

## Non Competitive Action - Frequently Asked Questions

The following list comprises some FAQ's that have been compiled to provide guidance on the process of applying for a Non-Competitive Action (NCA).

### **How is spend in the University governed?**

Non salary spend within the University is governed by internal policy and procurement legislation. Which one applies is determined by the overall value of the requirement and by the scope of the requirement.

£1,000 to £49,999 (goods and services)	£50,000 to £181,302 (goods and services)	Above £181,302 (goods and services)
£1,000 to £1,999,999 (Works)	£2million to £4,551,413 (works)	Above £4,551,413 (works)
<b>Internal Governance</b>	<b>Governed by Procurement Reform (Scotland) Act 2014</b> <a href="#">Link to Act</a>	<b>Governed by the Public Contracts (Scotland) Regulations 2015</b> <a href="#">Link to Regulations</a>

### **What is a Non Competitive Action?**

As an organisation that receives public funding, the University is governed by Public Sector policy and legislation. The procurement legislation dictates that goods and services must be bought using proportionate, transparent processes that ensure non-discrimination and equal treatment of all suppliers. Non-Competitive Action is the process used to confirm/request an exemption to these policies and legislation. Any user selecting this option should understand the potential implications of proceeding which include the University claw back of funding, legal proceedings and potential for fines and penalties.

### **What situations will justify the award of a contract without competition?**

There is no single checklist of situations or factors to be considered. The decision whether to approve a NCA request will need to be made on a case by case basis.

Some situations may include:

Extreme urgency - competition is not required when a contract needs to be put in place urgently to respond to a circumstance which is 'unforeseeable' by, and outwith the control of, the University (e.g. severe and unprecedented weather conditions). However, any contract awarded through the NCA process must only cover the urgent (immediate) need;

Note: This does not include situations where there is an extreme urgency to award a contract on the basis that the customer was aware of the requirement but has failed to factor sufficient time into their workflow/work planning to allow a genuine and effective competition to be undertaken.

Only one possible supplier - you will need to provide objective evidence that will withstand scrutiny and audit to support the decision that there is not an alternative or equivalent product or service available in the market which will meet your needs;

Additional purchases from the same supplier - after a contract has been awarded, additional requirements which have arisen through genuine and unforeseen circumstances and were not included in the original contract may, depending on the precise circumstances, be 'added on' to that contract. However, careful consideration should be given at the outset of the contract to avoid this circumstance, wherever possible.

### **Which situations will not justify the award of a contract without competition?**

These may include:

Contract is about to end but there is an ongoing requirement - it is important that you take account of future needs at the earliest opportunity as a failure to plan for future requirements will not support the approval of NCA;

There is not sufficient time to carry out a competition - this will not support the approval of NCA. The time taken to run a competitive process will reflect the value, nature and complexity of the purchase;

I am under pressure to award this contract quickly - unless the pressure has arisen through an urgent unforeseeable situation then you will need to award the contract following a genuine and effective competition;

I have used this supplier before and like what they can do - University policy requires that contracts are awarded through a genuine and effective competition. In the absence of a competition it may be difficult to demonstrate VFM;

I have been approached by a supplier and like their idea - any such approach will not result in the supplier simply being awarded a contract on a non-competitive basis. If the proposal is consistent with the business need, that need must be met by running a genuine and effective competition.

### **What happens if my request is not approved?**

If you cannot demonstrate that there are objective and justifiable grounds to support NCA then competition will be necessary. The level of competition will depend on the value, nature and complexity of the purchase.

### **How do I calculate the value of the anticipated contract?**

The anticipated value should be considered as the total aggregate value of the amount payable under the contract. Notwithstanding the term of the contract, if the purchase is for an ongoing requirement, for procurement purposes, the value should be estimated over a 48 month period.

Things to include within the total cost of the contract include, but are not limited to, the following:

- *cost of purchase*
- *delivery*
- *installation*
- *support/consultancy services*
- *maintenance (where purchased through the supplier)*
- *any expenses, fees or uplifts payable during the term.*

### **Can I separate costs out to avoid compliance with guidance/legislation?**

No, the Legislation is very clear that the estimated value must be calculated at current market rates and that the University **must not**:

- *Sub divide the value with the effect of excluding any spend from the Regulations (unless justified by objective reasons), or*
- *Choose a method to be used to calculate the estimated value with the intention of excluding the spend from the Regulations.*

### **Can NCA approval carry risks?**

Yes. Approval to award a contract using the NCA process does not guarantee that this will be free of challenge. A challenge can take many forms, for example, a complaint from another supplier to Scottish Ministers that they have been denied an opportunity to bid for the contract, a legal challenge in the Courts or raising the matter with the European Commission. For this reason, it is important that objective, supporting evidence is provided as part of the request for NCA.

### **What happens should we fail to comply with the published guidance/legislation?**

Breaches to University policy may be considered by internal audit and remedied accordingly.

Breaches to legislation are considered by a Court of Law who have powers to take one or more of the following actions:

- Suspending the award of contract where the contract has not already been entered into
- Setting aside a contract that has been awarded
- Awarding damages to any person perceived to have suffered loss or damage as a consequence of the breach
- Imposing fines and penalties.

**Please contact the Procurement Team if you require any further guidance.**