

Procurement Guidance Note  
**PGN 03/11**  
(as amended)

# Direct Award Contracts

Issued: 10 August 2016

## PROCUREMENT GUIDANCE NOTES

[Northern Ireland Public Procurement Policy \(NIPPP\)](#) was approved by the Northern Ireland Executive in 2002. In approving the policy, the Executive took the decision that legislation was not necessary to ensure that Departments, their Agencies, Non-Departmental Public Bodies and Public Corporations complied with the policy. Instead, it considered that compliance could be achieved by means of administrative direction.

Procurement Guidance Notes (PGNs) are the administrative means by which Departments are advised of procurement policy and best practice developments. They apply to those bodies subject to NIPPP and also provide useful guidance for other public sector bodies.

PGNs are developed by the Central Procurement Directorate (CPD), in consultation with the Centres of Procurement Expertise (CoPEs), and are subject to the approval of the Procurement Board.

Once endorsed by the Procurement Board, they are issued to the Departments for implementation and copied to CoPEs to develop, if necessary, underpinning procedures supporting the implementation of this guidance in their particular sector. PGNs are also published on the [Department of Finance \(DoF\) website](#).

**The following PGN was endorsed by the Procurement Board with effect from 10 August 2016 for use by those bodies subject to NIPPP.**

### Revision History

First issued as a Procurement Guidance Note PGN 02/10 titled 'Award of Contracts without a Competition'	17 June 2010
Reissued as Procurement Guidance Note PGN 03/11	24 November 2011
Revised	26 March 2013
Revised and retitled 'Direct Award Contracts'	10 August 2016

## CONTENTS

<b>1 Purpose.....</b>	<b>5</b>
<b>2 Legal And Policy Context.....</b>	<b>6</b>
<b>3 Transactions Which Do Not Require Accounting Officer Approval .....</b>	<b>8</b>
Exclusions from the Regulations.....	8
Modification of contracts during their term .....	9
General transactions.....	13
Charges in connection with statutory approvals and connections to utilities.....	14
Where no suitable tenders have been received.....	14
<b>4 Permissible Transactions Which Require Accounting Officer Approval .....</b>	<b>15</b>
Delegation of Accounting Officer approval.....	17
<b>5 Process For Dealing With DACs.....</b>	<b>17</b>
Business case.....	17
CoPE advice .....	18
Approval.....	18
Negotiation.....	18
Award.....	18
Publication .....	19
Recording .....	19
<b>6 Consequences of Non-Compliance With The Regulations .....</b>	<b>20</b>
<b>7 Further Information .....</b>	<b>21</b>
<b>Annex A     Sample Form for Requesting Procurement Advice From a                   CoPE in Respect of a DAC.....</b>	<b>22</b>
<b>Annex B     DAC Process Map.....</b>	<b>27</b>

### **Definition of Terminology**

In the preparation of this guide, the term **contractor/supplier** has been used to denote an organisation that contracts directly with a Department whether it is a supplier, a service provider or a construction contractor.

The term **Department** has been used to refer to those bodies subject to Northern Ireland Public Procurement Policy including Departments, Non-Departmental Public Bodies and Public Corporations. A full list of such bodies is available in Annex A of [Northern Ireland Public Procurement Policy](#).

## 1 PURPOSE

- 1.1 The purpose of this Procurement Guidance Note (PGN) is to provide guidance to Departments on what constitutes a Direct Award Contract (DAC), what needs to be considered before one is awarded and the 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).
- 1.2 Although the term DAC is widely used, it is not defined in the EU Procurement Directives or UK Procurement Regulations. A DAC is a public contract that is awarded without a competition and can be valued above or below the relevant [EU Threshold](#). A DAC must involve negotiating with the supplier. Such negotiations should seek a better deal for taxpayers.
- 1.3 There are circumstances where it is permissible under European law to award a DAC for contracts with an estimated value above the relevant EU Threshold. These are outlined in Regulation 32<sup>1</sup> of [The Public Contracts Regulations 2015](#) (PCR 2015). In some of these circumstances Accounting Officer<sup>2</sup> approval will be a requirement, while in others, it will not be needed. This is explained further in this PGN.
- 1.4 [Northern Ireland Public Procurement Policy](#) (NIPPP) permits Departments to award DACs below the EU Threshold where there are convincing reasons. Generally, these reasons will be similar to those set out in Regulation 32, however, there may be other reasons connected with the overriding public interest to award a contract without competition.

---

<sup>1</sup> Utilities should refer to Regulation 50 of the Utilities Contracts Regulations 2016. The circumstances when a concession notice is not required are set out in Regulation 31(6) of the Concession Contracts Regulations 2016.

<sup>2</sup> Term refers to Departmental Accounting Officers (or the person they have delegated this responsibility to, see paragraph 4.5).

- 1.5 DACs involve risk for Departments, whether as regards compliance with legislation or in ensuring value for money. Acting in the public interest may also be a necessary consideration irrespective of value. While ultimately only the intervention of a court can conclusively determine interpretation of the Regulations, Departments should seek advice from CoPEs as set out in section 5, and where necessary legal 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.<sup>2</sup>

**Note:** Purchases up to £5,000 awarded without a competition are not considered to be DACs if they are dealt in accordance with Procurement Guidance Note [PGN 04/12: Procurement Control Limits](#).

## 2 LEGAL AND POLICY CONTEXT

- 2.1 Public sector procurement is subject to the legal regime comprising the EU Treaty, the EU and UK legislation and the relevant case law which governs the operation of the European single market. EU law (with its principles of equality, transparency and non-discrimination) normally requires that public contracts, which are above the EU threshold, must be advertised and put out to tender. In addition, below threshold contracts, which are deemed to be of cross-border interest, must also normally be advertised in line with Procurement Control Limits. However, advertising is not required for below EU threshold contracts for certain social, health and education services listed in Schedule 3<sup>3</sup> of the PCR 2015 as they are not likely to be of cross border interest.
- 2.2 Procurement by Departments, their Agencies, Non-Departmental Public Bodies and Public Corporations is subject to NIPPP established by the Northern Ireland Executive in 2002. At the heart of NIPPP is the achievement of best value for money through adherence to the 12 guiding principles of procurement. Included in these guiding principles is the principle of competitive supply which states that procurement should be

---

<sup>3</sup> Schedule 2 of The Utilities Contracts Regulations 2016 and The Concession Contracts Regulations 2016.

carried out by competition unless there are convincing reasons to the contrary. Competition promotes economy, efficiency and effectiveness in public expenditure and also contributes to the competitiveness of suppliers.

- 2.3 Contracts (valued both above and below the EU threshold) co-financed by European Structural and Investment Funds will be required to conform to the requirement for open advertisement. Beneficiaries preparing such procurements must seek and follow guidance from the Managing Authority for the programme. [Commission Decision C\(2013\) 9527](#) dated 19 December 2013 sets out guidelines for financial corrections to be made to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement.
- 2.4 In addition to the legal and policy basis for public sector procurement, [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 Officers in procurement. It requires public sector organisations normally to acquire goods and services through fair and open competition (Chapter 4, paragraph 4.10.2).
- 2.5 Where a Department is giving a grant that will be used to procure goods, services or works, reference should be made to Procurement Guidance Note [PGN 01/07: The Use of Grant for Procurement](#) on the circumstances in which legislation and NIPPP, including on DACs, will apply.

**Note:** The PCR 2015 are paraphrased throughout the PGN. The Utilities Contracts Regulations 2016 (UCR 2016) and The Concession Contracts Regulations 2016 (CCR 2016) are referenced where appropriate. The full provisions of the Regulations should be considered and legal advice sought where necessary.

### **3 TRANSACTIONS WHICH DO NOT REQUIRE ACCOUNTING OFFICER APPROVAL**

#### **3.1 Exclusions from the Regulations**

3.1.1 The PCR 2015<sup>4</sup> 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 (eg 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 (eg those in connection with the issue, sale, purchase or transfer of securities);
- operations conducted with the European Financial Stability facility and the European Stability Mechanism;
- loans;
- employment contracts;
- civil defence and danger prevention services that are provided by non-profit organisations covered by certain CPV codes, with the exception of patient transport ambulance services;
- using public transport services by rail or metro (eg a train journey from Belfast to Bangor to attend a meeting); and
- public contracts between public sector entities, which satisfy a range of conditions.

3.1.2 The regulations do not apply to defence and security contracts which:

- 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);

---

<sup>4</sup> Regulations 7-12. Utilities should refer to Chapter 3 Section 2 of the UCR 2016. The exclusions for concession contracts are listed in Part 1, Chapter 2 of the CCR 2016.



- are not otherwise exempted as above:
  - to the extent that the protection of the essential security of the UK or another member state 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.

3.1.3 The contracts above are also excluded from compliance with the NIPPP. However, Accounting Officers should be satisfied that governance arrangements are in place to ensure value for money is obtained.

## **3.2 Modification of contracts during their term**

3.2.1 Departments can be faced with external circumstances that they could not foresee when they award contracts. The European Commission recognised that a certain degree of flexibility was needed to allow contracts to be modified without a new procurement procedure being necessary. The new modernised procurement regulations clarify the circumstances where, and extent to which, a contract can be modified without the need for a new procurement procedure (see paragraph 3.2.6) and have provided more flexibility for procurement professionals to follow best commercial practice and negotiate with suppliers. Negotiation provides the opportunity to challenge a supplier to provide improved value for money, to explore the potential for innovative solutions which will improve the delivery of public services and to review the efficiency of existing processes with a view to reducing costs to the Department.

3.2.2 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 a contract with appropriate conditions, commercial terms and

contract management arrangements is put in place and that value for money is achieved.

- 3.2.3 Very often costs associated with a modification of a contract are agreed using the existing contract price. These costs may not reflect market changes. Negotiations should be opened up with the supplier aimed at driving improved value for money. In the absence of competition a CoPE may be able to benchmark costs across the public sector to compare value for money. Ideally price review clauses should be included in the original contract to deal with this, as provided for under Regulation 72(1)(a)<sup>5</sup>.
- 3.2.4 There is also a need to ensure that any modifications are processed in accordance with the Conditions of Contract. CoPEs will be able to advise on the procedure to be followed for making modifications, including appropriate exit strategies, and how, in the first instance, contracts can be structured to avoid DACs occurring in the future eg having conditions in the contract which allow for contract extensions. Such clauses must be clear, precise and unequivocal.
- 3.2.5 The circumstances when a contract or framework agreement may be modified without a new competition being necessary are set out in Regulation 72<sup>6</sup> of the PCR 2015. Such modifications are considered to be variations to contracts and not DACs in the specific circumstances set out below. These circumstances can also be applied to below threshold competitions as a useful guide.
- 3.2.6 Regulation 72 of the PCR 2016<sup>7</sup> lists six independent scenarios where contract modifications shall be lawful. These are:
- (1) Where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in

---

<sup>5</sup> Regulation 88(1)(a) of the UCR 2016. Regulation 43(1)(a) of the CCR 2016.

<sup>6</sup> Regulation 88 of the UCR 2016. Regulation 43 of the CCR 2015.

<sup>7</sup> Regulation 88 of the UCR 2016 and Regulation 43 of the CCR 2016 contain similar but not identical provisions.

clear, precise and unequivocal review clauses provided that such clauses state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement.

- (2) Where additional works, services or supplies by the original supplier have become necessary and were not included in the initial procurement and a change of supplier cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs provided the price increase does not exceed 50%<sup>8</sup> of the original contract value. This applies to the value of **each modification** in so far as such successive modifications shall not be aimed at circumventing the rules. A notice must be published in the Official Journal of the European Union (OJEU).
- (3) Where the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen and the modification does not alter the overall nature of the contract and the increase in price does not exceed 50%<sup>9</sup> of the original contract value. This applies to the value of **each modification** in so far as such successive modifications shall not be aimed at circumventing the rules. A notice must be published in the OJEU.
- (4) Where a new supplier replaces the one to which the contracting authority had initially awarded the contract, as a consequence of:
  - either an unequivocal review clause, or
  - corporate restructuring or takeover by another supplier in a situation such as insolvency, where the new supplier fulfils the criteria for qualitative selection.

---

<sup>8</sup> The 50% rule does not apply to utilities.

<sup>9</sup> The 50% rule does not apply to utilities.

(5) Where the value of the modification is below **both** of the following values (provided the modification does not alter the overall nature of the contract or framework agreement):

- the relevant threshold mentioned in Regulation 5 (financial threshold); and
- 10% of the initial contract value for service and supply contracts and 15% for works contracts.

**Note:** Where several successive modifications are made under this scenario, the **cumulative value** must not exceed the limit of 10% or 15%.

(6) Where the modifications are not substantial. Presetext case C-454/06 has been codified with more detail to demonstrate what is looked on as a substantial modification. A substantial modification is where:

- The modification renders the contract or the framework agreement materially different in character from the one initially concluded.
- The modification introduces conditions which, had they been part of the initial procurement procedure would have:
  - allowed for the admission of other candidates than those initially selected;
  - allowed for the acceptance of a tender other than that originally accepted; or
  - attracted additional participants in the procurement procedure.
- The modification changes the economic balance of the contract or framework agreement in favour of the supplier in a manner which was not provided for in the initial contract or framework agreement.
- The modification extends the scope of the contract or framework agreement considerably.

- A new supplier replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for in the provision relating to insolvency.

**Note: In accordance with [FD \(DFP\) 10/15](#) all contract modifications must be supported by a suitable business case.**

3.2.7 Regulation 72(9)<sup>10</sup> makes clear that a **new procurement procedure** shall be required for modifications other than those provided for in Regulation 72<sup>11</sup>.

### 3.3 General transactions

3.3.1 There is a range of general transactions which, although a form of contractual arrangement may be entered into, do not require Accounting Officer approval or CoPE advice in order to be awarded without a competition. The transactions include:

- subscriptions to professional journals (eg RICS, CIPFA, BRE, DQI);
- participation in trade events or similar activity;
- payment of professional membership fees;
- corporate memberships (eg CBI, Business in The Community);
- attendance at training courses<sup>12</sup> and conferences;
- procurements under £5,000 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. (See Annex A of [PGN 04/12: Procurement Control Limits](#)); and

<sup>10</sup> Regulation 88(8) of the UCR 2016. Regulation 43(9) of the CCR 2016.

<sup>11</sup> Regulation 88 of the UCR 2016. Regulation 43 of the CCR 2016.

<sup>12</sup> This refers to attendance at training courses which are open for anyone to attend. For example, a Department wishes 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

- 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.

### **3.4 Charges in connection with statutory approvals and connections to utilities**

3.4.1 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 include<sup>13</sup>:

- 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.

### **3.5 Where no suitable tenders have been received**

3.5.1 In such cases it is worth investigating the reason why no tenders have been received. This could highlight a problem with the scope of requirements or Conditions of Contract in the original tender documents. The Department may 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 described in paragraph 4.1 can be used in the following situation; however, no Accounting Officer approval is required in this case:

*“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*

---

<sup>13</sup> The list provided is not exhaustive.

*conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests.”*

## **4 PERMISSIBLE TRANSACTIONS WHICH REQUIRE ACCOUNTING OFFICER APPROVAL**

4.1 Accounting Officer approval is required for all other circumstances which are classed as DACs. Regulation 32<sup>14</sup> of the PCR 2015 permits the use of the negotiated procedure without prior publication of an OJEU notice (ie a DAC) in certain circumstances. The circumstances include:

- where the works, supplies or services can be supplied only by a particular supplier for any of these reasons:
  - the aim of the procurement is the creation or acquisition of a unique work of art/ artistic performance;
  - competition is absent for technical reasons<sup>15</sup> (but only where no reasonable alternative or substitute exists);
  - due to the protection of exclusive rights (including intellectual property rights);
- where for reasons of extreme urgency, brought about by unforeseeable events, the time limits for certain procurement procedures cannot be met;
- in the case of a supplies contract where the products involved are manufactured purely for the purpose of research, experimentation, study or development;
- in the case of supplies contracts where additional deliveries are required from the original supplier which are intended as a partial replacement or extension of existing supplies and a change of supplier would mean the supplies acquired would have different technical characteristics and result in incompatibility or

---

<sup>14</sup> Utilities should refer to Regulation 50 of the UCR 2016. The circumstances when a concession notice is not required are set out in Regulation 31(6) of the CCR 2016.

<sup>15</sup> "Technical reasons" could be there only being one supplier with the expertise to do the work, or which produces the product; or has the capacity to complete on the scale required.

disproportionate technical difficulties in operation and maintenance.  
(The DAC cannot exceed three years in duration);

- for supplies quoted and purchased on a commodity market;
- for the purchase of supplies or services on particularly advantageous terms, from either a supplier which is winding up its business activities or the liquidator in an insolvency procedure or an arrangement with creditors or similar procedure;
- for service contracts following a design contest; and
- for the repetition of works/services (provided that those works/services are in conformity with a basic project for which the original contract was awarded and that the basic project indicates the extent of possible additional services and the total estimated cost of the subsequent works/services). Only to be used during the 3 years after the original contract was concluded.

4.2 It should be noted that although it is permissible under the Regulations to award a DAC in the circumstances listed above, a competitive procedure should be the standard method for conducting a procurement. This will help drive efficiencies, fight corruption and obtain fair and reasonable pricing.

4.3 Awarding a DAC when the tendering opportunity should have been advertised in the OJEU could be challenged and may lead to court proceedings. A court may declare the contract ineffective (ie cancel it) resulting in the imposition of a civil penalty and may award substantial damages. Further information on the consequences of non-compliance with the Regulations is provided in Section 6.

4.4 In order to mitigate the risk of ineffectiveness a Voluntary Ex Ante Transparency (VEAT) notice may be placed in the OJEU (see paragraph 6.4).



## **4.5 Delegation of Accounting Officer approval**

- 4.5.1 While all DACs should be scrutinised within a Department, it may not be necessary for the Departmental Accounting Officer personally to be involved in approving every instance. Following an assessment of the risk posed by DACs in the context of the particular Department, Departmental Accounting Officers may delegate the authority to approve DACs which fall below the relevant [EU Thresholds](#). This would normally be to officers at SCS level (or equivalent). Delegation of Accounting Officer approval should be carried out in accordance with [Managing Public Money \(Northern Ireland\)](#).
- 4.5.2 There may in addition be particular circumstances where, exceptionally, there is justification in delegating the authority to approve DACs which are above the EU thresholds, for example where there are regular DACs relating to specialist equipment or maintenance services which are available from only one source. It is open to Accounting Officers to put in place a written justified alternative arrangement in these limited circumstances.
- 4.5.3 In circumstances where the value of the DAC has been estimated but subsequently materially increases, appropriate additional approvals should be sought.
- 4.5.4 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.

## **5 PROCESS FOR DEALING WITH DACs**

### **5.1 Business case**

- 5.1.1 Procurements including those procured via a DAC require a proportionate business case with appropriate approval. The Programme for Government (PfG) requires social clauses to be included in public contracts. This should be considered in the business case.

## **5.2 CoPE advice**

- 5.2.1 Departments that intend to award a DAC should seek advice from their CoPE on the risks, potential to achieve value for money, a strategy for negotiation and appropriate Conditions of Contract. If necessary they should also seek legal advice.
- 5.2.2 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) the advice should be limited to benchmarking of costs and/or value for money where possible.
- 5.2.3 A CoPE can provide general advice on such matters as required by Departments.
- 5.2.4 In the case of DACs above the EU 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.
- 5.2.5 A sample form for requesting CoPE advice is provided at [Annex A](#).

## **5.3 Approval**

- 5.3.1 Please see paragraph 4.5 in relation to approval levels.

## **5.4 Negotiation**

- 5.4.1 Negotiation should take place with the supplier to ensure value for money. In the absence of competition a CoPE should benchmark costs across the public sector to compare value for money.

## **5.5 Award**

- 5.5.1 DACs should be awarded with appropriate Conditions of Contract (a CoPE will provide advice).

## 5.6 Publication

- 5.6.1 If the value of the DAC is above the EU threshold, consideration should be given to publishing a VEAT notice prior to award. (See paragraph 6.4).
- 5.6.2 If the value of the DAC is above the EU threshold a Contract Award Notice (CAN) must be published (whether or not a VEAT notice has been published).
- 5.6.3 Departments should ensure that all DACs with a value over £30,000 (£50,000 for Utilities) are published monthly by the relevant CoPE on its website unless there are exceptional reasons for not doing so. Each DAC should be referenced to a footnote to explain either the rationale or justification for it the award without a competition.

## 5.7 Recording

- 5.7.1 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 regulated by the PCR 2015 this should include the circumstances in Regulation 32<sup>16</sup> which justify such an award.
  - 5.7.2 Accounting Officers must ensure that summary information for all DACs is retained for consideration by the Departmental Board and Departmental Audit Committee. Arm's Length Bodies should ensure arrangements are put in place to forward details of all DACs to Departments.
  - 5.7.3 If, following CoPE advice and appropriate approval, a Department awards a DAC without further CoPE involvement, it should inform the CoPE that it has done so. It should also inform the CoPE if it decides not to proceed.
- 5.8 A DAC process map is provided at [Annex B](#).

---

<sup>16</sup> Utilities should include the circumstances under Regulation 50 of the UCR 2016.

## **6 CONSEQUENCES OF NON-COMPLIANCE WITH THE REGULATIONS**

- 6.1 A breach of the duty owed under the Treaty or the UK Regulations is actionable by contractors through proceedings in the High Court and the Court has a range of review procedures and remedies available for breaches of the public procurement rules.
- 6.2 One of the remedies is a Declaration of Ineffectiveness. Ineffectiveness is a very stringent and punitive remedy and one which 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 OJEU (ie to advertise) where prior publication was required under the procurement rules is one of the grounds for a Declaration of Ineffectiveness.
- 6.3 In the case of non-compliance with the Regulations within a procurement co-financed by the EU, guidance on the assessment and application of administrative financial corrections has been defined by the European Commission. This must be followed by Programme Authorities. Penalties of up to 100% of the contract value may therefore be imposed for non-compliance.
- 6.4 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 the OJEU. A VEAT notice is a protective mechanism that can be used where a Department has awarded a contract without prior advertisement, where it 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.

## 7 FURTHER INFORMATION

7.1 Any queries on this guide should be addressed to:

Procurement Policy Branch  
Central Procurement Directorate  
2<sup>nd</sup> Floor East  
Clare House  
303 Airport Road West  
Belfast, BT3 9ED  
Phone: 028 9081 6518  
Email: [procure.policy@finance-ni.gov.uk](mailto:procure.policy@finance-ni.gov.uk)

Construction Procurement Policy Branch  
Central Procurement Directorate  
2<sup>nd</sup> Floor East  
Clare House  
303 Airport Road West  
Belfast, BT3 9ED  
Phone: 028 9081 6871  
Email: [ConstructionProcurementPolicy@finance-ni.gov.uk](mailto:ConstructionProcurementPolicy@finance-ni.gov.uk)

**ANNEX A****SAMPLE FORM FOR REQUESTING PROCUREMENT ADVICE FROM A CoPE IN RESPECT OF A DIRECT AWARD CONTRACT (DAC)**

*If the value of the DAC is over the relevant EU threshold the advice must be sought from the Head of Procurement (HoP) or to a person the HoP has delegated this responsibility to.*

In order to receive advice in respect of a DAC this form must be completed with all relevant details and emailed to: XXXXXXXXXXXX

<b>Section 1. Client Contact Details</b>	
Name of Contact	
Department	
Branch/Division	
Address including Postcode	
e-mail address	
Office Telephone Number	
Mobile Telephone Number	
<b>Section 2. DAC Details</b>	
Title of DAC	
What is the estimated value of this DAC?	
What is the proposed length of this DAC?	
Which financial year(s) does this DAC cover? eg. 16/17, 17/18 etc	

Name, address and contact details of the proposed Supplier			
Is this a <b>new requirement</b> which has not been purchased before? (Please tick one of the options below) <b>If Yes proceed to Section 4</b>			
Yes		No	
<b>Section 3. Details of Previous Contract</b>			
Was the previous requirement subject to competition or tender or was it awarded directly to a supplier? (Please tick one of the options below)			
Competition/Tender		Direct Award Contract	
If the previous requirement was awarded directly to a supplier without competition please state the start and end dates of the previous Direct Award Contract including any extensions.			
Start Date		End Date	
If the previous requirement was awarded directly to a supplier without competition state the total value of previous DAC/s	£		
If the previous requirement was awarded directly to a supplier without competition state which Conditions of Contract were used eg. Suppliers, [Name of CoPE] Conditions of Contract.			
If the previous requirement was tendered by [Name of CoPE] please provide the [Name of CoPE] reference number and project title.			

<p>If the previous requirement was tendered please provide the start and end dates of the previous/existing contract including any options to extend which were stipulated in the original contract. (For software licences and support the start date should be the date the software was first bought and not the start date of the last annual renewal).</p>			
Start Date		End Date	
<p>If the contract has been extended beyond the original end date stated above please provide the dates of any extensions.</p>			
<p>What was the actual value of the contract at the time of award?</p>		£	
<p>What has been the total spend to date from the commencement of this contract including all extensions? <i>For software licences and support the total spend should be the spend from the date the software was first bought and not just the spend in respect of the last annual renewal.</i></p>		£	
<p><b>Section 4 - Justification for the DAC</b></p>			
<p>Please provide details of why this DAC is being requested explaining, if applicable, ownership of any intellectual property or exclusive rights.  <i>[Name of CoPE] may ask for further details if the initial information provided is not sufficient.</i></p>			



**Section 5 Publication on [Name of CoPE] website and OJEU (if applicable)**

*DACs (including consultancy) valued at over £30,000 (£50,000 for Utilities) awarded by [Name of CoPE] will be published on [Name of CoPE] website unless there are security considerations that would prevent this.*

*For those contracts valued over the EU threshold a Voluntary Ex-Ante (VEAT) notice may also be published in the Official Journal of the European Union (OJEU). A Contract Award Notice must be published in the OJEU. Each DAC will be referenced to explain that the contract has been awarded without a competition.*

*As the award of a DAC over £5,000 requires the putting in place of a contract with appropriate Conditions of Contract, contract management arrangements and (if over £30k or £50k for Utilities), the publication on the [Name of CoPE] website, Departments should allow sufficient time for this process to be completed.*

Please indicate if there are any security considerations which would prevent publication of the award of this DAC on the [Name of CoPE] website.

If there are no security considerations which would prevent publication indicate the rationale or justification for the DAC.

*Above threshold contracts should comply with Regulation 32 of The Public Contracts Regulations 2015<sup>17</sup>. For below threshold contracts generally the reasons will be similar to those set out in Regulation 32, however, there may be other reasons connected with the overriding public interest.*

<sup>17</sup> Regulation 50 of the Utilities Contracts Regulations 2016

**Section 6 [Name of CoPE] Advice to Accounting Officer**

*In the case of DACs above the EU threshold the CoPE advice must be from the Head of Procurement or the person they have delegated this responsibility to. The Accounting Officer may delegate responsibility for approval of a DAC (see para 4.5 of PGN 03/11).*

**Name:**

**Grade:**

**Date:**

**If you wish [Name of CoPE] to award the DAC, once you have received Accounting Officer approval return this form together with the following:**

- a copy of the Accounting Officer (AO) approval in respect of the DAC
- confirmation that a proportionate business case has been approved
- a specification of requirements / Terms of Reference

**to: XXXXXXXXXXXX**

## DAC PROCESS MAP

### Business Case (see paragraph 5.1)

Complete a proportionate business case and obtain appropriate approval.

### CoPE Advice (see paragraph 5.2)

Seek advice from a CoPE proportionate to the value of the DAC. The CoPE will provide advice on appropriate Conditions of Contract.  
If the value of the DAC is above the EU threshold seek advice from Head of Procurement (HoP) in the CoPE (or advice from the person delegated by the HoP) and legal advice if necessary.

### Approval (see paragraph 5.3)

If the value of the DAC is below the EU threshold seek Accounting Officer (AO) approval\* (or approval from the person delegated by the AO).  
If the value of the DAC is above the EU threshold seek AO approval\* (unless exceptionally the AO has delegated this responsibility).  
**\*The prior approval of the AO (usually Permanent Secretary) is required for all DACs for external consultants.**

### Negotiation (see paragraph 5.4)

Negotiate with the supplier to ensure value for money.

### Award (see paragraph 5.5)

Award the DAC using appropriate Conditions of Contract.

### Publication (see paragraph 5.6)

If the value of the DAC is above the EU threshold consider publishing a VEAT Notice in the OJEU prior to award and once awarded publish a Contract Award Notice in the OJEU. If the DAC is above £30k (£50k for Utilities) publish it on the CoPE website.

### Recording (see paragraph 5.7)

Keep a written record of the DAC setting out the reasons and justification.  
For DACs above the EU threshold this should include the circumstances under Reg 32 of the PCR 2015 (Reg 50 of the UCR 2016) which justify such an award.  
If the Department has awarded the DAC not the CoPE, inform the CoPE.