



Public Procurement Mystery Shopper Scheme – a new statutory obligation to comply

The Mystery Shopper Scheme is an alternative way for suppliers to bring a complaint about poor procurement practice outside of the legal regime. The latest Procurement Policy Note explains that section 40 of the Small Business, Enterprise and Employment Act 2015 affords greater enforcement powers to the Mystery Shopper Scheme and obliges certain contracting authorities to comply with procurement investigations through the provision of assistance, information and documentation.

The Mystery Shopper Scheme

What is the Mystery Shopper Scheme?

The Mystery Shopper Scheme is a service carried out by the Crown Commercial Service on behalf of the Minister for the Cabinet Office (“Mystery Shopper”).

Mystery Shopper allows suppliers to raise concerns about poor procurement practice, both across central government and the wider public sector, by providing direct feedback to government. It has two roles:

- it provides a clear, structured and direct route for suppliers to raise concerns about public procurement practice even when attempts at resolving issues with a contracting authority or a first-tier supplier have failed, and provides feedback to enquirers on their concerns; and
- it takes a proactive approach to compliance through spot checks on procurement processes and documentation.

Who must comply with Mystery Shopper?

The bodies covered by Mystery Shopper are:

- central government departments;
- the wider public sector in England (including local authorities, arms-length government bodies and non-departmental public bodies). However procurements carried out by devolved bodies in Scotland, Northern Ireland and Wales cannot be investigated;
- prime contractors working on government contracts.

How is Mystery Shopper used?

Suppliers can use Mystery Shopper by sending an email to MysteryShopper@crownccommercial.gov.uk or by telephoning the helpdesk on 0345 010 3503. Before doing so, suppliers or potential suppliers must read the terms set out in the Crown Commercial Service ‘Scope and remit of the Mystery Shopper Scheme’ document, to ensure that their case is one in which Mystery Shopper will be willing to intervene.

For central government referrals the aim is to provide a reasoned response to the enquirer within two months, and a response within three months for issues in the wider public sector.

There are a variety of potential outcomes. Mystery Shopper may:

- issue instructions to the contracting authority or prime contractor on how to remedy the specific problem for central government issues;
- work with a lead authority to remedy wider public sector issues;
- issue a set of recommendations to help a central government body resolve shortcomings in a “live” procurement exercise and/or avoid similar issues in the future. However Mystery Shopper does not have the power to require a contracting authority to delay or suspend an award of a contract.

A new statutory requirement to comply with Mystery Shopper

Section 40 of the Small Business, Enterprise and Employment Act 2015 (the “Act”) came into force on 26 May 2015 and strengthens Mystery Shopper by giving it a statutory power to carry out procurement investigations.

However, note that the application of section 40 of the Act is more limited than Mystery Shopper and does not apply to central government departments, their arms-length bodies and non-departmental public bodies.

Obligations for contracting authorities

When an investigation starts, Mystery Shopper will ask the contracting authority to respond of its own accord. If the contracting authority fails to do so, or fails to assist Mystery Shopper with its investigation, section 40 of the Act gives Mystery Shopper the power to issue a notice requiring the contracting authority to provide documents or other information in such form or manner as Mystery Shopper directs.

Under section 40 of the Act the contracting authority is then obliged to:

- give reasonable assistance to Mystery Shopper with its investigation; and
- comply with the formal notice requiring the provision of documents and/or information within 30 calendar days of its issue.

Mystery Shopper also has the power under section 40 of the Act to publish the results of its investigation.

Future Impact

Section 40 of the Act strengthens Mystery Shopper by giving it a statutory basis. Contracting authorities will be encouraged to comply with Mystery Shopper investigations for two primary reasons:

- non-compliance will be tackled by the issue of a formal statutory notice obliging the contracting authority to comply;
- continued non-compliance can be addressed by Mystery Shopper “naming and shaming” the contracting authority in the published results of its investigation.

However the greater powers afforded to Mystery Shopper are limited in their application and the mere risk of receiving a bad reputation may not be sufficient to ensure that contracting authorities observe their new statutory obligations.

To view the guidance notes on Mystery Shopper from the Crown Commercial Service, please click the links below.

[Procurement Policy Note – Requirements for contracting authorities to assist with procurement investigations](#)

[Scope and Remit of the Mystery Shopper Scheme](#)

Contacts



Stephanie Rickard

Legal Director

+44 (0) 117 902 6682

stephanie.rickard@burges-salmon.com



Melissa Jennings

Trainee Solicitor

+44 (0) 117 902 7780

melissa.jennings@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

Burges Salmon LLP is a limited liability partnership registered in England and Wales (LLP number OC307212), and is authorised and regulated by the Solicitors Regulation Authority. It is also regulated by the Law Society of Scotland. Its registered office is at One Glass Wharf, Bristol BS2 0ZX. A list of the members may be inspected at its registered office. Further information about Burges Salmon entities, including details of their regulators, is set out in the “Who we are” section of the Burges Salmon website at www.burges-salmon.com.

© Burges Salmon LLP 2015. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.