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DAO (DoF) 06/22

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Dear Accounting Officer

DIRECT AWARD CONTRACTS

Purpose

1. This DAO letter provides guidance on what constitutes a Direct Award Contract (DAC), what needs to be considered before one is awarded, and the potential consequences of doing so. It also sets out the process for approving DACs, including approval levels, and details the role of Centres of Procurement Expertise (CoPEs).

Background

2. Managing Public Money (Northern Ireland) sets out the main principles for dealing with resources used by public sector organisations in Northern Ireland and the responsibilities of Accounting Officers¹ in relation to procurement. It typically requires public sector organisations to acquire goods, services and works through fair and open competition unless there are convincing reasons to the contrary.

¹ Where the guidance refers to Accounting Officer approval this generally is taken to mean the Accounting Officer of the relevant organisation. If however the amount is outside the delegated limits set for an ALB, then the approval of the relevant departmental Accounting Officer is required

3. Competition promotes economy, efficiency and effectiveness in public expenditure and also contributes to the competitiveness of suppliers. In addition, procurement must be carried out in compliance with the relevant Public Procurement Regulations².

What is a DAC?

4. A DAC is a public contract awarded without a competition (see paragraphs 10 - 19 for what is not considered to be a DAC).
5. A DAC can be valued above or below the relevant UK Procurement Threshold.
6. Contracts that are modified maybe classified as DACs. However, the Procurement Regulations allow contract modifications in certain circumstances, (these are explained in paragraphs 16 – 18).
7. The rules relating to DACs above the UK Procurement Threshold are set out in the Public Procurement Regulations. The Regulations and Northern Ireland Public Procurement Policy (NIPPP) permit DACs to be awarded in certain circumstances which are explained below.
8. NIPPP permits Departments to award DACs below the UK Procurement Threshold where there are convincing reasons. Generally these reasons will be similar to those set out in Regulation 32 of the Public Contracts Regulations 2015³, however, there may be other reasons connected with the overriding public interest to award a contract without a competition.
9. DACs involve risk for Departments, whether as regards compliance with legislation or in ensuring value for money. While ultimately only the intervention of a court can conclusively determine interpretation of the Regulations, Departments should seek advice from CoPEs and, where necessary, legal

² Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 (as amended or replaced)

³ Regulation 50 of the Utilities Contracts Regulations 2016

advice, to assist them in balancing risks, considering any other legal duties and obligations that need to be taken into account, and taking properly informed decisions.

What is not a DAC?

10. The situations described in paragraphs 11 – 19 below are not classified as DACs and Accounting Officer approval is not required.

Exclusions from the Regulations

11. Regulations 7 to 12 of the Public Contracts Regulations 2015⁴ list exclusions from the Regulations. These are not regarded as DACs under legislation or policy as the procurement rules do not apply. Since they are excluded from the Regulations, they do not require Accounting Officer approval. They include, for example:

- the acquisition or rental, by whatever financial means, of land or existing buildings;
- certain legal services (for example, legal representation or advice by a lawyer in judicial proceedings before the courts or in situations where there is a high probability that judicial proceedings will result);
- certain financial services (for example, those in connection with the issue, sale, purchase or transfer of securities);
- loans;
- employment contracts;
- civil defence and danger prevention services that are provided by non-profit organisations covered by certain Common Procurement Vocabulary codes, with the exception of patient transport ambulance services;

⁴ Regulations 18-24 of the Utilities Contracts Regulations 2016.

- using public transport services by rail or metro; and
 - public contracts between public sector entities that satisfy a range of conditions.
12. The Regulations do not apply to defence and security contracts that:
- fall under the scope of the Defence and Security Regulations or to which those regulations do not apply (by virtue of Regulations 7 or 9 of those regulations);
 - are not otherwise exempted as above;
 - to the extent that the protection of the essential security of the UK cannot be guaranteed by less intrusive measures; or where application of the Regulations would oblige the UK to supply information, the disclosure of which it considers contrary to the essential interests of its security; and
 - are classified as secret or must be accompanied by special security measures in accordance with the laws, Regulations or administrative provisions in force in any part of the UK, and the UK has determined that the essential interests concerned cannot be guaranteed by less intrusive measures.
13. The contracts above are also excluded from compliance with NIPPP, however, Accounting Officers should be satisfied that governance arrangements are in place to ensure value for money is obtained and potential conflicts of interest are managed appropriately.

General transactions

14. There is a range of general transactions that, although a form of contractual arrangement may be entered into, do not require Accounting Officer approval or CoPE advice in order to be agreed without a competition. The transactions include:
- subscriptions to professional journals (for example, RICS, CIPFA, BRE, DQI);

- participation in trade events or similar activity;
- payment of professional membership fees;
- corporate memberships (for example, CBI, Business in the Community);
- attendance at training courses⁵ and conferences;
- procurements below £5,000, (£10,000 for Health), exclusive of VAT, that cannot be obtained from existing frameworks or call-off arrangements, or where in the event of an emergency, price checks cannot be obtained with the exception of external consultancy contracts which require Accounting Officer (usually Permanent Secretary) approval irrespective of value; and
- situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems. These are not procurements but simple authorisation schemes.

Charges in connection with statutory approvals and connections to utilities

15. There are circumstances when it will not be possible to obtain quotes or advertise for tenders. These circumstances relate to charges in connection with applications for statutory approvals and/or connection to utilities infrastructure where exclusive rights are held. Such arrangements are not procurements and, therefore, are not subject to procurement rules. The circumstances include⁶:

- aviation landing fees;
- planning application fees;
- building control application fees;
- consent to discharge effluent fees; and
- charges for connection to electricity, gas, and water networks.

⁵ This refers to attendance at training courses that are open for anyone to attend; for example, a Department wishing to send some staff on an advertised course on Risk Management. Commissioning a supplier to provide a series of tailored training courses for staff will, if not let competitively, be classified as a DAC.

⁶ The list provided is not exhaustive.

Modification of contracts during their term

16. Departments can be faced with external circumstances that they could not foresee when they award contracts. Regulation 72 of the Public Contracts Regulations 2015⁷ explains the circumstances where, and extent to which, a contract can be modified without the need for a new procurement procedure and provide flexibility for procurement professionals to follow best commercial practice and negotiate with an existing supplier. Negotiation provides the opportunity to challenge the supplier to provide improved value for money, to explore the potential for innovative solutions that will improve the delivery of public services and to review the efficiency of existing processes with a view to reducing costs to the Department.
17. Advice and assistance should be sought from a CoPE before modifying a contract or negotiating the price or terms with the supplier. A CoPE will ensure that the proposed modification is within the scope of the relevant regulations.
18. While contracts modified without a new competition using the provisions of Regulation 72 of the Public Contracts Regulations (or equivalent for Utilities Contracts Regulations 2016) are not considered to be DACs, modifications which extend contracts beyond the term set out in the procurement documents should be an exception and closely monitored by Departments. A contracts register (which Accounting Officers must maintain in accordance with DAO (DoF) 05/21 (7 September 2021) – Contracts Register), will help identify contracts which are reaching their expiry date.

Where no suitable tenders have been received

19. It is possible to negotiate with a single supplier where no suitable tenders are received as a result of a competitive tender exercise.
20. If no suitable tenders have been received it is worth investigating the reason why. This could highlight a problem with the scope of requirements or Conditions of Contract in the original tender documents. The Department may

⁷ Regulation 88 of the Utilities Contracts Regulations 2016

then be in a position to re scope the requirement and seek tenders again. If this is not possible, the negotiated procedure without prior publication (Regulation 32 of the Public Contracts Regulations 2015 or its equivalent in the Utilities Contracts Regulations 2016)) can be used where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered.

Accounting Officer approval

21. All DACs require Accounting Officer approval or approval of the person delegated by the Accounting Officer.

Delegation of Accounting Officer approval

22. While all DACs should be scrutinised within a Department, Accounting Officers may wish to delegate authority to approve DACs which are deemed to be lower risk. For example, approval may be delegated for DACs below the UK Threshold where Public Procurement Regulations would not apply. Delegation of Accounting Officer approval should be carried out in accordance with Managing Public Money (Northern Ireland). For audit purposes a documented process should be in place outlining the delegated limits and individuals with authority to approve DACs.
23. In circumstances where the value of the DAC has been estimated but subsequently materially increases, appropriate additional approvals should be sought.

External consultancy

24. The prior approval of the Accounting Officer (usually the Permanent Secretary) is required in every case when it is intended to award a contract for external consultants without competition.

Process for dealing with DACs

Business Case

25. Procurements, including those procured via a DAC, require a proportionate business case with appropriate approval. NIPPP requires social, environmental and economic considerations to be included in public contracts. This should be considered in the business case.

CoPE advice

26. Departments that intend to award a DAC should seek advice from their CoPE on the risks, potential to achieve value for money, and appropriate Conditions of Contract. If necessary, they should also seek legal advice.
27. CoPE advice on DACs needs to be proportionate to the value of the transaction and, in the case of a new supplies and non-construction services contract where the estimated contract value is below £30,000 (£50,000 for Utilities), exclusive of VAT, the advice should be limited to benchmarking of costs and/or value for money where possible.
28. A CoPE can provide general advice on such matters as required by Departments.
29. In the case of DACs above the threshold, Departments should seek advice from the Head of Procurement in a CoPE (or advice from a person delegated by the Head of Procurement) and legal advice, where appropriate.

Negotiation

30. Negotiation and benchmarking, where possible, should take place with the supplier to ensure value for money.

Publication

31. If the value of the DAC is above the relevant UK Procurement Threshold a Contract Award Notice (CAN) must be published. Consideration should also be given to publishing a Voluntary ex ante Transparency (VEAT) Notice prior to award (see paragraph 37 for more details).

32. Departments should ensure that all DACs with an award value above £30,000 (£50,000 for Utilities), exclusive of VAT, are published monthly by the relevant CoPE on its website, unless there are exceptional reasons for not doing so.

Recording

33. For audit purposes, a written record should be kept by Departments setting out the reasons and justification for all DACs. This may also be needed in the event of a legal challenge. For DACs above the UK Threshold, this should include the circumstances in Regulation 32⁸ that justify such an award.
34. Accounting Officers must ensure that DACs are reported to the Departmental Board and the Departmental Audit and Risk Assurance Committees. Arm's Length Bodies should ensure arrangements are put in place to forward details of all DACs to Departments.

Consequences of Non-compliance with the Regulations

35. A breach of the UK Regulations is actionable by suppliers/aggrieved parties through proceedings in the High Court. The Court has a range of review procedures and remedies available for breaches of the public procurement rules.
36. One of the remedies is a Declaration of Ineffectiveness. Ineffectiveness is a very stringent and punitive remedy, and one that is reserved by a court for serious breaches of the Regulations. It leads to contract cancellation, plus a financial penalty, and compensation may also be awarded by the Court. A breach of the requirement to publish a contract notice in the UK e-notification service Find a Tender (FTS), (that is to advertise), where prior publication was required under the procurement rules, is one of the grounds for a Declaration of Ineffectiveness.

⁸ Utilities should include the circumstances under Regulation 50 of the UCR 2016.

37. Where it is intended to award a contract for which there has been no prior publication of a contract notice, a VEAT Notice may be placed in FTS. A VEAT Notice is a protective mechanism that can be used where a Department has awarded a contract without prior advertisement, where it is considered that the Regulations permitted this. Its purpose is to allow interested suppliers a short period within which to challenge the award decision. CoPE advice should be sought.

Action

38. This DAO should be brought to the attention of all relevant staff within your Department and Arm's Length Bodies.

Queries

39. Any queries regarding this letter/guidance should be addressed to:
procure.policy@finance-ni.gov.uk.

Yours sincerely



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