

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

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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 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. 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:
  - 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. Please refer to [Policy number 725](#) – Agency workers policy for further information for PSCs engaged via an agency.

## 5 HMRC online tool

- 5.1 The HMRC provide an online tool for checking each engagement in terms of its employment status for tax (known as CEST). The tool can be accessed via the following link:  
<https://www.gov.uk/guidance/check-employment-status-for-tax>
- 5.2 Lead client officers must use this tool in all cases before the requisition or Procurement Request Form (PRF) is submitted. It should also be used when contracts are changed after engagement. The results of each assessment should be printed out or emailed and kept as a record. This is important because HMRC will stand by the result given unless a compliance check finds the information provided is not accurate. HMRC will not stand by results achieved through contrived arrangements designed to get a particular outcome from the service. This would be treated as evidence of deliberate non-compliance with associated higher penalties.

## 6 Treatments (including terms and conditions of contract)

- 6.1 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. Usually, this will mean that the client is engaging the contractor on a business-to-business basis, rather than on a personal services basis. This difference will usually suffice to ensure that the third-party contract is not caught within the IR35 rules.

To ensure this is genuinely the case, the lead client officer must use the online tool (see section 5 above) provided by the HMRC to check the employment status for tax, and then ensure the subsequent requisition or TRF, engagement of and the relationship with the contractor are managed in view of the CEST result and the guidance proposed in this policy.

Procurement managers will ensure the procurement of the contract is compliant. This concerted approach will enable the relevant contractual engagements to be compliant with IR35. 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 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.

- 6.2 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). The CEST online tool also includes some of these.
- 6.3 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.
- 6.4 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 intermediary basis). Similarly, any changes or variations to contracts should be appropriately assessed to ensure that the IR35 rules remain not applicable.

## **7 Roles and responsibilities**

- 7.1 Heads of service, managers, lead client officers and procurement managers are responsible to ensure that engagements of contractors via third-party contracts are compliant with all statutory provisions, including the intermediary's legislation (IR35).
- 7.2 In particular, heads of service and managers are responsible to ensure that their lead client officer requisitions, commissions and manages the third-party contracts to be compliant with the intermediaries legislation (IR35). The primary ways to achieve this are:
  - Use the online CEST tool.
  - Ensure that commercial relationships with intermediaries are in accordance with the guidance list in Appendix 1.
  - 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.
  - Ensure all relevant documentation and evidence is captured and stored.
- 7.3 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.
- 7.4 Heads of service, managers, lead client officers and procurement 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 Procurement Request Form (PRF) to Procurement.

Heads of service must ensure that all relevant purchase requisitions and tender request forms are compliant before they are submitted 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.

- 7.5 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.
- 7.6 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.

**Flow chart**

- 7.7 The following flow chart is provided as a summary of the above:

**Flow chart for IR35 compliance**

**Step 1: Identify need for services**



**Step 2: Determine requirements:** The lead client officer (LCO) should consider what services are required, how they should be delivered to the end user, and what the relationship will be between the contractor's company and the client



**Step 3: Procurement request Form:** For expenditure over £25k, the LCO should ensure the Procurement Request Form process is completed before proceeding



**Step 4: Determine whether the engagement falls within or outside of IR35.** The LCO should use the HMRC's online tool to check the employment status for tax (CEST) and email/print off the results and file as a record <https://www.gov.uk/guidance/check-employment-status-for-tax>

It is advisable to consult with Procurement at this stage if assistance is needed.



**Step 5a: Not within IR35.** If the result is outside of IR35, the LCO should proceed to engagement as detailed in Step 6.

**Step 5b: Within IR35:** If the result is that the engagement is within IR35, the LCO should not proceed with the engagement via a contract or purchase order, but seek further advice from their line manager. In such cases, the engagement is likely to require a PAYE or other solution. In exceptional cases, it may be possible for the need to be fulfilled on a business to business basis instead – advice on this should be sought from the Assistant Director, Procurement and Commercial.



**Step 6a: Engagement - if under £25k and if a Purchase Order is the preferred route**, the LCO should ensure a requisition is raised for the engagement ensuring the details in the requisition and purchase order reflect those of the CEST result and the applicable guidance in Appendix 1 of this policy.

OR

**Step 6b: Engagement - if over £25k**, the LCO should arrange for a Procurement Request Form (PRF) to be submitted via Hotwire ensuring a copy of the CEST results and the relevant treatments (from the guidance in Appendix 1 of this policy) for the contract are included in the requirement and passed to Procurement



**Step 7: Procurement** - The procurement manager will check that the contract is compliant before seeking competition from the market and before contract award. If requested by the LCO, the procurement manager is also available to check purchase orders under £25k for compliance.



**Step 8a: During service delivery, for purchase orders**, The LCO must ensure the basis of the relationship with the contractor remains compliant with the CEST result throughout the duration of the engagement. If a change is made to the order, resulting in a change to the basis of the relationship, repeat the CEST process in Step 4.

OR

**Step 8b: During service delivery, for contracts**, managers must ensure the engagement of the contractor is managed in accordance with the contract and CEST result. If a change is made to the contract, resulting in a change to the basis of the relationship, repeat the CEST process in Step 4.

## 8 Umbrella companies

8.1 An umbrella company is a pay structure vehicle which deducts the taxes from its employee. However, a contractor's IR35 status is not dependant on their internal payment structure arrangements. The decision whether the engagement of a contractor by the public sector falls inside IR35 is solely dependant on the relationship between the worker and the end client. If an engagement of a contractor falls within IR35, then regardless whether it is a personal services company or an umbrella company, the liability for the payment of taxes would fall to the client.

In such cases, it is not the policy of the London Fire Commissioner to engage contractors on any basis where the Commissioner is liable to deduct the tax and National Insurance contributions on behalf of that contractor.

## 9 Further information, guidance and support

9.1 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.

9.2 For complex queries, you should contact the Assistant Director, Procurement and Commercial or a Corporate and Commercial Law Manager from General Counsel's Department.

## Appendix 1 - Guidance list for IR35 compliance

The following are incorporated into LFC's standard terms and conditions of contract for services (available from the Procurement Department).

<b>Treatment of contractual elements</b>	<b>Detailed guidance of contractual treatments</b>
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 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 sub-standard, 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.

## Document history

### Assessments

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

EIA	23/01/2019	SDIA	16/01/2019	HSWIA	22/01/2019	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
Page 10	HSWIA date added.	22/01/2019
Page 5, para 7.7 Page 6, para 9.2	'Head of' title changed to reflect the changes in structure and governance due to the abolition of the London Fire and Emergency Planning Authority.	20/08/2020
Throughout	Minor changes to improve language, reflect the changes to the Procurement thresholds from £10k to £25k and the removal of TRF which has been replaced by a PRF.	20/07/2023

### 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