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THE PUBLIC CONTRACTS REGULATIONS 2015

&

THE UTILITIES CONTRACTS REGULATIONS 2016

DYNAMIC PURCHASING SYSTEMS

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OVERVIEW

What is the Dynamic Purchasing System?

The Dynamic Purchasing System (DPS) is a procedure available for contracts for works, services and goods commonly available on the market. As a procurement tool, it has some aspects that are similar to an electronic framework agreement, but where new suppliers can join at any time. However, it has its own specific set of requirements. It is to be run as a completely electronic process, and should be set up using the restricted procedure and some other conditions (as set out in Regulation 34 of the Public Contracts Regulations 2015).

Contracting authorities, including central purchasing bodies, may set up a DPS. The DPS should be set up for identified types of requirement, which may be divided into categories of products, works or services.

The DPS is a two-stage process. First, in the initial setup stage, all suppliers¹ who meet the selection criteria and are not excluded must be admitted to the DPS. Contracting authorities must not impose any limit on the number of suppliers that may join a DPS. Unlike framework agreements, suppliers can also apply to join the DPS at any point during its lifetime. Individual contracts are awarded during the second stage. In this stage, the authority invites all suppliers on the DPS (or the relevant category within the DPS) to bid for the specific contract. The new directive and Regulations update the existing DPS rules, as discussed below.

Why is this helpful / necessary?

The DPS can streamline procurement for both suppliers and authorities; suppliers don't have to demonstrate suitability and capability every time they wish to compete for a public sector contract, and the award of individual tenders can be quicker than under some other procedures. The DPS is more flexible in some respects than frameworks, particularly as suppliers may join it at any time during its period of validity, meaning that suppliers are not locked out for the duration as they are with traditional frameworks. However the DPS under the old rules was rather cumbersome, so it was little-used either in the UK or in other member States. The new rules provide additional flexibility.

What has changed?

The basic principles remain from the old DPS, but there are several significant changes. Suppliers no longer have to submit an "indicative tender" with their request to join the DPS. The old obligation for authorities to publish a further simplified advertisement in the OJEU each time they wish to award a contract under a DPS no longer applies. The default four-year limit on the duration of a DPS has been removed. These improvements make the DPS significantly more useable and useful.

Which rules do I need to refer to?

¹ For convenience "supplier" is used in this note to include any economic operator

Regulation 34 of the PCR 2015 sets out the rules on Dynamic Purchasing Systems. Regulation 34(5) states that in order to procure under a DPS, contracting authorities should follow the rules of the restricted procedure, and subject to the provisions of clause 34. Therefore, Regulations that apply to the Restricted Procedure, and to procedures generally, apply to the DPS, except where regulation 34 specifically alters or dis-applies them.

The corresponding provision in the Utilities Contracts Regulations is Regulation 52. It should be noted that in Regulation 52 (25) – (27) covering means of proof, cross references are made to relevant provisions of the PCR 2015.

KEY POINTS

Stage 1: Establishing the DPS and adding additional suppliers

To set up a DPS, a contracting authority must place a call for competition in OJEU to make known the intention to establish a DPS, and suppliers must be allowed at least 30 days to respond. (As with other procedures, sub-central bodies may use a Prior Information Notice to make known their intention). This initial DPS set-up phase only covers the exclusion and selection criteria, as used in other procedures, and as set out in Regulations 57-64 of the PCR 2015. The OJEU contract notice should specify the nature of the requirements and the approximate quantities or values envisaged.

As with other procedures, the procurement documents should be made freely available electronically from the date of the advert. These procurement documents must remain available electronically throughout the duration of the DPS.

A DPS can be divided into categories of works services or goods, which are objectively defined on the basis of characteristics of the procurement to be undertaken under the category. The characteristics used to define a group may include size of contract or geographical area of contract delivery.

If the DPS is divided into categories, the selection requirements for each category should be appropriate to that category, and may vary between categories. In accordance with Regulation 59, suppliers should “self-certify” their compliance with the selection requirements, and confirm that none of the grounds for exclusion apply, in order to gain admittance to the DPS. Normally (subject to Regulation 59(8)), only suppliers who win contracts under the DPS should be expected to provide documentary evidence of their status (consistent with other procedures).

This is also subject to the requirement of Regulation 59(11), so authorities should not request supporting documents where they already hold them or can obtain relevant information from a national database. Where a supplier has already submitted documents under a previous contract (DPS or indeed otherwise) it should be asked to confirm these are still applicable, and only provide new documents as preceding ones expire, or circumstances change. Where CPBs set up DPSs It would be sensible for the CPB to hold information about the evidence submitted, and make this available to its own customers.

All suppliers who meet and pass the exclusion and selection criteria must be admitted to the DPS and/or the relevant categories within it.

Suppliers may join the DPS at any point during its validity if they satisfy the selection requirements, and none of the grounds for exclusion apply. The authority is required to evaluate these suppliers' requests within 10 working days of receipt; this may be extended to 15 days if justified, for example, by the need to examine documents or to verify whether the selection criteria have been met (examination documents or other verification should not be the default, and only used if necessary for the proper conduct of the process; as noted as only the winning bidder should normally have to submit documents).

Contracting authorities may provide for award of contracts under a DPS on the basis of updated electronic catalogues, provided that the authority establishes the technical specification and format for the catalogue; supplier's requests to participate should be accompanied by a catalogue.

Stage 2: Awarding specific contracts using the DPS

Once the DPS is set up, an authority may award specific contracts using a DPS that they are entitled to use by inviting all suppliers admitted to the relevant category to bid, in accordance with regulation 54. As with a framework, the award criteria to be used for the award of individual contracts are to be set out in the original contract notice². These criteria may be "formulated more precisely" for specific contracts, as set out in the invitation to tender for the specific contract.

The award process and permissible award criteria are consistent with those for other procedures; the minimum timescale for return of tenders is 10 days. Where the contracting authority is a sub-central body, this time limit can be reduced by mutual agreement between the contracting authority and all suppliers in the relevant DPS / category.

The authority may choose to require that tenders for a specific contract comprise or include electronic catalogues, adapted to the specific requirement, in which case the authority should have asked the suppliers request to participate to be accompanied by a catalogue as mentioned above.

There is no obligation to undertake a "standstill" period, although there may be some benefits in doing so (see under FAQ section below).

The DPS is to be undertaken as a wholly electronic procedure, in accordance with Regulation 22 (1) to (7) and (11) to (20). Unlike other procedures there is no derogation to postpone the electronic requirements, so this requirement is in force from the date of the new Regulations. However where authorities already use an e-procurement solution it may well be that this can be used or adapted for a DPS; authorities may wish to discuss with their e-procurement solution or service provider. The requirement for an electronic procedure does not prevent "human" evaluation of tenders received under a DPS.

There is no requirement to submit any form of award notice to OJEU following the setting up of the DPS, or when new suppliers are added to the DPS. There *is* a requirement to publish contract award notices (which must be sent to the Publications Office within 30 days of award) for specific contracts awarded under the DPS. However, authorities can choose to

² Or in the invitation to confirm interest where a Prior Information Notice was used for the original advertisement.

group DPS contract award notices on a quarterly basis, which must be sent within 30 days (after) the end of each quarter. Authorities should also abide by the requirements for publication on Contracts Finder about contracts awarded, as explained under Procurement Policy Note 03/15; see

<https://www.gov.uk/government/publications/procurement-policy-note-0315-reforms-to-make-public-procurement-more-accessible-to-smes>

A DPS may be set up by central purchasing bodies, to undertake centralised purchases by the CPB itself, and / or for the CPB's "customers" to compete contracts.

Frequently Asked Questions

General nature and use of DPS

Q. The DPS is to be used for “commonly used purchases...generally available on the market”. What does this mean?

The rules do not specify how this should be interpreted. It is likely to depend on the specific type of goods, works or services covered by the DPS. The DPS will normally be suitable for largely “off-the-shelf” requirements which can be closely specified in advance. One-off, or heavily bespoke and / or highly complex requirements are unlikely to be suitable

Q. Are there any restrictions on the number or type of category into which a DPS may be divided?

No restrictions are specified in the rules; the regulations require that categories are objectively defined on the basis of the characteristics of the procurement to be undertaken. The rules state that these characteristics may include the maximum size of contract or geographical area of contract performance. However other characteristics are not excluded, for example the nature or scope of the deliverables might be appropriate. The authority will have to make its decision based on the specifics of its requirements. Early market engagement may be helpful in identifying suitable categories. Of course categories will need to ensure compliance with Treaty principles; so it would not be permissible to have different categories for different sizes or geographical locations of *suppliers*.

Q. Is there a time limit on how long a DPS can operate? And is there any flexibility?

The “period of validity” must be stated on the original OJEU notice; but the Regulations indicate that the period can be later amended (extended, shortened, terminated) subject to notification on the relevant OJEU standard form. This provides useful flexibility if the authority’s circumstances change, or developments in technology, markets, etc mean the DPS as originally set-up outlives its usefulness. There is now no specific maximum duration of a DPS. Any changes to the period of validity of a DPS should comply with relevant Treaty principles.

Q. What is a suitable duration for a DPS?

The authority must make its own decision based on its needs and understanding of the market. Early market engagement should help provide insights. A longer-running DPS will reduce the need to re-compete, but if it is too long the DPS may become obsolete if the authority’s circumstances or markets change. As noted above the authority may be able to lengthen or shorten the duration if necessary.

Q. Does the DPS encourage SME access to public contracts?

As with all procedures, the suitability for SMEs depends more on the authority’s procurement decisions than the particular rules which apply to the process. However the DPS has some features which can potentially encourage SMEs. The selection stage is potentially less onerous, as the supplier only has to complete this stage on entry to the DPS (and thereafter

periodically reconfirm its status) instead of having to do so separately for all procurements. As the DPS is open to suppliers throughout its duration, new start-ups, or businesses that wish to expand into new public sector markets, will not be frozen out of the market.

The division of DPS into categories by type of requirement, size of contract, or geographical place of delivery, could be arranged to ensure that niche suppliers and SMEs have maximum opportunity to compete.

Q. Is it permissible to have different terms and conditions for contracts under different categories of a DPS?

The rules do not govern the terms of the contracts awarded under a DPS. It would not be contrary to the rules to have different terms and conditions for contracts awarded under different categories of a DPS provided these complied with the Treaty principles of transparency, equal treatment and proportionality. There should be objective reasons why different terms and conditions are appropriate for different categories. The terms and conditions should be appropriate to contract for “commonly use purchases... available on the market” (so contracts designed for large bespoke requirements, for example, would not be appropriate).

In all cases the intended terms and conditions should be included within the procurement documents made available when the DPS is first advertised.

Q. Can suppliers be required to sign-up to the standard contractual terms and conditions of the authority setting up the DPS as part of the initial application process?

The authority can make clear that suppliers will be required to accept the terms and conditions of the authority setting up the DPS when bidding for contracts under the DPS.

Q. Does the “standstill” period apply to setting up the DPS?

There is no obligation to hold a standstill before admitting suppliers and commencing the DPS. And as suppliers may apply (or reapply if previously not accepted) at any time during the currency of the DPS, a standstill at initial set up-would be of little value.

Suppliers joining a DPS

Q. Do suppliers need to submit an “indicative tender” with their initial application?

No; this requirement in the old rules has been removed from the new DPS.

Q. If a DPS is divided into categories, may a supplier apply for more than one category?

Yes, a supplier may apply for as many categories as it wishes.

Q, Can we limit the number of suppliers on the DPS or in any categories under the DPS?

No; any and all suppliers who pass the exclusion criteria and meet the selection criteria must be admitted to the DPS [category].

Q. Can we set the selection criteria at a high level, intended to limit the number of successful applicants?

No. The selection criteria and pass marks should be proportionate and objectively justifiable according to the requirements to be delivered in the DPS / category. Unnecessary or overly-onerous requirements meant to limit the number of suppliers would breach proportionality and equal treatment, would be likely to discourage SMEs, and would tend to reduce competition.

Q. Is it permissible to have different selection criteria for different categories under the DPS?

Yes; where a dynamic purchasing system is divided into categories, the contracting authority should apply selection criteria that are proportionate and relevant to the characteristics of the category concerned.

It is possible that a supplier could pass the selection stage for, and be admitted to, one or several categories but not to others.

Q. If a supplier fails the exclusion or selection stage, can it reapply later?

Yes.

If the supplier had failed the exclusion stage, it could reapply if the mandatory or discretionary exclusionary periods had ended, or if the supplier had self-cleaned.

If the supplier did not meet selection criteria, it could reapply if its circumstances changed, for example if it had newly available skills, experience, or if something else which would change its answers to the selection criteria had occurred.

Q. If a supplier is admitted, is it obliged to bid for any contracts procured under the DPS?

No.

Q. Can a supplier be deselected from a DPS?

A supplier's initial admission to the DPS should normally be based on self-certification that it passes the exclusion criteria and meets the selection requirements. In similar manner to other procedures, the winning bidder for a contract under a DPS should be asked to provide confirmatory evidence before award of contract (unless previously submitted as discussed above). Please see separate guidance on "selection and award" for further information on those rules.

If a supplier ceases to meet the original exclusion or selection criteria during the course of the DPS it is likely that it could be excluded (indeed if it fails one of the mandatory exclusion grounds the authority will be *required* to remove the supplier).

The frequency of updates is for the authority to decide, but at least an annual update might be appropriate. Authorities could also require suppliers to confirm that their exclusion and selection status is not changed before the award of each contract.

It would *not* be permissible to remove or exclude a supplier from a DPS because the supplier had not chosen to bid for any contracts under the DPS, or because the supplier had bid but was unsuccessful in all its bids.

Q. Can a supplier be excluded for poor performance on contracts under the DPS?

Poor performance on prior public or utilities contracts which have led to contract termination, damages or other comparable sanctions are now grounds for discretionary exclusion. (Regulation 57(8)(g)). Therefore poor performance on previous contracts under the DPS which had led to sanctions could be used to exclude the supplier from the same, and other, DPSs in future.

As with any other exclusion for poor performance, this must be based on objective failings which led to sanctions; subjective assessment of a supplier's attitude, aptitude, etc must not be used.

If a DPS is set up by a CPB for use by other contracting authorities, the decision on whether to exclude a supplier should rest with the CPB.

Q. Can a supplier be deselected from one or more categories but not others?

In principle, yes, if the supplier ceases to meet the selection criteria for some categories but remains compliant with all the criteria for other categories.

If a supplier breaches a mandatory exclusion ground during the course of the DPS, he must of course be excluded from the whole DPS. And most of the discretionary exclusion grounds are unlikely to be category-specific.

However, if a supplier had evinced poor performance in contracts under some categories but not others, although it would be permissible to exclude it from the whole DPS, depending on the case, it might be more proportionate and appropriate to only remove it from the problematic categories.

Authorities will need to make their own case-specific judgements, and treat all suppliers equally.

Q. How long do we have to complete the assessment of new applicants?

Regulation 34(16) states that contracting authorities must finalise their evaluation of new applicants (i.e. applications which are received during the period of validity of the DPS) within 10 days of receipt. This may be prolonged to 15 working days in individual cases where this can be justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met. Contracting authorities are under a clear duty to meet these timescales, and should ensure that systems and resources are in place to meet them.

These rules also apply to the initial evaluation of applicants when the DPS is set up. However, as long as the invitation to tender for the first specific contract under the Dynamic

Purchasing System has not been sent, the period may be extended provided that no invitation to tender is issued during the extended evaluation period. If initial evaluation of tenders takes additional time, it is therefore possible to delay the start of the DPS to provide further time for evaluation of applicants.

Individual contract award under a DPS

Q. Do I have to run a competition for every requirement under a DPS? Or can the DPS be used for “direct awards”, perhaps for low-value contracts?

The rules state that each requirement under a DPS must be competed; all suppliers under the DPS or the relevant category must be invited to bid. “Single tender” is not permitted (unless only one eligible supplier has applied for the category), and there is no derogation for low-value contracts.

This reflects the nature of the DPS; admission to the system only requires suppliers to demonstrate their suitability, ability, and capability to deliver the type of requirement in the DPS or category. (There is no requirement to submit any type of tender as part of the application for admission). Therefore the decision on the best value-for-money offering can only be decided at the tender stage for each individual requirement, and equal treatment requires that all suppliers on the DPS [category] have the opportunity to bid.

The European Commission regards impermissible direct awards as the worst type of breach of the procurement rules and Treaty principles, and would probably take legal action, particularly if there was systemic use of direct awards under a DPS. Aggrieved suppliers would also be able to take action under the Remedies rules.

The 10-day minimum for return of tenders (including if applicable completion of a catalogue) in a competition under a DPS is substantially shorter than the total procurement process-time for the other procedures under the directive. As the DPS is intended for commonly used purchases generally available on the market, and must be an electronic process, it should normally be possible to readily undertake a competition.

Q. If we cannot limit the number of suppliers on the DPS or in any category, how will we effectively resource and undertake competitions for individual contracts?

The DPS is no more onerous than the open procedure for individual contracts; in fact it will be easier, as authorities will only have to examine tenders and not assess supplier’s exclusion and selection status for every contract (although they may need to receive the supporting documents as confirmation, as discussed above). Authorities will also know how many suppliers are on the DPS [category] at any given point, so they will know the maximum number of potential responses in advance. As the DPS is for works, goods and services commonly available on the market, it may be possible in many cases to run relatively straightforward award evaluation criteria, which will help to keep resource requirements in check.

As with any procurement, contracting authorities should adopt the “Lean” approach. This will include early market engagement to understand the supplier base and the potential for the market to meet the authority’s needs. This will help the authority to decide the best division

into categories. Focused categories may help limit the number of suppliers who apply for each category.

Authorities, including CPBs, and authorities with access to DPSs and frameworks put in place by CPBs, will wish to consider the relative merits of DPSs, frameworks, and individual separate procurements, depending on the specific requirements and circumstances.

Q. Does the standstill period apply to contracts under the DPS?

The standstill period is not obligatory for individual contracts awarded under a DPS.

Q. Is there a clear requirement to provide a debrief report for unsuccessful bidders for individual contracts under a DPS?

The requirement for a “notice of decision” as required in the rules for most procedures is specifically **not** obligatory for award of contracts under a DPS. However authorities are not prohibited from either proactively providing feedback or offering to provide feedback on request, and CCS regards provision of feedback as being good practice. Where an authority provides or offers feedback it should treat all suppliers equally, make known its intention to do so in advance, and abide by good practice on providing feedback, as when providing feedback under procedures where it *is* obligatory.

Q. May individual contracts “overhang” the duration of the DPS itself?

This is not specifically covered in the rules, and given the flexibility of DPS duration, need not be a concern. However, the new rules specifically allow “overhang” in frameworks, and there is no reason to consider that proportionate overhang would be impermissible in DPS. As with all procedures, the DPS should not be used in a way which will distort or prevent competition.

Electronic processes and DPS

Q. The DPS must be a wholly electronic process; what does this mean?

The provision of Regulation 22, covering electronic communications, apply to the use of the DPS from the entry into force of the Regulations, and Regulation 34(2) states that a DPS must be a ‘completely electronic process.’ The derogation to postpone electronic communications does **not** apply to the DPS. Authorities which wish to use the DPS will therefore need to ensure that they have access to suitable IT systems which enable compliance with Regulation 22, (including the technical and security requirements in Regulation 22 (16) et seq). As noted above, however, existing e-procurement solutions and services may be useable or adaptable for the DPS, as the requirements and processes are similar in principle to those in other procedures under the rules.

The specific derogations in Regulation 22 (8) to (10) for oral communication do not apply. As the DPS is for works, goods and services commonly available on the market, it is unlikely that the derogations for physical models, special formats or office equipment, or specific security requirements in Regulation 22(2) to (7), will normally be pertinent, although they apply where relevant. As mentioned activities not involving communication between the parties, such as tender evaluation, do not have to be electronic, although there is no prohibition on use of electronic evaluation tools.

Q. Can electronic auctions be used for the award of contracts under a DPS?

Yes, the rules explicitly allow the use of e-auctions in the award of contracts under a DPS, provided that the subject matter is suitable (including a requirement that the technical specification can be established with precision). All the other rules applicable to e-auctions also apply; see Regulation 35.

Electronic catalogues and DPS

Q. Can catalogues be used in the DPS?

Yes, the authority may choose to allow or require the submission of electronic catalogues. These should meet the requirements for electronic communication in Regulation 22 and the provisions on e-catalogues in Regulation 36.

As with all use of catalogues under the public procurement rules, suppliers should not simply submit their general catalogues but should adapt the format and content to the specific requirements of the DPS.

Contracting authorities may require economic operators to submit an electronic catalogue as part of tender for a specific contract under a DPS. Authorities may also ask for submission of a catalogue with the initial request to participate. Please see separate guidance on e-communications for further details of the use of e-catalogues.

Q. If the request to participate in the DPS is accompanied by a catalogue, what should that catalogue contain?

The rules do not specify what the catalogue should contain. It should comply with the technical specifications and format specified by the authority, (having regard to Government policy on open standards), and the format and content are likely to depend on the nature of the works, goods or services to be procured. As it is not an indicative tender it is unlikely that it would need to contain detailed pricing information. Specific details of works, services or products and prices for each specific requirement will be completed at tender stage.

Q. If suppliers have recently completed catalogues can these be used for additional contracts, without further updating, and without going to tender again?

There is no provision to do so under the rules. The rules envisage that each supplier will be advised every time an authority wishes to award a tender, and invited to complete / update its catalogue and confirm whether it wishes to participate. In practice, in some cases, it may be that the supplier will be able to simply confirm that a previous catalogue still stands unchanged.

DPS and Central Purchasing Bodies

Q. Can DPSs be set up by Central Purchasing Bodies?

Yes, CPBs are specifically allowed to set up DPSs. These can be used by the CPB to make central purchases, or to be used by other “customer” authorities of the DPS to award individual contracts. Regulation 37(3) states that where a DPS established by a CPB may be used by other contracting authorities, the call for competition must mention this fact. Where

an authority uses a DPS set up by a CPB to compete and award contracts, the authority will be responsible for proper conduct of the individual competition.

Q. If a DPS is set up by a CPB, is it necessary for all the potential contracting authority “customers” to be identified in the contract notice or procurement docs?

Unlike the Regulations governing the award of frameworks by CPBs, there is no explicit requirement for the potential users to be identified (either by name, or as unambiguous members of a particular class or category). There is only the requirement in Regulation 37(3) that where a DPS established by a CPB may be used by other contracting authorities, the call for competition must mention this fact. However, as good practice, for transparency and to reduce the risk of challenge, CCS recommends that CPBs who set up a DPS do clearly identify the permitted and potential user-base.

Q. Can a sub-central authority which uses a DPS set up by a central government purchasing body, use the derogation to allow less than 10 days for return of tenders?

This is not explicitly covered in the rules, but it may be possible in principle, if the sub-central body runs the competition. The sub-central body would be responsible for the process and decisions on the award of the contract, and any failure to apply with the regulations. As it would be necessary for the sub-central authority to obtain agreement of all the suppliers on the DPS [category], this derogation might not be greatly helpful in practice.

If a central purchasing body wishes to set up a DPS which will allow sub-central bodies to allow less than 10 days, the CPB may wish to take specific legal advice on the best way to structure the award process.