

Decision title

Policy for compliance with IR35 tax provisions in relation to procuring third-party contracts

Recommendation by
Assistant Director, Technical and Commercial

Decision Number
LFC-0093-D

Protective marking: **NOT PROTECTIVELY MARKED**

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Summary

In April 2017, the intermediaries legislation, known as IR35, was revised by HM Revenue and Customs (HMRC) to include specific rules for off-payroll working in the public sector. Under the legislation duties are placed on Public Sector organisations for determining whether or not IR35 rules apply to engagements of third parties operating as their own intermediary. This report proposes a new policy, which includes a compliance framework and guidance, to support the Brigade achieve compliance with the IR35 provisions in relation to awarding contracts for services to third parties.

Decision

The London Fire Commissioner approves the proposed draft policy in Appendix A for compliance with IR35 tax provisions in relation to third party contracts with intermediaries.

Dany Cotton QFSM
London Fire Commissioner



Date 12-12-18

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LONDON FIRE BRIGADE

Report title

Policy for compliance with IR35 tax provisions in relation to procuring third-party contracts

Report to	Date
London Fire Commissioner	5 December 2018
Report by	Report number
Head of Procurement	LFC-0093

Protective marking: **NOT PROTECTIVELY MARKED**

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Summary

In April 2017, the intermediaries legislation, known as IR35, was revised by HM Revenue and Customs (HMRC) to include specific rules for off-payroll working in the public sector. Under the legislation duties are placed on Public Sector organisations for determining whether or not IR35 rules apply to engagements of third parties operating as their own intermediary. This report proposes a new policy, which includes a compliance framework and guidance, to support the Brigade achieve compliance with the IR35 provisions in relation to awarding contracts for services to third parties.

Recommended decision

The London Fire Commissioner approves the proposed draft policy in Appendix A for compliance with IR35 tax provisions in relation to third party contracts with intermediaries.

Background

1. In April 2017, changes in tax provisions within the intermediaries legislation (known as IR35) came into effect. These changes provided more stringent tax requirements for individuals operating as their own intermediary such as a Personal Service Company (PSC). The IR35 Compliance Framework Internal Audit Report (September 2017) by the Mayor's Office for Policing and Crime (MOPAC) recommended that the Head of Procurement develop a compliance framework for the engagement of third-party contractors to ensure compliance with the IR35 tax provisions.

Scope

2. The scope of the proposed policy is restricted to the direct engagement of contractors by the Commissioner under a services contract or via a purchase order, and for the most part relates to self employed persons such as consultants or sole traders who provide services to the

Commissioner. Unless otherwise specified, the term 'contract' is used throughout this report to mean third-party contract for services or purchase order, either of which will give rise to a commercial contractual relationship.

3. Personnel engaged on a PSC basis via a temporary labour supply agency such as Hays are not included in the scope of the proposed policy – refer to Policy PN725 for further information for PSCs engaged via an agency.

Risk

4. The risk for the Commissioner is noncompliance with the statutory provisions. This risk could manifest if the content of a third-party contract is procured, awarded or managed on a basis which is tantamount to, or otherwise effectively the same as, an employment contract under PAYE (Pay As You Earn) but is under the guise of a third-party contract. This could occur either inadvertently (such as managers being unaware of the statutory requirements) or via premeditated contrivance to circumvent the rules.
5. If a contract is inappropriately awarded by the Commissioner and the IR35 rules are found to apply, then the Commissioner could become liable for any unpaid employment tax and Class 1 National Insurance Contributions under PAYE, as well interest charges and penalties for noncompliance.

Solution

6. There are a number of treatments which differentiate engagements via a typical third-party contract basis from a PAYE basis. The incorporation of such differences into a third-party contract will normally be sufficient to ensure compliance with IR35. To assist managers to achieve compliance, detailed guidance on these differences are included in the proposed policy note (appended to this report) and the treatments have been incorporated in the standard terms and conditions of contract for services, available from Procurement Department.
7. An example of the difference between a third-party contract basis and a PAYE basis is the liability for rework to correct poor quality. Under a third-party contract, the contractor is financially liable for the costs of rework, whereas under a PAYE basis, the employer is liable for the costs of rework. Another example of the difference is the method of service provision. Under a third party contract, the contractor is usually at liberty to determine the method as to how the service will be performed and provided. Under a PAYE basis, the employer takes more direct responsibility for these. Another example is insurance and indemnities. Under a third-party contract, the contractor will usually provide these, including proof, by way of certification. Under a PAYE basis, the employer would provide these.
8. The proposed policy includes a guidance list of these different treatments to inform managers how to properly requisition, develop, commission and manage their third-party service contracts which are within scope. The guidance list will also be used by procurement managers in awarding contracts for the same.
9. The standard form of contract for services (available from the Procurement Department) embodies the treatments from the guidance list.
10. The proposed policy advises managers to contact Corporate Procurement Services for further information and advice.

Conclusion

11. The principles of the proposed policy are adhered to within Corporate Procurement Services in the award of contracts. Formal approval of the proposed policy will ensure the wider roll out and awareness of the IR35 requirements among Brigade managers to ensure compliance for both contracts and purchase orders. This will enable compliance in all stages of the procurement cycle, including requisitioning, procuring, awarding and managing contracts with intermediaries.

Finance comments

12. This report recommends the approval of a draft policy for compliance with IR35 tax provisions in relation to third party contracts with intermediaries. The report notes that if a contract is inappropriately awarded then this could result in the Commissioner becoming liable for unpaid tax and National Insurance Contributions as well as interest charges and penalties for noncompliance.

Workforce comments

13. There are no direct implications for the workforce in the implementation of the proposed policy.

Legal comments

14. Under section 9 of the Policing and Crime Act 2017, the London Fire Commissioner (the "Commissioner") is established as a corporation sole with the Mayor appointing the occupant of that office.
15. As a public authority, the Commissioner is subject to the intermediaries legislation (IR35). IR35 was brought into force by the Finance Act 2017, which introduced changes to the Income Tax (Earnings and Pensions) Act 2003.
16. Responsibility for deciding if the IR35 rules apply falls to the public authority. The legislation also makes the public authority responsible for paying associated employment taxes and National Insurance contributions to HM Revenue and Customs in the event of noncompliance.
17. The policy, if approved by the Commissioner, will streamline the compliance process with IR35.

Sustainability implications

18. There are no direct implications for sustainable development as a result of ensuring compliance with the IR35 tax provisions.

Equalities implications

19. There are no direct equalities implications in the implementation of the proposed policy.

List of Appendices

Appendix	Title	Protective Marking
A	Draft Policy – Compliance with IR35 in relation to procuring third-party contracts (including a guidance list - Appendix 1)	Publish in full

Consultation

[Note: this section is for internal reference only – consultation information for public consideration should be included within the body of the report]

Name/role	Method consulted
Insert names/or roles of those consulted, including any	Insert how they were consulted –
Name/role	Method consulted
with the representative bodies.	meetings, away day, by email or by draft circulation of this report.
Assistant Director of Technical & Commercial	Draft circulation of report and email
Steven Adams, Head of Executive Support	Draft circulation of report and email
Michele Rolfe General Counsel	Draft circulation of report and email
Adrian Bloomfield, Assistant Director of Finance	Draft circulation of report and email
Nicole Fletcher, Head of Sustainable Development	Draft circulation of report and email

Compliance with IR35 tax provisions in relation to procuring third-party contracts

New policy number: **TBC**
 Old instruction number: **n/a**
 Issue date: **2 November 2018**
 Reviewed as current: **2 November 2018**
 Owner: **Head of Procurement**
 Responsible work team: **Procurement**

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Summary

In April 2017, the intermediaries legislation, known as IR35, was revised by HM Revenue and Customs (HMRC) to include specific rules for off-payroll working in the public sector. Under the legislation duties are placed on Public Sector organisations for determining whether or not IR35 rules apply to engagements of third parties operating as their own intermediary. This policy, which includes a compliance framework and guidance, provides support to the Brigade to achieve compliance with the IR35 provisions in relation to awarding contracts for services to third parties.

1 Background

1.1 In April 2017, changes in the tax provisions within the intermediaries legislation (known as IR35) came into effect. These changes provided more stringent tax requirements for individuals operating as their own intermediary. An intermediary can be:

- a worker's own limited company – known as a Personal Service Company (PSC)
- a partnership
- an individual

1.2 The changes also increased responsibilities for agencies and public sector organisations (as end users of intermediaries). In some cases, the changes will apply when the Commissioner engages a contractor via a procurement route.

1.3 The use of the term 'contractor' in this policy refers to a limited company or PSC, or relevant partnership or individual. The guidance in this policy will be published on Hotwire and will be referenced in Procurement Standing Orders and Approved Code of Practice on Tenders and Contracts.

2 Risk

2.1 The risk for the Commissioner is noncompliance. In particular, this risk could manifest when a third-party contract is procured and awarded on a basis which is tantamount to or otherwise the same as, an employment contract under PAYE (Pay As You Earn) but is under the guise of thirdparty contract. This could occur either inadvertently (such as managers being unaware of the statutory requirements) or via premeditated contrivance to circumvent the rules. There are a number of treatments which differentiate a typical third-party contract basis from a PAYE basis – these are detailed later in this guidance to assist managers achieve compliance with IR35.

2.2 If a contract is inappropriately awarded by the Commissioner and the IR35 rules are found to apply, then the Commissioner could become liable for any unpaid employment tax and Class 1 National Insurance Contributions under PAYE, as well interest charges and penalties for noncompliance.

3 Purpose of this policy

3.1 The purpose of this policy is to:

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- provide a governance framework for the achievement of compliance with the IR35 rules regarding third-party contracts for services
- make heads of service, managers and procurement staff aware of the statutory requirements and their particular responsibilities
- provide information to heads of service, managers and procurement staff in order to assist them achieve compliance
- ensure heads of service, managers and procurement staff know where to go for further information, guidance and support when needed.

4 Scope

4.1 The scope of this policy is restricted to the direct engagement of contractors by the Commissioner under a contract for services or via a purchase order, and for the most part relates to self-employed persons such as consultants or sole traders who provide services to the Commissioner. Unless otherwise specified, the term 'contract' is used throughout this policy to mean third-party contract or purchase order, either of which will give rise to a commercial contractual relationship.

4.2 Personnel engaged on a PSC basis via a temporary labour supply agency such as Hays are not included in the scope of this policy – refer to Policy PN725 for further information for PSCs engaged via an agency.

5 Treatments

5.1 A commercial contractual relationship between a client and a third-party contractor using a payment mechanism based on performance and risk transfer is, by nature, usually very different from an employer and employee relationship on a PAYE basis. This difference will usually suffice to ensure that the third-party contract is not caught within the IR35 rules. However, to ensure this is genuinely the case, managers must ensure the requisition, procurement, engagement of and the relationship with the contractor are assessed and managed in view of the guidance proposed in this policy. This will enable the contract to be compliant. The essential test examines what the relationship between the client and the contractor would be if there wasn't an intermediary involved. The actual relationship can be assessed by using the information about the working practices, resources, risks, rewards, and responsibilities of the parties within the contract in order to decide whether there is any applicable employment status under IR35. This does not rely on any label, description, or contract title, but rather tests the actual integrity and underlying nature of the contractual relationship and the commercial responsibilities within it.

5.2 There are a number of test considerations which help to determine whether a contract is genuinely outside of IR35 – many of these have been explained below, and included in the guidance list (in Appendix 1) and in the Commissioner's standard form of contract for services (available from the Procurement Department).

- 5.3 If the guidance list is adhered to, it will ensure that a contract or purchase order is compliant, being outside of the IR35 rules by its very nature. It sets out a number of considerations, which though not mandatory in themselves, are the sorts of issues which, when taken together as a whole, will determine whether or not a particular contract is within or outside of IR35 and thereby determining whether a contract is compliant or non-compliant with the IR35 provisions.
- 5.4 This approach must be adopted for all third-party contracts within the scope of this policy (primarily consultancy type contracts, or sole traders or partnerships who operate on an

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intermediary basis). Similarly, any changes or variations to contracts should be appropriately assessed to ensure that the IR35 rules remain not applicable.

6 Roles and responsibilities

- 6.1 Heads of service, managers and procurement managers are responsible to ensure that third-party contracts are compliant with all statutory provisions, including the intermediaries legislation (IR35).
- 6.2 In particular, heads of service and managers are responsible to ensure that the requisitioning, commissioning and management of their third-party contracts are compliant with the intermediaries legislation (IR35). The primary ways to achieve this are to ensure that commercial relationships with intermediaries are in accordance with the guidance list in Appendix 1 and to use the standard form of contract for services when applicable. This standard form of contract embodies the treatments from the guidance list. The standard form of contract may be used and varied as appropriate, provided that the essence of the contractual relationship is not altered to such a degree that it represents a relationship similar to a PAYE basis. For further advice on the use of the guidance list or the standard form of contract, refer to Corporate Procurement Services section in the Procurement Department.
- 6.3 In simple terms, a contract for services with an individual must not be constructed on or give effect to the equivalent of a PAYE basis as the form of contractual relationship. There are a number of test considerations which help to determine whether a contract is genuinely outside of IR35 – these have been included in the guidance list (in Appendix 1) and embodied in the standard form of contract.
- 6.4 Heads of service and managers must use the guidance list in Appendix 1 to ensure that their requirements for engaging an intermediary are developed in a compliant manner. The relevant sections of the guidance list must be considered before raising a requisition/purchase order or before submitting a Tender Request Form (TRF) to Procurement. Heads of service must ensure that all relevant purchase requisitions and tender request forms are compliant before submitting for further action. Once a compliant contract has been let with an intermediary, heads of service and managers must ensure that the contractual relationship is managed according to the terms of the contract in order that compliance is maintained throughout the contract duration.
- 6.5 It is the responsibility of procurement managers to ensure tenders are conducted in accordance with this policy, that contracts are drafted in accordance with the guidance list and that future formal changes to contracts do not undermine compliance. Procurement managers will provide advice on compliance to heads of service and managers when required.

- 6.6 Before authorising a purchase order or signing a contract, the relevant manager and/or procurement manager should undertake a final review to ensure that compliance has been achieved throughout the process of procurement and drafting the final terms of the order or contract.

7 Further information, guidance and support

- 7.1 In the first instance managers should discuss queries with their head of service regarding their own department's requirements. If further detailed advice is required, contact a procurement manager within Corporate Procurement Services section of the Procurement Department who will be able to assist.

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- 7.2 For complex queries, you should contact the Head of Procurement or a Corporate and Commercial Law Manager from General Counsel's Department.

Appendix 1 – Guidance list for IR35 compliance

Treatment of contractual elements	Detailed guidance of contractual treatments
Risk and Reward – Payment Mechanism	The payment mechanism will be via a performance based lump sum method (possibly in instalments) using a defined specification with the achievement of milestones or completion of services to the required standard. Alternatively, payment may be via a day rate method, with a total or defined amount of days and the services specified in terms of time and quality (i.e. performance based). Note that payment under this approach is dual in terms of the services being completed according to the required quality and within the specified time. This is clearly different from the basis of payment methods used for PAYE, which do not embody this risk and reward dynamic for performance or quality
Risk Transfer – Method of Delivery	It would usually be the contractor’s responsibility to determine the method of delivery, however, the Commissioner as client may approve the method statement, and stipulate that all delivery of services must be in alignment with, and not be at odds with, the Commissioner’s policies and practices. Under a PAYE engagement, the employer is generally determines the method of delivery.
Risk Transfer – Responsibility for Quality	It is the contractor’s responsibility and risk that all services are to be provided in accordance with, and the outcomes thereof are to achieve, the required quality or standard. This may be defined specifically or as being in accordance with industry standard good practice, including reasonable skill and care. Under a PAYE relationship, the employer is responsible for risks

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regarding the quality of work.

Risk Transfer – Liability for Rework

The standard form of contract includes provisions for the contractor to be liable for the cost of any rework which proves to be substandard, unless the poor quality has been caused by an act or omission of the

	Commissioner for which an adjustment may be made. This financial liability does not apply to an employee within a PAYE relationship.
Risk Transfer – Indemnities and Insurance:	The contractor is required to provide certificates
	of insurances (professional indemnity insurance and public liability insurance, as well as employer’s liability insurance if applicable), as well as indemnifying the Commissioner against losses and liabilities. Under a PAYE relationship, the employer is responsible to provide insurance.
Risk Transfer – Achievability and Due Diligence	It is the contractor’s responsibility to undertake its own due diligence in relation to the achievability of the service outcomes and outputs required. The employer would take on these responsibilities under PAYE.
Resources – Premises	A contractor will usually make use of its own premises for the provision of services. However, due consideration may be given to access to the Commissioner’s premises
Resources – Equipment	A contractor will usually provide its own equipment for the provision of services (this does not exclude the use of the Commissioner’s equipment such as technology in the Commissioner’s meeting rooms for use as part of a meeting with the Commissioner’s staff)
Resources – Personnel	A contract for the provision of services could involve a requirement or obligation for the contractor to supply, if necessary, a substitute person to provide or complete the services, if the usual person was unavailable. This should include an undertaking for the contractor to ensure that personnel working on the provision of services possess the appropriate skills, qualifications and experience to perform the tasks assigned to them. However, care should be taken in terms of protecting the Commissioner’s right to approve the assigning or sub-contracting the Agreement. These requirements do not apply to an employee under PAYE.

Termination	A third-party contract should contain termination and exit arrangements, including appropriate provisions for the protection, safe keeping and return of the Commissioner’s data and information as well as intellectual property rights. It is rare for such termination and exit arrangements to be expressly included in a PAYE contract.
Other standard terms and conditions of contract	As a third-party contract, there are a number of other terms and conditions which make the relationship with the contractor entirely different than with an employee on a PAYE basis. These include among others Force Majeure, Non Solicitation of the Commissioner’s Staff, Labour and Collective Agreements, Arbitration and Dispute Resolution, Freedom of Information including responsibilities post expiry of contract – refer to Procurement Department for the standard form of contract for services.

DRAFT

Document history

Assessments

An equality, sustainability or health, safety and welfare impact assessment and/or a risk assessment was last completed on:

EIA		SDIA		HSWIA		RA	
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Audit trail

Listed below is a brief audit trail, detailing amendments made to this policy/procedure.

Page/para nos.	Brief description of change	Date

Subject list

You can find this policy under the following subjects.

Freedom of Information Act exemptions

This policy/procedure has been securely marked due to:

Considered by: (responsible work team)	FOIA exemption	Security marking classification