

PRINCIPLES FOR MINISTERIAL INVOLVEMENT IN COMMERCIAL ACTIVITY AND THE CONTRACTING PROCESS

Introduction

Third party suppliers have a vital role in delivering the Government's agenda, attracting one third of Departmental spend. Ministers have a vital role in setting commercial priorities, making sure that the right suppliers are chosen to address the right requirement and managing contracts to achieve the performance and value required. Ministers should hear from and challenge suppliers, making sure that they understand the strategic intent behind policy, and that supplier solutions make appropriate tradeoffs between cost, risk and quality. Ministers can give suppliers confidence in the process and encourage suppliers to treat Government as a strategic partner. Ministers can also set red lines; making it clear that suppliers who are receiving public money must meet Government's ethical, environmental and social standards.

It is therefore imperative that Ministers be involved in commercial activity. Ministerial involvement in the development of commercial strategies should be actively sought by officials. Evaluation criteria should be designed to reflect ministerial priorities for the goods or services being procured, including criteria such as delivery of social value and use of SMEs. Ministers should meet key Departmental suppliers and make it clear what is needed of them. Departments should enable such involvement in a way that supports Ministerial ambition and accountability while maintaining public trust in the integrity of Government's commercial dealings. This guidance steps through four stages of commercial activity and offers advice on how to maximise the value of Ministerial involvement while maintaining the necessary safeguards.

Ministerial involvement before procurement starts

Ministers can engage with current or future suppliers to the Government outside of a formal procurement process, i.e. before the opportunity is advertised, as this can be useful in growing and shaping markets, as well as gaining intelligence through a better understanding of market issues. Ministers should approach this in the same way as any engagement with the private sector. They should ensure an appropriate record of the discussion is made; allow equal opportunity for access for all, including SMEs, and seek to ensure suppliers' intellectual property is not compromised. Ministers should be aware of the priorities set out in the National Procurement Policy Statement¹, which encourages Departments to widen their supply base to ensure resilience.

Departments should ensure that Ministers are pre-briefed on Government's previous commercial dealings with current or potential suppliers before such meetings, including performance on current contracts. Commercial teams have access to market intelligence on larger companies, and detailed knowledge of those who are critical to Government. Best practice is for Ministers to include a senior member of the Department's Commercial Directorate in such meetings to ensure that a level playing field is maintained and that suppliers are not over-selling their capabilities or performance.

¹ Available [here](#)

Departmental officials should make Ministers aware of the upcoming programme of tendering activity (the 'commercial pipeline') through an oversight committee or similar so that they can get involved as they see fit. Ministers should be able to expect officials to provide swift advice to allow flexible decision making.

When meeting suppliers, Ministers should take care not to discuss matters related to current or potential procurement intentions of the Department that are not in the public domain or otherwise available to other suppliers. Ministers should also exercise caution in accepting pro bono offers from suppliers as these have the potential to distort future competitions, usually at the expense of SMEs who cannot afford to make such an offer while larger competitors can. There are circumstances where pro bono offers may work, such as a trial of off-the-shelf software, but generally commercial and legal advice should be sought before entering into such arrangements.

Ministers who are MPs also represent their constituents. If a Minister wishes to introduce a local supplier to Government, then a declaration of interest can be recorded and the Minister can excuse themselves from future decisions related to that supplier, should they be involved in a future procurement.

Ministerial involvement during a procurement process

Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their Departments. Because of this accountability and their high public profile, Ministers thus have a special role in the procurement process. The procurement is being carried out in the name of the Minister on behalf of the Crown, and what is being bought and how it is bought should fully reflect Ministerial intentions.

Departmental procurement teams should consult Ministers at regular intervals in high profile procurements. Depending on the procurement procedure, this may be

- when considering plans for early market engagement;
- when drawing up the specification and the selection and award criteria;
- when shortlisting bidders; prior to the announcement of a preferred or successful bidder; and prior to contract award.

In relation to major procurement, Ministers can

- Approve the specification and the choice of buying method - for example where a service would benefit from innovation, approving a procedure that encourages new entrants and an evaluation scheme that rewards new ideas;²
- Be personally involved in communication to the market, to stress the importance of the contract to the Government and to encourage the best possible offer from bidders
- Meet executives from the bidding companies during the procurement process, gaining their personal commitment to the success of the contract.

² For example Ministers might have regard to the ['Innovation Partnership'](#) procedure or the [Small Business Research Initiative](#) sponsored by BEIS.

Advice to Ministers should be provided in time to allow proper consideration and exercise of commercial options. Circumstances where Ministers are left little or no choice because of imminent contract expiry or other immovable deadlines should be avoided.

It is however desirable and important to maintain a clear separation of the Minister's role from that of the procurement team in the selection of suppliers for public contracts.

Ministers should not:

- Seek to influence the procurement process so that for example the requirement, timing and choice of procedure favours one particular supplier over another³
- Express a preference for a particular supplier or subset of suppliers (or a preference against certain suppliers) during the selection process based on anything other than the evaluation of a supplier's response against the published selection and award criteria
- In circumstances where Ministers wish to dismiss or reject the recommendations of the procurement team e.g. downselection, not proceed without taking commercial, financial and legal advice to ensure they are adhering to requirements about correct use of public resources.
- Take direct representations from involved suppliers or business associations during the process. Ministers should be aware that procurement processes, including the need for equal treatment, require such representations to be dealt with by the procurement team.

Ministers (as with officials) involved in any way in a formal procurement process (once the process has formally commenced, i.e. the opportunity has been advertised) must declare any personal or professional interests and dealings with likely tenderers. Where any such interests are revealed, procedures will need to be put in place to avoid a conflict of interest (perceived or actual). Ministers should consult their Permanent Secretary and may wish to ask a Ministerial colleague to participate instead. Departments must ensure that they keep a clear audit trail which must include any declared personal or professional interests and the steps taken to mitigate them.

If a Minister meets a supplier during a specific procurement, it should be part of a series of meetings arranged for all bidders still in the competitive process (for example after a downselection). If a Minister receives an unsolicited offer from a supplier during a procurement, then that supplier should be directed to engage in the formal procurement process.

There may be circumstances where Ministers feel it is necessary to change direction during a procurement, for example to meet an urgent emerging requirement. In such circumstances legal advice should be sought regarding whether such a change is permissible within the wording of the advertised requirement, as bidders might have acted differently if they had known the full scope of the opportunity.

³ This does not prevent a Minister mandating the consideration of the strategic procurement priorities set out in the [National Procurement Policy Statement](#)

It is sometimes suggested that the identity of bidders must be kept secret during the evaluation, a practice often referred to as 'anonymised bidding'. The main argument often made for this is that it offers protection for Ministers against accusations of bias, e.g. being affected by lobbying or vested interests. However, Ministers have a broader responsibility than simple endorsement of a process outcome and are ultimately accountable for major procurement decisions. Ministers must therefore have a full understanding of the judgements that they are making, and an awareness of all of the potential effects of those decisions. Anonymised bidding can limit a Minister's understanding and is therefore not recommended.

Contract Award

Contracts are normally entered into in the name of the Minister of the Department concerned, and Ministers should be informed of the results of tendering exercises before a contract is signed, together with the rationale for the result.

There may be circumstances when Ministers might decide not to proceed with the procurement (and thus not enter into the contract). Under these circumstances advice should be provided to the Minister on the risks of taking this course of action. This should include the legal risks of abandoning the procurement as well as any financial or operational implications together with alternative courses of action, such as an extension of an existing contract and/or a re-procurement.

Special consideration should be given to direct awards or other awards without a full competition which, under the Public Contracts Regulations 2015, can only be made in particular circumstances. Departments must publicly justify why the circumstances of the award meet these criteria and should be satisfied that these circumstances justify the selection of this particular supplier without a full competitive selection process.

Ministers cannot exclude particular suppliers from a competition other than by formal de-selection. Suppliers can only be de-selected if they are ineligible to bid (for example an exclusion ground applies or they fail to meet the previously published selection criteria) or if they are down-selected through the bid evaluation process.

Ministerial involvement in contract and supplier management post contract signature

Ministers should be kept informed of performance on key contracts, and may wish to be involved in high level discussions on performance. Ministers should be advised of the need to protect the Department's contractual rights in such discussions.

Ministers should also be made aware at an early stage of any major disputes or suspected instances of fraud or other misconduct on the part of a supplier. If Ministerial discussions take place, this should be with legal advice.

Ministers may want to be involved in decisions to terminate contracts for poor performance or other reasons. Termination options should only be exercised in accordance with the contract terms and applicable law, for example where the contract allows for termination for failure to meet published performance criteria or voluntary termination on payment of compensation to the supplier.

Many Government contracts have options for term extensions. Ministers should be aware that while the default position is to re-compete to retain competitive pricing and keep technology and other delivery assets up-to-date, there are occasionally commercial justifications for exercising such extensions.

Rules regarding the prevention of conflicts of interest apply throughout the life of the commercial relationship.

Supplier concerns

In the event that a supplier wishes to make representations to a Minister about unfair treatment or other unsatisfactory action by a Department's commercial or contract management team, the supplier should be encouraged to instead use the Cabinet Office's Public Procurement Review Service complaints process. If this does not apply, for example if they are a strategic supplier to Government, they should approach their Crown Representative. But if that is not possible, a Ministerial meeting can take place as long as it is attended by a member of the Government Commercial Function from outside the Department.

Further advice

Questions concerning this guidance should be directed to the Government Chief Commercial Officer at cco@cabinetoffice.gov.uk or to the Permanent Secretary of the Department (who may also wish to consult the Propriety & Ethics team in the Cabinet Office).