supplier to discuss the way forward. At this meeting, CoPE Senior Management should:

- provide the supplier with details of the poor performance and the standard required;
- give the supplier the opportunity to explain the reasons for its poor performance;
- agree, with the supplier, an Action Plan that will deliver an improved performance to meet the required standards within a period specified by CoPE Senior Management; and
    - formally advise the supplier that failure to improve to a satisfactory level within this specified period would be viewed as significant or persistent deficiency in the performance of a substantive requirement under the contract and that it would provide grounds for termination of the

contract that may, depending on the gravity of the issue, result in one or more of the following actions: the supplier may be issued with a *Notice of Written Warning.* The issue of multiple such Notices would be a *comparable sanction* in lieu of termination under the Public Contracts Regulations 2015[15] where the Department has the right to terminate the contract at the supplier's expense. The effect of multiple Notices issued to the same supplier will be to enable any Department, at its discretion, to consider the supplier's exclusion from future procurement competitions being undertaken for a period of **12 months**;

- the supplier may be issued with a *Notice of Unsatisfactory Performance.* This Notice would be a *comparable sanction* issued in lieu of termination under the Public Contracts Regulations 2015 where the Department has the right to terminate the contract at the supplier's expense. The Notice is issued where, for wider public interest, the Department does not wish to terminate the contract despite having grounds to do so. The effect of the Notice will be to enable any Department, at its discretion, to exclude the supplier from future procurement competitions being undertaken for a period of **three years**; or
- in cases of extreme poor performance; or a major problem arises; or if the contract has a significant period to run, consideration will be given to immediate or timely termination (see Section 7).

3.2 The CoPE Senior Management should keep a written record of this *Poor Performance Meeting* and keep the Department informed (if it is not represented at the meeting) of any actions that must be taken.

[15] Regulation 57(8)(g) of The Public Contracts Regulations 2015. Utilities should refer to Regulation 80(4)(b) of The Utilities Contracts Regulations 2016.

4 ISSUE OF A NOTICE OF WRITTEN WARNING

4.1 Stage 4

4.1.1 If the supplier has not sufficiently improved its performance after the specified time, it will be invited by CoPE Senior Management to another *Poor Performance Meeting* where it will be notified, in writing, that its contract performance is unsatisfactory and could justify termination of the contract. In such cases the CoPE Senior Management will issue **Letter 4: Notice of Written Warning** (Appendix 4) to the supplier.

4.1.2 The *Notice of Written Warning* informs the supplier that its unsatisfactory performance has been formally recorded and may be taken into account by CoPEs in the assessment of suppliers on future procurement competitions. The Notice will be valid for a period of 12 months from the date of issue or the target date for completion of the contract, whichever occurs later.

4.1.3 Where a supplier is in receipt of multiple *Notices of Written Warning* on one or more Government contracts, it may be excluded, at the Department's discretion, from future procurement competitions for a period of 12 months from the date of issue of the latest *Notice of Written Warning*. Information on the *Notice of Written Warning* issued to a supplier will also be available to CoPE Senior Management when it is considering either the issue of a *Notice of Unsatisfactory Performance* or termination of the contract.

4.1.5 Suppliers will be required to declare receipt of any *Notices of Written Warning* on future PQQ/ITT documents issued by a CoPE on behalf of bodies subject to the Northern Ireland Public Procurement Policy.

4.1.6 When issuing a *Notice of Written Warning*, CoPE Senior Management shall send a copy to CPD's Construction Procurement Policy Branch (ConstructionProcurementPolicy@finance-ni.gov.uk), which will maintain a central Register of such Notices for all CoPE contracts for works, supplies and services.

5 ISSUE OF A NOTICE OF UNSATISFACTORY PERFORMANCE

5.1 Stage 5

5.1.1 If the supplier has not sufficiently improved its performance after the period specified in the *Notice of Written Warning*, the CoPE Senior Management, after consultation with the Department, should issue **Letter 5: Notice of Unsatisfactory Performance** (Appendix 5). The issue of the notice must be approved by the Head of CoPE and be presented, in person, by a member of the CoPE's senior management to the supplier's representatives at the *Poor Performance Meeting*.

5.1.2 The *Notice of Unsatisfactory Performance* should include details of the failure to deliver a substantive requirement(s) and clearly state the contract grounds on which the Department would be entitled to terminate the contract. It should also state that the Notice is issued as a comparable sanction, in lieu of termination, under regulation 57(8)(g) of the Public Contracts Regulations 2015. When issuing a *Notice of Unsatisfactory Performance*, the CoPE Senior Management shall send a copy to CPD's Construction Procurement Policy Branch (ConstructionProcurementPolicy@finance-ni.gov.uk), which will maintain a central Register of such Notices.

5.1.3 A supplier in receipt of a *Notice of Unsatisfactory Performance* will be required to declare this, in future PQQ/ITT submissions, for a period of three years from the date of issue of the Notice. Departments may, at their discretion, exclude such a supplier for a period of three years from the date of issue of the Notice.

5.1.4 If the contract still has a significant period to run, or if performance is so poor that it cannot be allowed to continue, termination may be considered by CoPE Senior Management rather than issue of a Notice. Otherwise, the supplier's performance should continue to be very closely monitored by CoPE Senior Management for the remaining period of the contract.

6 APPEALS PROCEDURE

6.1 The supplier may appeal the decision to issue a *Notice of Unsatisfactory Performance*. Any such appeal will be dealt with under the Dispute Resolution Procedure set out in the Terms and Conditions of the Contract.

7 TERMINATION OF THE CONTRACT

7.1 Only the Head of CoPE, in discussion with the Department and its legal advisers, should instigate contract termination. It is important to consider, before any discussion on termination, what the contract conditions include and the procedures they require with procurement and legal advice. To do otherwise may risk breaching the contract, which could result in litigation and a claim for damages.

7.2 When terminating a contract, CoPE Senior Management shall advise CPD's Construction Procurement Policy Branch. (ConstructionProcurementPolicy@finance-ni.gov.uk), which will maintain a central Register of suppliers which have had a contract terminated.

8 TAKING SUPPLIER POOR PERFORMANCE INTO ACCOUNT IN FUTURE COMPETITIONS

8.1 In order for multiple *Notices of Written Warning* or a *Notice of Unsatisfactory Performance* to be taken into account on future competitions, they must have been issued by or on the advice of a CoPE as a comparable sanction in lieu of termination, where the Department was entitled to terminate the contract at the supplier's expense but for wider public interest reasons decided not to.

8.2 A question should be included in the PQQ or ITT documents asking the supplier if it has been issued with:

- a *Notice of Written Warning* including details of how many;
- a *Notice of Unsatisfactory Performance;* or
- a contract termination,

within the three year period before the closing date for submission of the PQQ/ITT.

8.3 The Department should verify the supplier's declaration regarding its receipt of such Notices, or prior contract termination, by checking the central Register of Notices. This should be undertaken before confirming a suitable list of suppliers in a restricted tender process or the successful supplier in an open tender process.

8.4 If a supplier declares that it has been issued with multiple *Notices of Written Warning* on the same or multiple prior public contracts, or a *Notice of Unsatisfactory Performance* within the three year period before the closing date for submission of the PQQ/ITT, CoPE Senior Management may seek an explanation from the supplier:

- of the deficiencies in performance that led to issue of the Notice(s)[16]; and
- of any self-cleansing measures that it has taken since the deficient performance to ensure its reliability[17] despite the grounds for exclusion.

8.5 The Department, with advice from its CoPE, must evaluate the effectiveness of the measures taken by the supplier to cleanse itself of the causes of its deficient performance, as well as its gravity and relevance to the contract it is letting. It is important to observe the principle of proportionality in these situations. The issue of any *Notice of Written Warning* by a CoPE on prior public contracts may also be taken into account as part of an assessment of the effectiveness of any measures taken by the supplier.

8.6 In deciding whether to exclude, the Department, with advice from its CoPE, should in particular take into account:

i. that the Public Contracts Regulations require a supplier to prove that it has taken sufficient measures to prevent further misconduct. The evidence required to prove this normally becomes greater the more serious the grounds for exclusion, or where deficiencies occurred in more than one prior public contract undertaken by the supplier in the previous three years;

ii. that there must be proof of concrete technical, organisational and personnel measures that are appropriate to prevent further misconduct. The dictionary definition of 'concrete' refers to real and demonstrable evidence, as opposed to abstract or theoretical, and to that which is strong. The issue of several *Notices of Written Warning* on one or more prior public contracts, or the issue of a *Notice of Unsatisfactory Performance*, may cast doubt on how concrete the measures taken by the supplier have been;

iii. that the evidence submitted should, under the Public Contracts Regulations,

[16] This information can be verified against data held by CPD on its central Register.

[17] Regulation 57(13) of The Public Contracts Regulations 2015. Utilities should refer to Regulation 80(4)(b) of The Utilities Contracts Regulations 2016.

be sufficient to demonstrate the supplier's reliability. An assessment of reliability should take account of the gravity of the misconduct and the existence of any previous *Notices of Written Warning* or *Notices of Unsatisfactory Performance* in the previous three years.

8.7 A Department that decides that the prior deficient performance is relevant, and the measures taken are not sufficient to demonstrate reliability, must give the supplier a statement of the reasons for that decision.

8.8 The Department should be aware of the risk to public money of letting a contract to a supplier that has a record of unsatisfactory performance. It should also be aware that repeated prior unsatisfactory performance indicates an increased risk of similar performance in future contracts.

9 MONITORING OF NOTICES AND TERMINATIONS

9.1 A central Register of suppliers in receipt of current Notices and Terminations will be maintained by CPD, and will be publicly available on its website. This Register will cover all procurements by bodies subject to Northern Ireland Public Procurement Policy.

9.2 It is recommended that as part of the procurement process for a public contract, Departments use the Register to verify whether a supplier has received a Notice or had a prior contract Terminated.

LIST OF ANNEX D APPENDICES

Appendix 1 Template for Letter 1: First Written Warning of Unsatisfactory Performance - notifying supplier that its performance is considered poor.

Appendix 2 Template for Letter 2: Improved Performance - notifying supplier that its performance has now improved.

Appendix 3 Template for Letter 3: Second Written Warning of Unsatisfactory Performance - notifying supplier that its poor performance is being referred to senior management within the CoPE.

Appendix 4 Template for Letter 4: Notice of Written Warning - notifying supplier that its poor performance is formally recorded.

Template for Notice of Written Warning.

Appendix 5 Template for Letter 5: Notice of Unsatisfactory Performance.

Template for Notice of Unsatisfactory Performance.

Appendix 6 Protocol for Managing Supplier Poor Performance Flowchart.

ANNEX D, Appendix 1

Template for **LETTER 1: FIRST WRITTEN WARNING OF UNSATISFACTORY PERFORMANCE**

To: [Supplier's Name & Address]

Date: [...../...../20...]

Dear Sir/Madam,

FIRST WRITTEN WARNING OF UNSATISFACTORY PERFORMANCE

RE: [CONTRACT TITLE]

As part of its contract monitoring procedures [Name of Department/Contracting Authority] routinely assesses performance on all contracts.

It has come to our attention that your performance on the above contract is NOT satisfactory in the following area(s):-

[Specify performance deficiencies and refer to relevant clauses of the Conditions of Contract or other contract documents. Also specify the required improvement activities and expected outputs.]

Suppliers not delivering on contract requirements is a serious matter. It means the public purse is not getting what it is paying for.

In line with the Conditions of Contract [Clause no.], we are giving you [specify timescale for improvement] to improve your performance in this/these area(s).

If your performance does not improve to satisfactory levels within these timescales, the matter will be escalated to senior management in [Name of CoPE]. If this occurs and your performance does not improve to satisfactory levels within the specified period, this can be considered grounds for termination of the contract at your expense as provided for in [Clause no.] of the Conditions of Contract. In lieu of termination, [Name of CoPE] may issue a *Notice of Written Warning or a Notice of Unsatisfactory Performance*. A supplier in receipt of multiple *Notices of Written Warning* or a *Notice of Unsatisfactory Performance* may, in accordance with [The Public Contracts Regulations 2015 or The Utilities Contracts Regulations 2016], be excluded from future public procurement competitions for a period of up to three years.

Yours faithfully,

[Contract Manager]

ANNEX D, Appendix 2

Template for **LETTER 2: IMPROVED PERFORMANCE**

To: [Supplier's Name & Address]

Date: [...../...../20...]

Dear Sir/Madam,

IMPROVED PERFORMANCE

RE: [CONTRACT TITLE]

I refer to my letter of [date] which advised of unsatisfactory performance on the above contract in relation to [specify previous deficiencies].

[Then summarise current performance / improvements made]

I wish to inform you that your performance now meets the contract requirements**.**

It is important that this level of performance is maintained and, to ensure this, your performance will continue to be closely monitored. If, however, performance deteriorates, consideration may have to be given to the remedies provided for in the Conditions of Contract.

Yours faithfully,

[Contract Manager]

ANNEX D, Appendix 3

Template for **LETTER 3: SECOND WRITTEN WARNING OF UNSATISFACTORY PERFORMANCE - PERFORMANCE IS AGAIN UNSATISFACTORY**

To: [Supplier's Name & Address]

Date: [...../...../20...]

Dear Sir/Madam,

SECOND WRITTEN WARNING OF UNSATISFACTORY PERFORMANCE - PERFORMANCE IS AGAIN UNSATISFACTORY

RE: [CONTRACT TITLE]

I refer to my letter of [date] which advised of unsatisfactory performance on the above contract in relation to [specify previous deficiencies and the timescale given for addressing them]. Suppliers not delivering on contract requirements is a serious matter as it means the public purse is not getting what it is paying for.

Your performance has not sufficiently improved and still does not meet the contract requirements. In light of this, the matter is being referred to senior management in [Name of CoPE] for further action. If your performance does not improve to satisfactory levels within the period specified by senior management, this can be considered grounds for termination of the contract at your expense as provided for in [Clause no.] of the Conditions of Contract. In lieu of termination, [Name of CoPE] may issue a *Notice of Written Warning* or a *Notice of Unsatisfactory Performance*. A supplier in receipt of multiple *Notices of Written Warning* or a *Notice of Unsatisfactory Performance* may, in accordance with [The Public Contracts Regulations 2015 or The Utilities Contracts Regulations 2016], be excluded from future public procurement competitions for a period of up to three years.

[Then summarise current performance and refer to relevant contract documentation explaining where/how the terms of the contract are not being fulfilled].

Yours faithfully,

[Contract Manager]

cc. [Name of CoPE]

ANNEX D, Appendix 4

Template for **LETTER 4: NOTICE OF WRITTEN WARNING**

To: [Supplier's Name & Address]

Date: [...../...../20...]

Dear Sir/Madam,

NOTICE OF WRITTEN WARNING

RE: [CONTRACT TITLE]

I refer to correspondence of [date/s] which advised of unsatisfactory performance on the above contract in relation to [specify deficiencies].

I have considered your performance in relation to [specify deficiencies] on the above contract and your efforts to address these. Unfortunately your performance has not improved sufficiently and still does not meet the requirements of the contract. In light of this, I am now issuing you with this *Notice of Written Warning*.

A copy of this warning will be sent to CPD which will keep a central record of it. Details of this warning will be available, for a period of 12 months from its issue, to any CoPE considering excluding you from future procurement competitions. It may be taken into account by a CoPE when considering if you have demonstrated persistent deficiencies in prior public contracts. It may also be taken into account by the CoPE when considering the effectiveness of any measures you have taken to demonstrate your reliability despite the existence of a ground for exclusion.

If your performance does not improve to satisfactory levels within [specify the timescale given for addressing the deficiencies], this can be considered grounds for termination of the contract at your expense as provided for in [Clause No.] of the Conditions of Contract. In lieu of termination, [Name of CoPE] may issue a *Notice of Unsatisfactory Performance* which, under [The Public Contracts Regulations 2015 or The Utilities Contracts Regulations 2016], is one of the permissible grounds for discretionary exclusion from future public procurement competitions for a period of three years.

[Then summarise current performance and refer to relevant contract documentation explaining where/how the terms of the contract are not being fulfilled].

Yours faithfully,
[CoPE senior manager]

cc. [Contract Manager]

Construction Procurement Policy Branch, CPD Policy & Performance Division.

Template for **NOTICE** [Issue on CoPE headed paper or insert CoPE logo]

NOTICE OF WRITTEN WARNING: **NOTICE NUMBER [INSERT NUMBER E.G. 1, 2 ETC]**	
Name of Supplier:	
Dun & Bradstreet Number (D&B D-U-N-S):	
Address:	
Contract Ref and Title:	
Department/Contracting Authority:	
I hereby certify that [Name of Supplier] has shown significant or persistent deficiencies in its performance of a substantive requirement under the above contract as detailed below:	
[Insert details of significant or persistent deficiencies]	
[Name of Department/Contracting Authority] has issued this *Notice of Written Warning.* If [Name of Supplier] is in receipt of multiple *Notices of Written Warning* on this and / or other public contracts it may be excluded from future public procurement competitions for a period of 12 months.	
Signed:	[Head of CoPE]
Name:	[printed]
Name of CoPE:	
Date of Issue:	
***Date of Expiry:**	

INFORMATIVES

A Department/Contracting Authority, in relation to a public contract it is procuring, may ask in its procurement documentation if a potential tenderer has had a prior public contract terminated or had a comparable sanction imposed on it within the last 3 years. In such an event [Name of Supplier] must declare that it has received this and any other *Notices of Written Warning* or *Notices of Unsatisfactory Performance* within the last 3 years. Similarly [Name of Supplier] must also declare if it has had a contract terminated within this timeframe. Failure to declare this information may be considered misrepresentation.

*Date of Expiry will be 12 months after the Date of Issue of the Notice of Written Warning or the target date for completion of the contract, whichever occurs later.

ANNEX D, Appendix 5

Template for LETTER 5: COVER LETTER FOR ISSUE OF A NOTICE OF UNSATISFACTORY PERFORMANCE

To: [Supplier's Name & Address]

Date: [...../...../20...]

Dear Sir/Madam,

ISSUE OF A NOTICE OF UNSATISFACTORY PERFORMANCE

RE: [CONTRACT TITLE]

I refer to my letter of [date] which advised of unsatisfactory performance on the above contract in relation to [specify previous deficiencies and the timescale given for addressing them]. Suppliers not delivering on contract requirements is a serious matter as it means the public purse is not getting what it is paying for.

Your performance has not sufficiently improved and still does not meet the contract requirements. This is grounds for termination of your contract at your expense as provided for in [Clause no.] of the Conditions of Contract.

[Then summarise current performance and refer to relevant contract documentation explaining where/how the terms of the contract are not being fulfilled].

Due to wider public interests and in lieu of termination, [Name of CoPE] has issued the attached *Notice of Unsatisfactory Performance*. This certificate is a 'comparable sanction' in lieu of termination under [The Public Contracts Regulations 2015[18] or The Utilities Contracts Regulations 2016[19]] and is one of the permissible grounds for discretionary exclusion from future public procurement competitions for a period of three years.

If submitting a Pre-Qualification Questionnaire (PQQ) or Invitation to Tender (ITT) in relation a future procurement competition by a body subject to Northern Ireland Public Procurement Policy, within three years of the date of issue of this certificate, you must declare that you have received this certificate in the submission.

The Department/Contracting Authority retains the right to terminate the above contract as allowed under the contract provisions.

Yours faithfully,
[Contract Manager]

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[18] See Regulation 57(8)(g)

[19] See Regulation 80(4)(b)

cc. [Name of CoPE]
Construction Procurement Policy Branch, CPD Policy & Performance Division

Template for **NOTICE** [Issue on CoPE headed paper or insert CoPE logo]

NOTICE OF UNSATISFACTORY PERFORMANCE	
Name of Supplier:	
Dun & Bradstreet Number (D&B D-U-N-S):	
Address:	
Contract Ref and Title:	
Department/Contracting Authority:	
I hereby certify that [Name of Supplier] has shown significant or persistent deficiencies in its performance of a substantive requirement under the above contract as detailed below:	
[Insert details of significant or persistent deficiencies]	
[Name of Department/Contracting Authority] has issued this *Notice of Unsatisfactory Performance.* Under [Clause No] of the above contract, [Name of Department/Contracting Authority] is entitled to terminate the contract at the expense of [Name of Supplier]. Due to wider public interests, [Name of Department/Contracting Authority] has issued this *Notice of Unsatisfactory Performance* as a comparable sanction in lieu of termination in accordance with [Regulation 57(8)(g) of The Public Contracts Regulations 2015 or Regulation 80(4)(b) of The Utilities Contracts Regulations 2016]. Consequently [Name of Supplier] may be excluded from future public procurement competitions for a period of 3 years.	
Signed:	[Head of CoPE]
Name:	[printed]
Name of CoPE:	
Date:	
***Date of Expiry:**	

INFORMATIVES

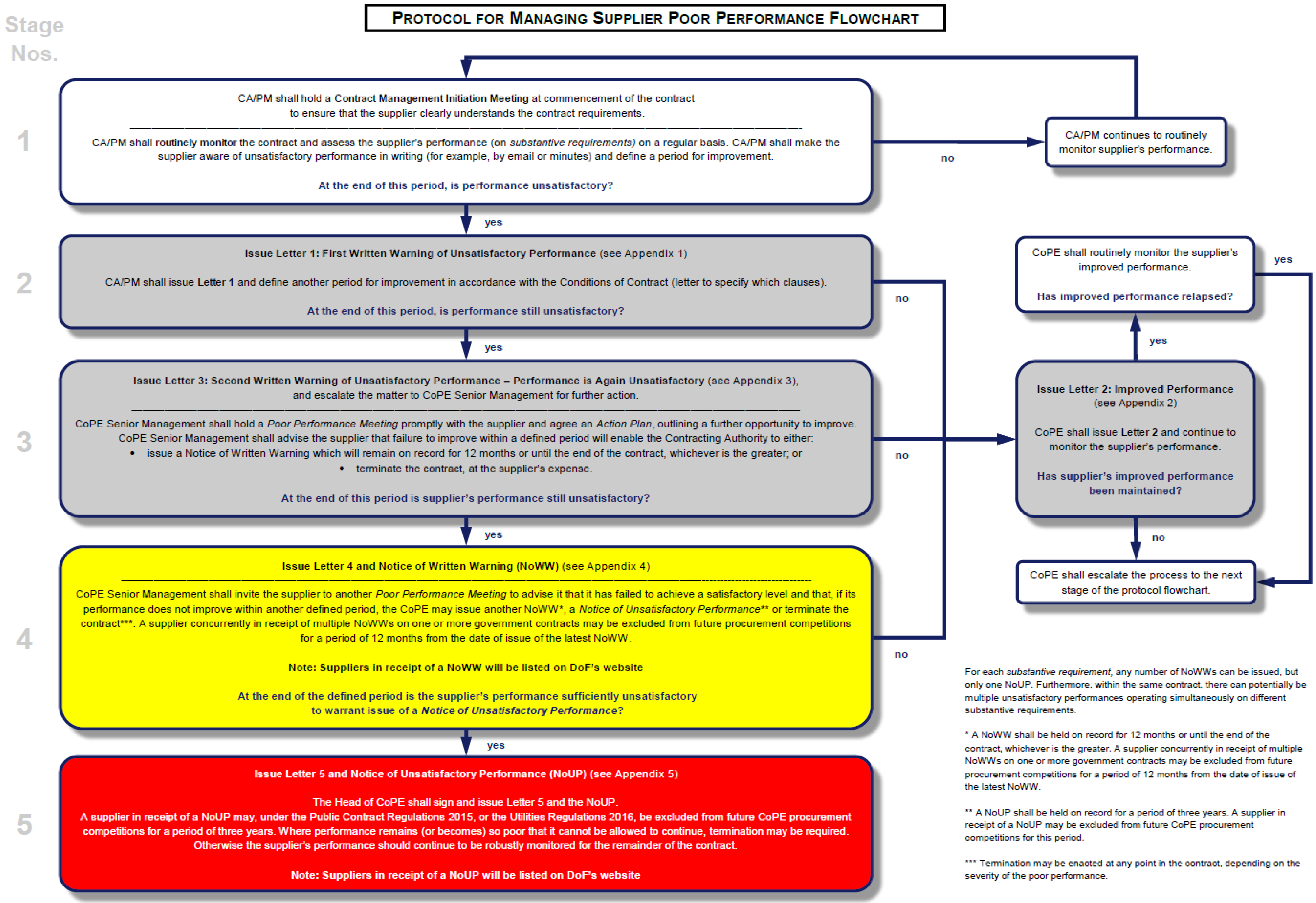
A Department/Contracting Authority, in relation to a public contract it is procuring, may ask in its procurement documentation if a potential tenderer has had a prior public contract terminated or had a comparable sanction imposed on it within the last

3 years. In such an event [Name of Supplier] must declare that it has received this and any other Notices of Written Warning or Notices of Unsatisfactory Performance within the last 3 years. Similarly [Name of Supplier] must also declare if it has had a contract terminated within this timeframe. Failure to declare this information may be considered misrepresentation.

*Date of Expiry will be 3 years after the Date of Issue of the Notice of Unsatisfactory Performance.

APPEALS

You may wish to appeal the decision to issue a *Notice of Unsatisfactory Performance*. Any appeals will be dealt with under the contract's *Dispute Resolution Procedure*. Please see [Clause no.] of the Conditions of Contract.



For each *substantive requirement*, any number of NoWWs can be issued, but only one NoUP. Furthermore, within the same contract, there can potentially be multiple unsatisfactory performances operating simultaneously on different substantive requirements.

* A NoWW shall be held on record for 12 months or until the end of the contract, whichever is the greater. A supplier concurrently in receipt of multiple NoWWs on one or more government contracts may be excluded from future procurement competitions for a period of 12 months from the date of issue of the latest NoWW.

** A NoUP shall be held on record for a period of three years. A supplier in receipt of a NoUP may be excluded from future CoPE procurement competitions for this period.

*** Termination may be enacted at any point in the contract, depending on the severity of the poor performance.