Annex 4 Commercial Control, and Dispute Disclosure

Policy Summary

4.1 Following the All Commercial Control pilot Cabinet Office will continue to operate a Commercial Control replacing the previous Strategic Supplier Control. The following commercial activity is subject to the Commercial Control:

- Any commercial transaction valued £10 million or more.
- Any material change to services affecting an existing contract, with an estimated value of £10 million or more, which results in a contract variation.

4.2 In addition, organisations should inform the Cabinet Office of all disputes with any supplier which are likely to result in a payment, either from or to the supplier, in excess of £10m (including legal costs).

4.3 Key considerations for the Cabinet Office when reviewing a control include, amongst others:

- What options has the organisation investigated, and to what level, to lead to promotion of their preferred commercial strategy in this control? Does the strategy offer further benefits or improvements in commercial terms?

- Has the organisation undertaken sufficient market research and interaction (appropriate to the sector in question) or is it using recent market intelligence and engagement to ensure that the proposed commercial strategy can offer value for money (including promoting options using procurement procedures that maximise competition)? This should be evidenced.

- Will the proposed commercial approach deliver savings for government? How will it occur and can this be evidenced? Does the commercial strategy outlined adhere to relevant procurement legislature and procedures (i.e. EU Treaty and Procurement Directives, UK Regulations) and other relevant legislation?

- Has the organisation taken steps to avoid the necessity to extend a contract, i.e. through consideration of other procurement routes? If an extension is proposed is this permissible?

- In order to achieve value for money, when considering the commercial structure of their requirements, have organisations considered:
  - Disaggregation to promote competitive tension – i.e. particularly for Technology;
How to encourage greater diversity, innovation and market interest from suppliers;

That market providers have the capacity and capability to deliver the required service solution.

- Is the proposed commercial approach permissible through the contractual structure?

- Recognition of government policy in areas including Government business with SMEs, Prompt Payment Code and Open Book achieving savings as per agreed spending rounds, or other related commercial policy positions.

- The organisation to provide narrative and data upfront to substantiate any cost or price information in the case, such as benchmark data, information on margins applied by suppliers or comparable analyses.

- Provision of contract and commercial management arrangements or resource that will be utilised by the organisation to manage the proposed commercial option.

Process

4.4 Organisations are advised to consider what buying activity exists within their business cases and future pipeline, particularly where this could contain multiple contracts or commercial proposals within a wider programme of activity. It is advised that each buying activity is identified clearly in the control request (and in any early engagement with the Cabinet Office and HM Treasury) to enable understanding of the procurement or commercial approach for each component and to facilitate the operating principles of the Cabinet Office controls.

4.5 Organisations are encouraged to engage early with the Cabinet Office and in good time to gain approval at the stages described below. This guidance outlines how engagement can occur between organisations and Cabinet Office, and outlines typical approaches to these various stages.
<table>
<thead>
<tr>
<th>Stage</th>
<th>Engagement</th>
<th>Approach to Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Strategic Outline Business Case</td>
<td>Forward planning or pipeline</td>
<td>Organisation to share with Cabinet Office future activity involving £10m or more contracts. This should be in the form of a pipeline.</td>
</tr>
<tr>
<td>Strategic Outline Business Case*</td>
<td>Early Engagement OR Control</td>
<td>Organisations to ensure advice and guidance (including any views of Crown Representative) are built in to inform and facilitate the next approval point. Any large programmes of activity should prompt early engagement with Cabinet Office and HM Treasury. This will allow sufficient time for advice to be given and planning for any future Controls stages. Note: for large programmes of activity organisations are advised to engage with Cabinet Office and HM Treasury sufficiently early to ensure that advice can be provided on whether a control may be required at this stage, though this will not always be the case. A formal control will be administered here if spend is over delegated limits and requires HM Treasury approval.</td>
</tr>
<tr>
<td>Pre-Outline Business Case</td>
<td>Early Engagement</td>
<td>If already engaged at SOBC, discussions will take the form of either:</td>
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<tr>
<td></td>
<td></td>
<td>• Periodic updates by the organisation to ensure that advice is understood and followed up; or</td>
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<td></td>
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<td>• CO joining working groups for commercial level discussions as required</td>
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<td>If not engaged at SOBC, Cabinet Office and organisations engage ahead of OBC development to ensure that advice and guidance (and potentially engagement of the Crown Representative) can be offered to inform and facilitate the next approval point – this will include understanding of the commercial case</td>
</tr>
<tr>
<td>Outline Business Case</td>
<td>Control</td>
<td>Review of the commercial business case for each planned commercial activity, this must include detail of the planned procurement or commercial approach, or detail of any planned application of permissible contract extensions to an existing contract – i.e. ahead of engaging with the supplier.</td>
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<tr>
<td>Stage</td>
<td>Engagement</td>
<td>Approach to Stage</td>
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</tbody>
</table>
| Pre-Final Business Case | Early Engagement | If review undertaken from OBC, engagement will take the form of either:  
  • Periodic updates by the organisation to ensure that advice or conditions set at OBC are understood and followed up ahead of future FBC stage; or  
  • Cabinet Office joining working groups for commercial level discussions as required to inform a future FBC stage.  
If Cabinet Office has not been engaged or no review is undertaken at OBC, organisations to engage with Cabinet Office sufficiently early to ensure that advice and guidance (and potentially engagement of the Crown Representative) can be offered to inform and facilitate the next approval point at FBC – this will include understanding of the commercial case |
| Final Business Case | Control            | Cabinet Office will consider each proposed commercial activity. This will include:  
  • review against the commercial approach outlined by the organisation at OBC stage (or equivalent organisation level “gate” review) – for example as agreed with Cabinet Office at OBC Control stage (and this review will also consider any progress and/or adherence to conditions set at that stage)  
  • consideration of any proposal agreed in principle with a Strategic Supplier for any extension or change/variation (for extensions, this should have been agreed with the Supplier following OBC Stage approval on the requirement to extend a contract) – this will also consider any progress and/or adherence to conditions set at OBC stage by Cabinet Office  
At this stage, the organisation is now ready to enact their commercial approach |
Template & Contacts

4.6 The Commercial Control expenditure requests should be submitted to commercialassurance@cabinetoffice.gov.uk using the template at Annex 4.1. Organisations can also add any other available business case material, data and information about disputes with Strategic Suppliers via this mailbox.

4.7 For joint Digital and Technology expenditure requests, please refer to Annex 5.

Disputes Disclosure

4.8 Organisations must inform the Cabinet Office of all disputes with any supplier which are likely to result in a payment, either from or to the supplier, in excess of £10m (including legal costs). This applies to all disputes, whether instigated by an organisation or a supplier.

4.9 Organisations should complete the Dispute Disclosure Form Template at Annex 4.2, thereby providing key information on the dispute to the Cabinet Office. Completed forms should be sent to commercialassurance@cabinetoffice.gov.uk.

4.10 Guidance on core areas of the Dispute Disclosure Form Template can be found at Annex 4.2. Disclosure Forms will be forwarded to the Government Legal Department for information.

4.16 Cabinet Office may engage with the organisation to obtain additional information and may, in agreement with the organisation, assume a supporting or leading role in helping to manage and resolve the dispute.

4.11 For the avoidance of doubt, the information submitted by organisations in relation to Disputes Disclosure is independent from the spend control process for the purposes of assessing spend requests.