Defence and Security Public Contracts Regulations 2011

Chapter 3 – Financial Thresholds

Purpose

1. This guidance explains how procurers assess whether a contract falls within the financial thresholds of the Defence and Security Public Contracts Regulations (DSPCR) 2011.

2. Specifically, the guidance explains the legal framework, what a financial threshold is and how you calculate the estimated value of a contract or framework agreement.

What are financial thresholds?

3. If the requirement falls within the scope of DSPCR, the financial threshold is the point when the estimated value of the proposed contract or framework agreement is at a level that requires procurers to apply the DSPCR.

What is the legal framework?

4. Regulation 9 (Thresholds) of the DSPCR establishes the financial threshold values, and the method for calculating the estimated value of contracts and framework agreements.

What are the financial threshold amounts in the DSPCR?

5. In sterling, the financial thresholds (exclusive of VAT) in the DSPCR, valid from 1 January 2012, are:

Type of contract (s)	Amount (£)
Goods and services	347,868[1]
Works	4,348,350

6. There will be a revision of the values of the financial threshold every two years; the next revision will be in 2014. The Official Journal of the European Union (OJEU) publishes the revised values at the beginning of November preceding the 1 January revision.

[1] the equivalent threshold in the Public Contracts Regulations 2006 is £113,057.

When does the DSPCR apply?

7. The DSPCR applies to all contracts (or series of related contracts) and framework agreements within its scope where the award procedure for the contract or framework agreement:

a. is not subject to a treaty exemption (see Chapter 4 – Treaty Exemptions) or an exclusion under Regulation 7 (see Chapter 5 – General Exclusions in the DSPCR); and

b. has a total value (exclusive of VAT) estimated to be equal to or greater than the financial threshold.

Contracts below the financial threshold

8. While the DSPCR does not apply to procurements below the thresholds, procurers are still bound to comply with the fundamental rules of the Treaty on the Functioning of the European Union (TFEU) (e.g. equality of treatment amongst suppliers) where the contract award might potentially be of interest to suppliers in other Member States.

9. The European Commission ("the Commission") has explained its legal opinion on the application of TFEU obligations to low value procurement (i.e. requirements that fall below the financial thresholds) in its Interpretative Communication on contracts not fully subject to the Public Contracts Regulations (PCR) 2006 and the Public Contracts (Scotland) Regulations (PCSR) 2006. We assume that the Commission's opinion will be the same for low value procurements under the DSPCR.

10. Therefore, unless there are valid grounds for non-competitive procurement (e.g. application of a treaty exemption, extreme urgency, technical reasons or exclusive rights), procurers must apply a degree of advertising sufficient to open up competition and allow scrutiny of the impartiality of the procedures. Ministry of Defence (MOD) procurers must advertise such requirements in the Defence Contracts Bulletin and Contracts Finder.

11. The PCR 2006 and PCSR 2006 have significantly lower financial thresholds for goods and services than the DSPCR. This means that you will treat a requirement that is within the scope of the DSPCR that has an estimated value between £113,057 and £347,868 as low value procurement.

How do you estimate the value of contracts?

12. You must base the calculation of the estimated value of the contract on the total amount payable to the supplier, excluding VAT. This must include:

a. any form of option that can be validly exercised, i.e. you may not be able to add up all option values as some options may be mutually exclusive;

b. any likely renewal of the contract;

c. any prize or payment awarded by the procurer to the supplier, any premiums or other payments for insurance services; and

d. any fees, commission or other payments for design services.

13. The estimate must be valid when you send the contract notice to the OJEU or, if the estimated value is below the financial threshold, when the contract award procedure starts.

14. Regulation 9 sets out how to calculate the estimated value of work, works, goods or services contracts. This includes rules on how to calculate the estimated value of contracts that do not have a fixed duration or specify a total price.

15. If the contract includes one or more options, you must estimate the value based on the highest possible amount that you would pay under the contract if you exercised all the options.

How do you estimate the value of a series of related contracts?

Method of calculation

16. If you intend to enter into a number of contracts to fulfil a single requirement for goods or services, the estimated value of the requirement is the value of the consideration that the procurer expects to pay under all of those contracts. For goods and service contracts which are regular in nature (i.e. a series) or which you intend to renew within a given period, then you need to aggregate the value of the series or the renewals.

17. You may estimate the value of the series of contracts or the renewable supply or services contracts either:

  a. by looking back to similar contracts over the previous financial year or past 12 months, adjusted where possible for foreseeable changes in quantity or value over the coming year following the award of the initial contract; or

  b. by looking forward to the estimated aggregate cost in the year following first delivery or first performance of a service or during the financial year if that is longer than 12 months.

18. Where a procurer has a single requirement for goods, services or works and enters into a number of contracts to fulfil that requirement the estimated value is the aggregate value of all the contracts.

19. Subject to the small lots waiver (see below), you are not allowed to split a single requirement into separate contracts with the intention of circumventing the rules on estimating the contract value and, more widely, on applying the DSPCR as a whole.

20. You may not make the choice of valuation method described above, or any decision to enter into separate contracts, with the intention of excluding any contract from the application of the DSPCR.

Small lots waiver

21. If the requirement is divided into several lots, each one the subject of a contract, and their aggregated value equals or exceeds the financial threshold,

the DSPCR must be applied to each contract, irrespective of whether its' individual value is less than the financial threshold, subject to the waiver for small lots at Regulation 9(10).

22. Regulation 9(10) means that you may waive (i.e. choose not to apply) the DSPCR to any lots which have an estimated individual value exclusive of VAT of less than:

a. £69,574 for a supply or services contract; or

b. £869,670 for a works contract;

if the total value of the excluded lot(s) does not exceed 20% of the total value of all the lots.

23. The exclusion of lots using Regulation 9(10) does not prevent you from taking into account their value to determine whether you must award in accordance with the Regulations.

How do you estimate the value of framework agreements?

24. The calculation of the estimated value of a framework agreement is the maximum estimated value, excluding VAT, of all the call-off contracts envisaged for the total term of the framework agreement.

How do you estimate the value of contracts with third party revenue?

25. In order to determine the value of a contract for the purpose of Regulation 9, you must take account of the total value of the contract from the point of view of a potential tenderer. This must include the total amounts paid by the procurer and all the revenue from third parties.

26. For example, in a three year contract for the production of a business magazine for the procurer, the contract value includes:

a. any payments by the procurer to its contractor; and

b. all third party revenue from the magazine, such as:

(1) subscriptions paid by magazine subscribers to the contractor; and

(2) advertising revenue paid by advertisers to the contractor.

27. If the contract is a concession contract and consists of, or includes, the grant of a right to exploit the service or works, the value of the contract is what the procurer would have expected to pay had it not granted such a concession.

What are the key points to remember?

1. You must use the DSPCR for all contracts within its scope where the contract:

   a. is not subject to an exemption or an exclusion; and

   b. has a total value (exclusive of VAT) estimated to be equal to or greater than the financial threshold of:

      (1) £347,868 for goods and services; or

      (2) £4,348,350 for works.

2. You must use the calculation methods in Regulation 9 for estimating the value of the requirement. This will prevent artificially low valuations.

3. You must not disaggregate requirements into 'penny packets' to circumvent the DSPCR.

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