

# Defence and Security Public Contracts Regulations 2011

## Chapter 2 - Scope

### Purpose

1. This guidance explains what procurers need to consider in order to decide whether the award procedure for their contract comes within the scope of the Defence and Security Public Contracts Regulations (DSPCR) 2011.
2. Specifically, the guidance explains the legal framework, what the scope of the DSPCR is and how to decide if a proposed contract falls within that scope.

### What is the scope?

3. The term scope covers two concepts: firstly what procurements are covered by the DSPCR (i.e. the “field of application”) and secondly who the DSPCR applies to (i.e. which bodies must comply with the DSPCR).

### What is the legal framework?

4. Regulation 4 (Contracting authorities) defines the term “contracting authority” which incorporates “utilities”. In this guidance, we use the term “procurer” for contracting authorities and utilities.
5. Regulation 6 (Application) sets out the types of procurements to which the DSPCR will apply. You will also need to be familiar with the following terms defined in Regulation 3(1): “military equipment”; “sensitive equipment”; “sensitive services”; “sensitive works”; and “classified information”.

### Field of Application

6. The DSPCR governs procurements within its scope in the fields of defence and sensitive security. Procurements outside the scope of the DSPCR continue to be governed by the following Regulations, subject to the thresholds and general exclusions in those Regulations:
  - a. Public Contracts Regulations (PCR) 2015
  - b. Public Contracts (Scotland) Regulations (PCSR) 2015;
  - c. Utilities Contracts Regulations (UCR) 2016; or
  - d. Utilities Contracts (Scotland) Regulations (UCSR) 2012.
7. The DSPCR covers contract award procedures for contracts and framework agreements for:
  - a. the supply of military equipment, including any parts, components or sub-assemblies of military equipment;
  - b. the supply of sensitive equipment, including any parts, components or sub-assemblies of sensitive equipment;

- c. work, works, goods and services directly related to the equipment referred to in sub-paragraphs (a) and (b) for any and all elements of its life cycle;
- d. work, works and services for specifically military purposes or sensitive works and sensitive services,

including the supply of specific tools, test facilities or support for items a. to d. as referred to in Recital 12 of the Directive.

## **What is military equipment?**

8. Military equipment is defined as “equipment specifically designed or adapted for military purposes and intended for use as arms, munitions, or war material”, including but not limited to equipment:

- a. within the product types set out in the [official translation](#) of the Council Decision 255/58 (the “Council List”); or
- b. listed in the [Common Military List](#) of the European Union (EU) as amended from time to time.

9. The product types included in the Council List also incorporate a number of sub-classifications (e.g. under the broad heading “military fire control equipment”).

10. You should interpret the Council List broadly to take account of the evolving character of technology, procurement policies and military requirements that lead to the development of new types of equipment. As for the Common Military List, you should refer to the most up-to-date version.

11. The DSPCR applies to equipment not only specifically designed for military purposes but also adapted for military purposes. Therefore, products initially designed for civilian use but adapted before delivery to the procurer for use as arms, munitions or war material will fall within the scope of the DSPCR.

12. To be classed as military equipment, for example, a “militarised” version of a helicopter which was initially developed for the civilian market would need distinguishable military technical features (e.g. weapons systems or avionics) enabling it to carry out missions that are clearly military (e.g. air-to-ground combat or armed reconnaissance).

13. Dual-use or civil equipment or services used to fulfil a military need without adaptation are unlikely to be covered by the DSPCR. You should consult your legal advisers at the outset of the procurement in such cases, as this can be a difficult area.

14. The DSPCR also governs the procurement of parts, components and sub-assemblies of military equipment, even if they stand alone and do not by themselves meet the definition of military equipment. It also covers the procurement of specific tools, test facilities and support for covered goods and services.

## What is sensitive equipment?

15. "Sensitive equipment" means equipment for security purposes (whether military or non-military security) involving, requiring or containing classified information (see Chapter 12 – Security of Information). This definition can be broken into two aspects - security purposes and classified information.

### Security purposes

16. Security is a broad concept covering a wide range of very different areas, missions and participants, and, by its nature, has a more generic scope than defence. Security procurements have many similar features to defence procurements and are equally sensitive. Therefore, the equipment in question must be put to use for a security purpose though it does not have to be specifically designed or adapted for "security purposes".

17. Security purposes comprise of, for example, situations where military forces and security bodies cooperate to fulfil the same missions; or where the purpose of the procurement is to protect national security (including national resilience) on UK territory, or beyond it, against serious or disruptive threats.

18. Security purposes may therefore involve, for example, border protection, police activities and crisis management missions carried out by police or customs, at national, regional or even local level. Other examples include:

- a. counter-terrorism; or
- b. protection of national, regional or local: infrastructure, utilities, ports and airports, transportation networks, communication and postal networks, databases, energy and natural resources, security systems, sovereign capabilities, or trade.

19. Parts, components or sub-assemblies of sensitive equipment, work, works and services, even if they stand alone and do not by themselves meet the definition of sensitive equipment at paragraph 15, also fall under the DSPCR if they are intended to be put into sensitive equipment.

### Classified Information

20. Sensitive equipment must involve, require or contain classified information. Regulation 3 (Interpretation) of the DSPCR defines "classified information" as:

"any information or material, regardless of its form, nature or mode of transmission, to which a security classification or protection has been attributed and which in the interests of national security and in accordance with the law or administrative provisions of any part of the United Kingdom requires protection against appropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise".

21. In practice, this definition of classified information means in the UK information or material that has the protective marking of “OFFICIAL”<sup>1</sup>, “OFFICIAL-SENSITIVE”, “SECRET” or “TOP SECRET” for reasons of national security in accordance with the UK Government Protective Marking System.
22. You may give the classification to information or material, including the equipment itself. It may be information or material you need to pass to contractors or subcontractors, or generated by the contract, or intrinsic to the contract itself. The classified information requiring protection can be passed, generated or involved at any point in the procurement process from the tender exercise through to performance of the contract.
23. The DSPCR includes specific provisions, including Regulations 11 (Classified information) and 38 (Security of information), which allow procurers to impose confidentiality obligations on contractors and subcontractors for the handling, usage, protection and destruction of classified information prior to, during and following the procurement process.

### **Work, works, goods and services directly related to military and sensitive equipment**

24. The DSPCR applies to work, works, goods and services directly related to military and sensitive equipment, which includes any elements of the “life cycle” of military and sensitive equipment.
25. The DSPCR defines “life cycle” as “all possible successive stages of a product, including research and development, industrial development, production, repair, modernisation, modification, maintenance, logistics, training, testing, withdrawal and disposal”. These stages include for example, studies, evaluation, storage, transport, integration, servicing, dismantling, destruction and all other services following the initial design.
26. Examples of directly related contracts include:
- a. supplies of special tools, test equipment and machines which are necessary for the production or maintenance of military and sensitive security equipment;
  - b. supplies of special flight suits and helmets for pilots of combat aircraft;
  - c. services provided for the overhaul and repair of military aircraft, tanks, warships, etc.; and
  - d. works for the construction of test facilities for military equipment.

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<sup>1</sup> It is MOD policy not to mark information or assets as ‘OFFICIAL’, therefore for MOD procurements the definition in the DSPCR of classified information will only be relevant for information or assets marked as ‘OFFICIAL-SENSITIVE’ or higher. However, it is recognised that Other Government Departments (OGDs) and Agencies do mark information or assets as ‘OFFICIAL’ as a matter of policy and therefore that (in appropriate circumstances) such information or assets will be classified information for the purposes of the DSPCR.

## **Work, works and services for specifically military purposes**

27. The DSPCR also apply to work, works and services for specifically military purposes. This concerns work, works and services that do not directly relate to military equipment but meet specific military needs and are procured for that purpose.

28. Examples of works and services for specifically military purposes include:

- a. works for construction of a runway or air-raid and fall-out shelter or storage facilities; and
- b. services involving the transport of troops.

## **Sensitive works and sensitive services**

29. The DSPCR also apply to “sensitive works” and “sensitive services” which means work or works and services for security purposes, involving, requiring or containing classified information.

30. This concerns work, works and services that do not directly relate to sensitive equipment but are of a sensitive nature and are procured for a security purpose. For example, their purpose may be classified.

## **Mixed contracts**

31. Regulation 6(4) of the DSPCR deals with contracts (or framework agreements) that are partly within the scope of the DSPCR with the other part subject to other national regulations.

32. The DSPCR will apply to the award of the contract (or framework agreement) if:

- a. the subject of part of the contract (or framework agreement) falls within the DSPCR; and
- b. the subject of the other part of the contract (or framework agreement) falls within the scope of the PCR 2015, PCSR 2015, UCR 2016 or UCSR 2012; and
- c. you can objectively justify the award of a single contract (or conclusion of a single framework agreement).

33. If part of the contract (or framework agreement) falls within the scope of the DSPCR but the estimated value of the single contract (or framework agreement) is under the financial threshold of the DSPCR<sup>2</sup>, then none of the national regulations in paragraph 33 applies. However, the overarching treaty principles<sup>3</sup> will apply.

34. Regulation 6(5) of the DSPCR deals with requirements that are partly within the scope of the DSPCR with the other part subject to a treaty exemption. The

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<sup>2</sup> DSPCR financial thresholds are £363,424 for goods and services and £4, 551,413 for works.

<sup>3</sup> The treaty principles are our obligations under the TFEU for transparency, equal treatment of suppliers, non-discrimination, mutual recognition and proportionality in the conduct of public procurement.

award of the contract (or framework agreement) will not be subject to the DSPCR if:

- a. the subject of part of the contract (or framework agreement) falls within the DSPCR; and
- b. the subject of the other part of the contract (or framework agreement) falls outside the scope of the DSPCR, PCR 2015, PCSR 2015, UCR 2016 or UCSR 2012 as it is subject to a treaty exemption; and
- c. you can objectively justify the award of a single contract (or conclusion of a single framework agreement).

35. The DSPCR does not define “justified for objective reasons”, as this will be different from one situation to another. It will be for the procurers to decide on a case-by-case basis, ensuring consistency in approach within their own area.

36. You must strictly interpret the assessment of why a single contract may be “justified for objective reasons” as the application of these rules may result in contracts falling under the financial threshold of the DSPCR that would otherwise have fallen within the financial threshold in the PCR 2015 or PCSR 2015<sup>4</sup>.

37. Procurers must not join requirements solely for the purposes of benefiting from the higher financial threshold or general exclusions set out in the DSPCR. Nor must you seek to join requirements for work, works, goods or services that are within the scope of the DSPCR with work, works goods or services which partly benefit from a treaty exemption and thereby exclude the whole requirement from the DSPCR unless you can objectively justify the reasons.

38. In all cases, when assessing whether you can justify a single contract for objective reasons, procurers must demonstrate the objective link amongst various elements of the mixed contract that makes it reasonable and proportionate to award a single contract or framework agreement. For example, there is an indivisible link between the elements and the main objective of the contract. You should not consider value for money issues as part of this assessment.

## **Who does the DSPCR apply to?**

### **Procurers**

39. Regulation 4 defines contracting authorities by reference to Regulation 2(1) of the PCR 2015 and Regulation 2(1) of the PCSR 2015, and clarifies, importantly, that it includes “utilities”, as defined by Regulation 2(1) of UCR 2016 and Regulation 3 of the UCSR 2012.

40. Any body referred to in the PCR 2015, PCSR 2015, UCR 2016 or UCSR 2012 as a contracting authority or utility will be:

- a. a “contracting authority” for the purposes of the DSPCR; or
- b. a “procurer” for the purposes of this guidance.

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<sup>4</sup> This will apply to requirements for goods and services valued from £118,133 (the PCR 2015 threshold) to £363,424 (the DSPCR threshold).

## **What are contracting authorities?**

41. Regulation 2(1) of the PCR 2015 sets out a list of contracting authorities which includes central government authorities which are further listed at Schedule 1 of the PCR 2015. In broad terms, contracting authorities can be summarised as state, regional or local authorities, bodies governed by public law and associations formed by such authorities or bodies.

## **Bodies governed by public law**

42. European Court of Justice case law requires that you must interpret the definition of the State in functional terms. In other words, it must include bodies which, albeit are formally separate from state, regional or local authorities, are in fact entirely dependent on them and carry out tasks on their behalf.

43. This point is addressed by the phrase “body governed by public law” in the definition of contracting authority, which means a body:

- a. established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character; and
- b. having legal personality; and
- c. either:
  - (1) financed, for the most part, by state, regional or local authorities, or other bodies governed by public law;
  - (2) subject to management supervision by those authorities or bodies; or
  - (3) has an administrative, managerial or supervisory board on which more than half of the members are appointed by those authorities or bodies.

44. A body is likely to have an industrial or commercial character if it operates in normal market conditions, aims to make a profit and bears the risk of its activity. If in doubt, legal advice should be sought.

45. The DSPCR therefore applies to any body with legal personality under public or private law, established in the general interest, whose operational choices and activities are, or may be, influenced by a procurer because of the one or more three links described at paragraph 43.c above.

## **What are utilities?**

46. Regulation 2(1) of the UCR 2016 and Regulation 3 of the UCSR 2012 defines contracting entities which fall within those regimes as a “utility”, being a “relevant person” carrying out an activity listed in Schedule 1 of the UCR 2016 and the UCSR 2012.

47. The definition of relevant person includes three categories:

- a. contracting authorities;
- b. public undertakings over which one or more contracting authorities may, directly or indirectly, exercise a dominant influence due to their



ownership, financial participation or rights granted by the governing rules of the body;

c. other bodies who carry out activities which are set out in the second column of Schedule 1 to the UCR 2016 or UCSR 2012 and pursue “activities” listed in those Schedules on the basis of a special or exclusive right which has been granted to them.

48. The activities listed include gas, heat and electric, water, transport, postal services, oil, gas and coal exploration and exploitation and ports or airports.

### **Free market exclusion for utilities**

49. The DSPCR does not contain an equivalent exclusion to Regulation 34 of the UCR 2016 or Regulation 9 of the UCSR 2012, which, very simply put, excludes an activity by a utility if it is considered to be directly exposed to competition in an unrestricted market.

50. This means that the DSPCR might apply in situations where an exclusion had already been granted by the European Commission (“the Commission”) establishing that utility companies in a particular sector are considered to operate outside the scope of the UCR 2016 or UCSR 2012.

51. One example of a situation where the Commission has already granted an exclusion under the Utilities Directive is in respect of electricity generation and the supply of electricity and gas (both wholesale and retail) in England, Scotland and Wales. If utilities operating in this area (electricity generation and the supply of electricity and gas) award contracts for sensitive equipment, work, works or services, for example to protect their infrastructure, such contracts will now fall within the DSPCR even if the activities would have otherwise been exempt under the UCR 2016 or UCSR 2012.

### **“In-house” procurement**

52. You also need to consider whether you are procuring the goods, works, or services from a Crown body or an “in-house” body (e.g. Defence Science and Technology Laboratory or the Defence Electronics and Components Agency) as this may determine whether the DSPCR applies.

53. The DSPCR will not apply if the procurement is from organisations which are:

- a. part of the same legal person, i.e. a Crown body; or
- b. legally separate but so closely connected that it is inappropriate to make their dealings subject to EU law, and they are therefore considered to be indistinguishable for procurement purposes.

54. A Crown body is generally an organisation that acts on behalf of the Crown, i.e. acting for the sovereign in a public or official capacity. This would include most central government departments and trading funds. The Crown is one legal body and therefore cannot enter into a contract with itself.

55. The classification of bodies of the type referred to at paragraph 53.b above, as “in-house”, follow the decision of the European Court of Justice in the Teckal case (Case C-107/98).



56. The Teckal case established a two-part test, both parts of which must be met, to determine whether an organisation is “in-house” as follows:

- a. whether a procurer exercises the same sort of control over the legally distinct entity, similar to that it exercises over its own departments; and
- b. whether the principal part of the entity’s activities are provided to its controlling authority or authorities.

57. If the answer to both parts of the test is yes, then the DSPCR does not apply. The test is factual and you must apply it on a case-by-case basis. In order for the body to be considered as an “in-house” body there should be no private sector participation in the body, except in very limited circumstances.

### **What are the key points to remember?**

1. After taking into account the application of the DSPCR’s thresholds and exclusions, you will use the DSPCR to procure:

- a. military equipment and associated work, works, goods and services;
- b. sensitive security equipment and associated work, works, goods and services; and
- c. works and services for specifically military purposes; and sensitive works and services;

including the supply of specific tools, test facilities or support for items a. to c.

2. The rules on mixed contracts mean, if your procurement falls partly within the DSPCR, you will use the DSPCR to procure all items unless you can use a treaty exemption or exclusion. This rule applies regardless of the size of the part of the procurement falling within the DSPCR.

3. If you work for a utility company, the DSPCR does not contain a “free-market” exclusion equivalent to Regulation 34 of the UCR 2016 or Regulation 9 of the UCSR 2012. So, you must use the DSPCR to procure the goods, works and services described above, unless you can use a treaty exemption or exclusion.