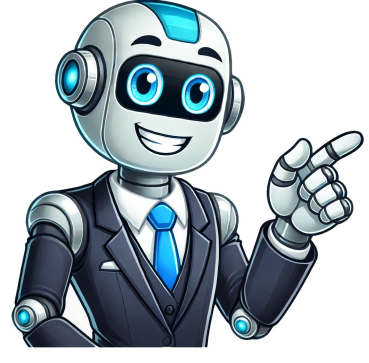


Click to prove
you're human



[illegible]

how they would meet it and to provide a price, on which basis the contracting authority would make its decision; or, for a commercially available good or service, it could be as straightforward as contacting a number of suppliers or checking online to see which supplier can meet the requirement in the quickest time and at the best price. 39. Carrying out any informal competition does not fetter in any way the contracting authority's discretion to rely on this direct award ground. 40. The contracting authority may also want to consider whether in these circumstances it is more expedient to modify an existing contract using the permitted modification ground at Schedule 8, paragraphs 2 and 3 (urgency and the protection of life, etc.), rather than make a direct award. See the guidance on contract modifications for more information. User choice contracts 41. This justification is where others have a legal right to have a say in the choice of the supplier (for example, under legislation such as the Care Act 2014 or the Children and Families Act 2014). This justification applies only where: a. the services are those that would ordinarily be procured under a light touch contract; b. such services are supplied for the benefit of a particular individual; and c. a contracting authority is required by legislation to have regard to the views of the particular individual, or a person providing care to that individual (their 'carer'), concerning who should supply the services. 42. In order to rely on this justification: a. the individual/carer must have expressed a preference as to who should supply the services, or the nature of the services to be supplied must be such that only one supplier is capable of providing them; and b. the contracting authority considers it is not in the best interests of the individual to award a contract via a competitive tendering procedure. 43. This may be, for example, in relation to certain personal or social care requirements. The person's needs (including where relevant a child's needs) may be very specialised with only a limited number of suppliers able to meet the requirement. There is likely to be a significant element of choice from the individual and/or their parent or carer, for example, a preference that the supplier is located as close as possible to family members or to enable a child to continue to attend the same school, and a strong element of professional judgement by social care staff. Defence and security 44. There are three justifications under this category. The first justification is where the public contract is a defence and security contract (as defined in section 7) and is for the supply of air or maritime transport services to the armed forces or security services while they are deployed outside the UK or in order for them to be deployed outside the UK. In addition, as is usual in, for example, the aircraft chartering market, the nature of the services must be such that a reasonable supplier would not be able to guarantee its offer for 10 days. 45. The second justification is where, in certain circumstances, it is more appropriate to directly award a new public contract rather than amend an existing contract. This justification can only be used where the new contract would be a 'qualifying defence contract' under section 14(2) of the Defence Reform Act 2014. 46. In this case, the contracting authority must already have an existing contract with the supplier to be awarded the new contract and if the existing contract was modified instead of a new contract being awarded, that modification would either: a. not be a substantial modification (under section 74(3)); or b. be permitted under Schedule 8, paragraph 4 (unforeseeable circumstances) or paragraph 8 (additional goods, services or works). 47. In practice, this justification is to deal with contracts which have been competitively awarded originally but are in effect being amended using a separate contract to allow the Single Source Contract Regulations 2014 to apply to the 'amended' part of the contract. 48. The final justification is where the contract: a. is a defence authority contract^{footnote 2}; b. is a defence and security contract because at least one of the reasons in section 7(1)(a-f) applies (i.e. not only 7(1)(g) or, in the case of a framework, not only section 7(1)(g) and 7(2)); and c. it is necessary for the contract to be directly awarded in order to enhance or maintain the operational capability, effectiveness, readiness for action, safety or security of the armed forces. This can include, for example, where contracts are needed to be awarded quickly to maintain the military's operational effectiveness. Above a certain threshold the Ministry of Defence (including Defence Equipment and Support) would need to seek Cabinet Office approval in order to use this justification. Section 42 (Direct award to protect life, etc) 49. Section 42 (Direct award to protect life, etc) allows specified contracts to be directly awarded as though a direct award justification (under section 41) applies. In this case, the justification will only apply where secondary legislation (regulations) has been made authorising the direct award. Secondary legislation may only be made where a Minister of the Crown considers it necessary to protect human, animal or plant life or health, or to protect public order or safety. 50. The purpose of this provision is to ensure procurements can be carried out quickly and in full knowledge in emergency circumstances, even if the circumstances leading to the event are foreseeable (which would rule out the extreme urgency justification for direct award contained in Schedule 5, paragraphs 13 and 14). 51. If regulations of this kind are made, then public contracts within scope may be awarded as though a direct award justification applies (therefore the rules in section 41 will apply). Contracting authorities will only be able to directly award public contracts on this basis after secondary legislation has been made and if the legislation is applicable to the particular contract. 52. It is envisaged that direct awards by this means will be a rare occurrence, and should secondary legislation be made, contracting authorities will be alerted through a Procurement Policy Note (PPN) or other suitable means. Section 43 (Switching to direct award) 53. Section 43 (Switching to direct award) allows a contracting authority to switch from a competitive tendering procedure to the direct award of a public contract in circumstances where no or no suitable tenders or requests to participate have been received in that competitive tendering procedure and the contracting authority considers that the award of a contract using a competitive tendering procedure under section 19 is not possible in the circumstances (see section 43(1)). 54. In these circumstances, a direct award cannot be made to an excluded supplier (as defined in section 57) and the public interest test in section 41(2) does not apply. Before awarding a contract under section 43, the contracting authority must check whether the supplier is an excludable supplier and then act accordingly. 55. Section 43(2) sets out when a tender or request to participate would not be considered 'suitable'. There are four circumstances: a. where the supplier's tender or request would be disregarded under section 19(3)(a), (b) or (c)^{footnote 3} (Award of public contracts following a competitive tendering procedure); b. where the tender or request does not satisfy the contracting authority's requirements or award criteria; c. where there is evidence of corruption or collusion; and d. where the tender materially breaches a procedural requirement set out for all suppliers to comply with in the tender notice or associated tender documents. 56. Section 43 includes details about what constitutes 'materially breaching a procedural requirement', which includes breaching a procedural requirement in relation to a tender. For example, a refusal by the supplier to provide an undertaking to obtain a performance guarantee may amount to a material breach. A breach is material if ignoring it would be treating the supplier more favourably than other suppliers 57. The contracting authority must also consider whether a supplier submitted an unsuitable tender or request to participate in the competitive tendering procedure. This is because it may not be appropriate in certain circumstances for such a supplier to be directly awarded the public contract, although it is not an absolute prohibition and it would depend on the particular circumstances. For example, if the supplier's tender was unsuitable due to collusion, a direct award would be inappropriate, but if it was unsuitable due to a failure to meet certain award criteria, it may, nevertheless, be preferable to award the contract to that supplier rather than to a supplier that failed to meet any award criteria. 58. When deciding to switch to direct award and determining whether an award is possible under section 19, the contracting authority should consider whether the reason for not receiving any suitable tenders or requests is because the documentation was not clear or there was an error, which if corrected and time still permitted, could result in a successful award. 59. If a supplier submitted an unsuitable tender prior to switching, the contracting authority is not required (under section 50) to provide an assessment summary to the supplier. This is because the submitted tender would not be an 'assessed tender' under section 50. 60. In this circumstance, the contracting authority must still, however, inform the supplier in writing that its tender is unsuitable and why, in order to evidence that it has met the objective in section 12(1)(c) of the Act. It is advisable to use the assessment summary structure to do this. 61. Section 43 provides that it is permissible to switch to directly award the contract that was the subject of a competitive tendering procedure where section 43(1) applies. Section 43(1)(a) specifically provides that the contract to be directly awarded under section 43 is the same contract that was originally subject to the competitive tendering procedure, which means that the conditions of contract cannot be significantly altered when switching to direct award. 62. In certain procurements the contracting authority may require all or part of the contract to be sub-contracted to a specified supplier. The contracting authority is only permitted to require this where a direct award justification applies in relation to particular goods, services or works, such that the contracting authority could award a contract directly to the specified supplier under section 41. For example, if the contracting authority considers that it will be necessary for any supplier to use certain software which is owned by one particular supplier, the contracting authority may require that a supplier sub-contracts the supply of the software to that particular sub-contractor. In this example, the contracting authority must consider it would be permissible to make a direct award to that sub-contractor under the direct award justification in Schedule 5, paragraph 5. 63. Where contracting authorities require a supplier to sub-contract to a specified supplier, this should be set out in the associated tender documents. 64. A procurement may have been the subject of either a pipeline notice, a preliminary market engagement notice and/or a planned procurement notice before a direct award is commenced. 65. As section 16 (preliminary market engagement) only applies in a competitive tendering procedure, the obligation to publish a preliminary market engagement notice would only, if relevant, arise if a direct award is made under section 43 (switching to direct award). However, contracting authorities can carry out some form of engagement with the market prior to making a direct award, and may wish to publish a preliminary market engagement notice, for example to demonstrate transparency and compliance with the objectives in section 12. Transparency notice 66. As set out previously, the key notice in a direct award is the transparency notice. Section 44 of the Act and regulation 5 requires a contracting authority to publish a transparency notice on the central digital platform before directly awarding a contract. This requirement does not apply to user choice contracts awarded under Schedule 5, paragraph 15. Regulation 26 sets out the information that must be included in this notice. This is summarised below. 67. Supplier information. The notice should include the supplier to whom the contract is to be awarded, if known at the time of publication. This should be the case in the majority of direct award situations, even where a supplier has been identified but negotiations are still ongoing. There may be exceptions, for example, in the case of extreme urgency where the contracting authority may be publishing the notice without having yet determined to whom the contract is to be awarded. The regulations allow for the notice to be published if a supplier has not yet been selected for award. 68. The information about the supplier (if known) to be awarded a contract includes, where the contract is being directly awarded to a supplier under section 41, information about whether it is an excluded supplier including, if relevant, what exclusion ground applies. This information will normally have been provided by the supplier through the central digital platform, however, regulation 7(4) provides flexibility in the case of urgency. The regulations recognise that the contracting authority may not be able to wait for a supplier to register, complete and submit their core supplier information before awarding the contract. See the guidance on publication of information for further information on how core supplier information is provided and obtained. 69. Grounds for direct award and associated information. Contracting authorities must include in the notice: a. the grounds for direct award; b. why the direct award is justified; c. where the contract is being awarded to an excluded supplier pursuant to section 41, the exclusion ground that applies and why the contracting authority believes there is an overriding public interest to award the contract to that supplier (when awarding to more than one supplier the contracting authority will need to be clear about which supplier is excluded); d. where the contract is being awarded in reliance on secondary legislation made under section 42(1), the title and registration number of the regulations made under section 42(1); and e. where the contracting authority has switched to direct award under section 43, the reason it considers there were no suitable tenders or requests to participate and why it considers that award under section 19 is not possible in the circumstances. 70. Known risks. If a contracting authority wishes to rely on the 'Materialisation of a known risk' ground in Schedule 8, paragraph 5 to make any future modifications to a directly awarded contract, the known risks must be identified in the transparency notice (as required by Schedule 8, paragraph 6(b)). For further information on modifications refer to the guidance on contract modifications. Timing 71. It is recommended that the transparency notice is published as soon as the decision to directly award the contract is made. Publishing as early as possible will mean that, if there is a challenge to the basis of the decision to directly award the contract, it will generally be made when it is less disruptive to the procurement. This is because a supplier has only 30 days (under section 106 (Time limits on claims)) to make a claim from the point at which it knew, or ought to have known, of the circumstances of the direct award). 72. Except as described below, the requirements for subsequent notices are the same as for contracts awarded under section 19 of the Act. 73. The next notice after the transparency notice will be one of the following: a. procurement termination notice: to inform interested parties that a contracting authority has decided not to proceed with the award of a contract after having previously published the transparency notice. A procurement termination notice is mandatory in all such circumstances except when the transparency notice was published by a private utility; or b. contract award notice: to notify the market of the outcome of a procurement and to alert the market to the fact that a contract is about to be entered into. 74. Contract award notice The contract award notice initiates any mandatory or voluntary standstill period and must be published before the contracting authority enters into a public contract. A contract award notice is mandatory for all direct awards except when the direct award is based on the justification for user choice contracts (section 50(6)(b)). The contracting authority is not permitted to enter into the contract during any standstill period (section 51(1)). 75. A contracting authority is permitted to publish a contract award notice at any point after the transparency notice when it is directly awarding a contract under the Act (i.e. there is no requirement to wait until the contract is about to be awarded). Early publication of the contract award notice can avoid any standstill period delaying the contracting authority entering into the contract as it could be published, for example, during negotiations or while contract administration is being finalised. Contracting authorities will need to ensure that any published contract award notice accurately reflects the contract that is to be awarded or the contract award notice will need to be re-published and a new standstill period observed (where such a period is required by the Act). 76. There are exceptions to the mandatory standstill period when a direct award is made under section 41 pursuant to Schedule 5, paragraph 13 (extreme and unavoidable urgency), under regulations made under section 42 (direct award to protect life, etc.); and under section 41, section 42 or section 43 by private utilities. Where an exception to the mandatory standstill period applies, the contracting authority may still choose to implement a voluntary standstill period. See the guidance on the contract award notice and standstill. 77. Contract details notice The next notice in the sequence after a contract award notice is a contract details notice. This notice provides interested parties with details of the contract that has been entered into and is mandatory, except where the contract has been directly awarded pursuant to Schedule 5, paragraph 15 (user choice contracts) or where it has been directly awarded by a private utility (section 53(6)(a)). (See the guidance on the contract details notice). What other guidance is of particular relevance to this topic area? Guidance on covered procurement objectives Guidance on conflicts of interest Guidance on exclusions Guidance on contract award notices and standstill We use some essential cookies to make this service work. We'd also like to use analytics cookies so we can understand how you use the service and make improvements.