

# **Defence and Security Public Contracts Regulations 2011**

## **Chapter 14 - Subcontracting under the DSPCR**

### **Purpose**

1. This guidance explains the subcontracting provisions contained within the Defence and Security Public Contracts Regulations (DSPCR) 2011.
2. Specifically, the guidance explains what we mean by subcontracting under the DSPCR, what the legal framework is and how procurers and successful tenderers should implement the subcontracting provisions for contracts that fall within the scope of the DSPCR.

### **What is subcontracting under the DSPCR?**

3. By “subcontracting under the DSPCR”, we mean the practice where the procurer obliges a successful tenderer to award subcontract(s) to third parties using the subcontracting provisions in the DSPCR.

### **What is the legal framework?**

4. The subcontracting provisions in the DSPCR are set out at Regulation 37 (Subcontracting) and Regulations 40 to 45 (Rules applicable to subcontracting) of the DSPCR.

### **What is the general approach?**

5. You may use the subcontracting provisions at Regulations 37 and 40 to 45 regardless of which procurement procedure you follow for the award of the main contract. However, the negotiated and competitive dialogue procedures allow you to discuss the impact of the subcontracting provisions with suppliers and therefore reduce the risk of causing unnecessary harm to an existing supply chain.
6. These subcontracting provisions strictly adhere to the principles of non-discrimination and equality of treatment. This means that, for requirements you award using the DSPCR, procurers should be mindful that:
  - a. you may not request that successful tenderer(s) award subcontracts to specific subcontractors or to subcontractors of a specific nationality;
  - b. if a successful tenderer identifies that they intend to subcontract part of the work to a third party (or parties), a procurer may require the successful tenderer(s) to award all or specific subcontract(s) under Regulations 40 to 45. In these cases:

- (1) where the conditions of Regulation 43 (Award of a subcontract without publication of a subcontract notice) are met, successful tenderers may award subcontracts without publication of a subcontract notice in accordance with the rules set out in Regulation 43 (although, even if advertising is not required, there is no restriction on successful tenderers publishing a sub-contract notice);
  - (2) where the conditions of Regulation 43 are not met, the successful tenderer must organise any subcontract awards in a fair and transparent way under the terms of Regulation 42 (Thresholds and rules on advertising);
- c. if a procurer does not require a successful tenderer to award subcontracts under Regulations 40 to 45, the successful tenderer should be free to select its subcontractor(s) and should not be required to use criteria to select its subcontractors that will discriminate on the grounds of nationality.

## **What are “third parties”?**

7. The obligation to award subcontracts under Regulations 40 to 45 only applies where the successful tenderer indicated that they intend to subcontract part of the contract to third parties.
8. Regulation 37(7) provides that related undertakings (defined in Regulation 37(8)) and groups of undertakings, which come into being to obtain the contract, are not third parties. For the purposes of the DSPCR, you should not consider subsidiaries of successful tenderers to be third parties.
9. This means that where you award a contract to a consortium or group of suppliers (whether they take a specific legal form or not) any contracts made between the participants in these groups, or with undertakings which are related to them, do not trigger the subcontracting provisions of Regulation 37(3).
10. If the successful tenderer indicates the intention to award subcontracts to an unrelated undertaking, the procurer may oblige the successful tenderer to award those subcontracts (or certain of those subcontracts) using the provisions set out in Regulations 40 to 45.

## **Requesting information from tenderers**

11. Procurers may ask tenderers to provide in their tender the information set out in Regulation 37(2), including:
  - a. information regarding any part of the contract that they intend to subcontract;
  - b. the proposed subcontractors details; and
  - c. the subject of the proposed subcontract.
12. Procurers may require tenderers to indicate any change occurring in relation to any proposed subcontracting, whether during the award procedure or during the execution of the contract, in accordance with Regulation 37(2). If required,

they should also include these obligations as contract performance conditions in the resulting contract.

13. Requesting information at paragraphs 11 and 12 is likely to be the default position except where the requirement is so straightforward that it is unlikely to require work to be subcontracted.

### **Subcontracting requirements to consider at the outset**

14. At the outset of a procurement process, procurers must consider whether the successful tenderer has to apply any of the selection criteria used in selecting tenderers for the main contract during the selection of subcontractors. If so, then they should identify them in the contract notice or contract documents, or both.

15. Procurers must also consider if it is likely that the successful tenderer will be able to make savings by awarding subcontracts under Regulations 40 to 45. This is an important consideration as there will be costs and time incurred by the successful tenderer in holding a competition, costs which the tenderer may pass onto the procurer in the contract price.

16. For the non-competitive negotiated procedure, procurers must consider whether to ask the tenderer at the start of the procedure (so that a decision can be made on the need to apply Part 7) to provide information on:

- a. packages of work being carried out by in-house facilities;
- b. subcontract competition proposals, including any rationale for proposed non-competitive procurement;
- c. long-term strategic relationships in place across potential supply networks that may affect or extend beyond the requirement in question.

17. Your decisions on these subcontracting requirements must be proportionate to the nature and scale of the contract requirements. If the procurer uses a subcontracting requirement referred to above, they should indicate this as early as possible in the procurement process.

### **What are the subcontracting options under DSPCR?**

18. The DSPCR allow procurers a choice of two options for subcontracting which they may impose on successful tenderers. However, procurers are not required to use either of these two options. Regardless of whether none, any, or which option you choose to use, or partially use, you must not require the successful tenderers to discriminate against potential subcontractors on grounds of nationality.

#### **Option 1 – Procurer scrutinises the supply network**

19. Under this measure the successful tenderer:
- a. decides which part(s) of the main contract will be subcontracted; and
  - b. selects the subcontractor(s).

20. The procurer accepts the tenderer's subcontracting proposal, subject to the procurer's ability to verify that the proposed subcontractor meets the selection criteria, which the procurer has indicated in the contract documents, will apply to subcontracts.

## **Option 2 – Require the successful tenderer to award subcontracts in accordance with Regulations 40 to 45**

21. Under this measure, and in accordance with Regulation 37(3):
- a. the successful tenderer decides which parts of the main contract to subcontract, and proposes the subcontractor it wishes to perform the work;
  - b. the procurer scrutinises the list of proposed subcontracts and instructs the successful tenderer to let some or all the subcontracts under the terms of Regulations 40 to 45.

## **Choosing the right subcontracting option**

### **General issues**

22. As the procurer, you are the ultimate customer. Therefore, you have an overall responsibility to secure effective capability and value for money and a legitimate interest in the behaviour of the supply chain if that will affect the outcome of the procurement.

23. However, you should consider carefully any action that may alter the successful tenderer's proposed supply chain and satisfy yourself that action you take is objective and justified. You should also consider the effect on the tender and the timescales for performance recognising that the successful tenderer may have based its tender on a presumption of sourcing work from particular suppliers.

24. Procurers also need to take into account the additional bureaucracy and cost associated with requiring successful tenderers to place subcontracts under the terms of Regulations 40 to 45.

### **Ensuring SME participation in the main contract**

25. Procurers should therefore only consider using these measures where the main contract is greater than £10M so that Small or Medium Enterprises (SME) are not discouraged from bidding for contract opportunities. The public consultation on the introduction of the DSPCR identified that SMEs are unlikely to be able to undertake contracts incorporating the requirements of Regulations 40 to 45.

### **Factors to consider**

26. In deciding whether to mandate that the successful tenderer must advertise their subcontracting requirements you may wish to consider the following points:
- a. The nature of the contract:
    - (1) Does the requirement lend itself to creating subcontract opportunities? This may be the case for certain works contracts. If so, mandating subcontracting to third parties may be appropriate.

- (2) Is the requirement for a complex or specialist requirement, e.g. system integration for high tech defence equipment? In this case mandating subcontracting to third parties may not be appropriate, as it could be impractical and may disrupt an existing and fragile supply chain.
- b. The structure of the market, such as the:
- (1) size and value of the market;
  - (2) number and market share of potential subcontractors;
  - (3) level and forms of competition in the specific market sector;
  - (4) extent of available products or services that could meet the subcontracting requirement; and
  - (5) ease and cost of entry into the market.
- c. Subcontracting under Regulations 40 to 45 will work best in highly competitive markets where there are many suppliers of similar products, and the contract value is sufficient that there is a real prospect of achieving a saving or better value for money.
- d. Subcontracting under Regulations 40 to 45 is unlikely to deliver value for money if the market structure results in:
- (1) several large sellers who have some control over prices, e.g. through specialist technical knowledge in sectors that have high entry costs; or
  - (2) a single seller with considerable control over supply and prices, e.g. through exclusive rights or unique technical knowledge.

## **Assessing the impact of the subcontracting requirement**

27. Where procurers identify a proposed subcontract during a negotiated or competitive dialogue procedure, which they believe the tenderers should subcontract under Regulations 40 to 45, they should seek an impact assessment from the tenderer. Before exercising your right under Option 2 above, which you should only do exceptionally, procurers must understand the effect of their decisions on the tenderer and the timescales for performance.

## **When to apply the subcontracting option**

### **Competitive prime contract**

28. In a competitive procurement, you will usually follow Option 1 and allow the successful tenderer the freedom to select its own subcontractors in accordance with Regulation 37(1).

29. This is because in competitive procurements, market forces will usually drive the tenderer to seek subcontractors who will deliver the best value for money solutions in order that they can submit the most economically advantageous or lowest price tender.

30. Under Option 1, you have the right to scrutinise the list of proposed subcontracts and the selection criteria used in selecting tenderers for the main contract. Also under Regulation 37(4), you have the right to reject a proposed subcontractor although you must base any rejection upon the selection criteria set out for the award of the main contract.

31. Any attempt by the procurer to alter the tenderer's subcontract network (or supply chain) may lead to an increase in cost and introduce delays. It may also increase the procurer's liability (see below).

32. Where procurers are considering using Option 2 for competitive procurements they should seek commercial policy advice from within their organisation, and legal advice, where appropriate.

### **Non-competitive prime contract**

33. Where you are running a non-competitive procurement under the negotiated procedure you may wish to use Option 1 but reserve your right to supplement it with Option 2 to consider, exceptionally, mandating that some or all of the identified subcontracts are let in accordance with Regulations 40 to 45 of the DSPCR.

## **How to apply the subcontracting provisions**

### **What to put in the contract notice**

34. Procurers should indicate in the contract notice whether or not they may oblige successful tenderers to advertise and award any or all of the elements of work that they propose to subcontract. This applies to all procedures involving the publication of a contract notice (restricted procedure, competitive negotiated procedure or competitive dialogue).

35. If you award the main contract using the non-competitive negotiated procedure, you may publish the subcontracting requirements in a Voluntary Ex-Ante Transparency Notice (VEAT) (also known in the Ministry of Defence (MOD) as a Voluntary Transparency Notice (VTN)), sent to the Official Journal of the European Union (OJEU). In any case, the procurer must publish the information on the subcontracting requirements in the contract award notice sent to OJEU.

36. Procurers may also ask tenderers to indicate any changes which occur with regard to their subcontracting proposals during the contract award procedure (see Regulation 37(2)(b)).

37. If procurers wish to use Options 1 or 2, you must indicate in the contract notice:

- a. selection criteria used in selecting tenderers for the main contract and which selection criteria may lead to rejection of a proposed subcontractor by the procuring department;
- b. the information which is required in order to assess whether to reject proposed subcontractors in accordance with (a) above; and
- c. the details set out in Regulation 37(2)(a) in order to assess whether to require tenderers to award subcontracts under Regulation 37(3).

38. In view of the Treaty on the Functioning of the European Union (TFEU) principle of transparency, and in the interest of practicability, it is important that you inform the successful tenderer clearly and comprehensively of your subcontracting requirements as early as possible in the procurement process.

39. If procurers have chosen to use Option 1 or 2, the procurer should give the successful tenderer as much information as possible about the criteria the procurer wants the tenderer to apply for selecting its subcontractors.

### **What to expect in the tender**

40. If the procurer has requested that tenderers provide information on subcontracts, tenderers should include the following information in their tenders:

- a. which parts of the contract they intend to subcontract;
- b. the details of any proposed subcontractor (if these are already known); and
- c. the subject of the subcontracts they intend to award.

41. In instances where a group of suppliers has formed a group to obtain the contract the tender should include an exhaustive list of the members of the group and their related undertakings.

### **Examination of the tender**

42. In examining the tenders, procurers will first verify whether the tenderers have provided all of the information requested in the contract documentation.

43. If the tender fulfils these basic conditions, the next steps depend on which option the procurer has chosen. If the successful tenderer selects its subcontractors, procurers still have the right to reject individual subcontractors (see Regulation 37 (4)).

44. The procurer can therefore immediately go ahead and check the suitability of proposed subcontractors. You must base any rejection on criteria used for the qualitative selection of the tenderers for the main contract.

45. If the procurer rejects a proposed subcontractor it must send the tenderer a written justification, setting out why it considers that the subcontractor does not meet the criteria except where there are grounds to withhold the disclosure of information in accordance with Regulation 33(11)(a) to (d) (Information about contract award procedures).

46. Where you have specified in the contract notice that some or all of the subcontracts should be awarded in accordance with Regulations 40 to 45 (i.e. Option 2) you can assess whether you require the tenderer to award all or selected subcontracts in accordance with those Regulations.

47. If you identified at the outset that you may require tenderers to award subcontracts to third parties under Regulations 40 to 45 but did not identify which subcontracts this requirement will apply to, you should tell tenderers at this stage.

48. While there are no formal rules when deciding which subcontracts should be awarded under Regulations 40 to 45, procurers should be aware that their

decision must comply with the principle of equal treatment of tenderers, (see Regulation 41 (Principles)).

49. This means that you could nominate the relevant subcontracts on a case-by-case basis, but not in an arbitrary manner. The procurer should therefore determine an objective, non-discriminatory approach and provide as much information as possible on the criteria for its decision. Using part of the award criteria for the contract is unlikely to be controversial.

50. In particular, you must not base your decision on the nationality of the tenderer's initial choice of subcontractors.

51. Best practice is to decide which subcontracts the tenderer should award in accordance with Regulations 40 to 45 as early as possible in the contract award procedure. Consequently, in a restricted procedure, the procurer should communicate its decision to the tenderers immediately after examining the tenders.

52. In negotiated or competitive dialogue procedures the situation is slightly different. According to recital 40 of the Directive:

“the contracting authority / entity and the tenderers may discuss subcontracting requirements or recommendations with a view to ensuring that the contracting authority / entity is fully informed on the impact of different subcontracting options on, in particular, cost, quality or risk.”

53. In these procedures, you would determine the exact content of subcontracting obligations at a later stage, following negotiations between the parties.

## **The supplier's subcontracting regulations**

### **Principles**

54. Once you award the contract, the successful tenderer is obliged to apply the rules set out in Regulations 40 to 45 to any subcontracts that the procurer has decided must be awarded using Regulations 40 to 45.

55. The successful tenderer normally places subcontracts under the DSPCR after the award of the main contract. However, it is also possible for a tenderer to select its subcontractors during the preparation of the tender, using the procedures in Regulations 40 to 45. Tenderers would then conclude these subcontracts under the condition that the subcontract enters into force when the procurer awards the tenderer the main contract.

56. The successful tenderer may also fulfil the subcontracting requirement by awarding subcontracts using a framework agreement that the successful tenderer has concluded in accordance with Regulations 40 to 45.

57. Successful tenderers are required to respect the basic principles of transparency, fairness and equal treatment for the award of subcontracts under Regulations 40 to 45.

58. The third party subcontractors initially proposed by the successful tenderer are free to participate in any competitive procedures that the successful tenderer

subsequently runs, but note the definition of, and issues relating to, third parties above.

59. Where a successful tenderer who is also a contracting authority (including a utility), within the meaning of the DSPCR, is to award a subcontract, Regulation 45 (Rules to be applied) requires them to comply with the rules relating to main contracts set out in Parts 1 to 8 of the DSPCR.

### **Subcontract notice - Subcontracts above the threshold**

60. If a subcontract has a value above the threshold for applying the DSPCR, the successful tenderer(s) should submit a [Subcontract notice](#) to the Publication Office of the European Union (EU), which will publish the notice in the Official Journal of the European Union (OJEU) and in Tenders Electronic Daily<sup>1</sup> (TED).

61. Regulation 42 details the notice requirements that will contain basic information on the subcontract opportunity. In particular, it should contain the criteria for qualitative selection prescribed by the procurer, as well as any other criteria the successful tenderer intends to apply in accordance with Regulation 44 (Criteria for qualitative selection of subcontractors).

62. When a subcontract meets the circumstances described in Regulation 43, the DSPCR does not require the successful tenderer to publish a subcontract notice in the OJEU. Regulation 43 is concerned only with the circumstances when publishing a subcontract notice is not required and does not mandate any other process.

### **Subcontracts below the threshold**

63. For subcontracts below the threshold for applying the Regulations, there is no obligation to publish a subcontract notice. However, successful tenders still have to adhere to the principles of the TFEU regarding transparency and competition when awarding subcontracts.

### **Framework agreements**

64. The process for award of framework agreements allows the tenderer to select their supply network in a transparent and non-discriminatory manner. At the same time, they give subcontractors, in particular SMEs, an opportunity to build up cross-border business relationships and to become part of the supply chain of big system integrators from other EU countries. They can therefore be an important instrument for opening up established supply networks.

65. According to Regulation 42, successful tenderers may fulfil subcontracting requirements by awarding call-off subcontracts from a framework agreement that tenderer concluded in accordance with the rules set out in Regulations 40 to 45.

66. This is subject to the proviso that they limit the duration of the framework agreement to seven years, except in exceptional circumstances (see Regulation

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<sup>1</sup> Tenders Electronic Daily, the online version of the 'Supplement to the Official Journal of the European Union', <http://ted.europa.eu>.

42(7)), and do not use it improperly or in such a way that prevents, restricts or distorts competition.

## **Advertising of subcontracting opportunities**

67. Successful tenderers may wish to use [eNotices](#), an on-line tool for, among other things, preparing Subcontract notices and publishing them in the OJEU. The Government's Contract Finder portal for contract opportunities will automatically extract and publish notices published in the OJEU.

68. eNotices also helps you to check for possible errors in notices and for the compliance with the DSPCR. [SIMAP](#) also contains useful information (e.g. on codes and nomenclatures) that will help successful tenderers to comply with the DSPCR.

69. If MOD procurers require a successful tenderer to use Regulations 40 to 44, they should also require them to advertise any subcontract opportunities on [Defence Contracts Online](#). However, you must advise them not to publish national adverts before they publish the subcontract notice in OJEU.

## **Selection of subcontractors**

### **Procurement Procedures**

70. Successful tenderers are only required to apply a limited set of rules to the award of subcontracts to which Regulations 40 to 45 applies.

- a. Regulation 41 (Principles) states that 'the successful tenderer shall act transparently and treat all potential subcontractors in an equal and non-discriminatory way';
- b. Procurers may prescribe, or successful tenderers specify, or both, the criteria for qualitative selection of subcontractors. In all cases, the criteria must be:
  - (1) objective and non-discriminatory; and
  - (2) consistent with the criteria applied by the procurer for the selection of the tenderers for the main contract.
- c. The capabilities required must directly relate to the subject of the subcontract, and the levels of ability required must be commensurate with it.

71. Apart from these requirements, the successful tenderer is responsible for defining the award criteria and organising the procedure for awarding the subcontracts. Where the DSPCR requires publication of a subcontract notice in the OJEU, successful tenderers are not required to apply the same formal procedures that apply to the procurer except where they are also a contracting authority or utility.

## **Direction for subcontract awards**

72. The DSPCR does not allow procurers to direct a successful tenderer to award subcontracts to specific subcontractors or to subcontractors of a specific nationality.

73. If the procurer wishes to direct a successful tenderer(s) to award subcontracts to a specific subcontractor then they must justify that direction under Article 346(1)(b) TFEU or another treaty exemption as a measure necessary for the protection of essential security interests.

74. If the procurer requires a successful tenderer to use the procurer's in-house capability to deliver part of the contract (e.g. for maintenance or upgrade or support services) under the DSPCR the procurer cannot direct the tenderer to choose the in-house capability as a subcontractor.

75. Instead, the procurer should include its in-house capability as Government Furnished Assets (GFA)<sup>2</sup>, supplied to the successful tenderer in support of the contract. You must identify the mandatory use of GFA in the contract notice. In the defence field, GFA may be where the procurer requires the MOD Defence Support Group to provide equipment support or where the MOD Guard Service must provide site security.

## **Rejection of subcontractors**

76. Once the successful tenderer has selected the subcontractor(s), the procurer will verify the suitability of the selected subcontractor(s). You must base this verification on criteria used for the qualitative selection of the tenderers for the main contract.

77. In practice, the selection criteria you use to reject subcontractors will be a subset of the selection criteria used in the award of the main contract since not all of the original selection criteria may be relevant for a particular proposed subcontractor or its activity.

78. In assessing whether to reject proposed subcontractors during the performance of the main contract, procurers should assess the position carefully as rejection at this stage could potentially increase performance risk, complicate project management and result in delays and increased cost. It is very important that you objectively justify any decision to reject and record the decision on a registered file.

79. If the procurer rejects a proposed subcontractor, it must communicate its decision to the successful tenderer as soon as possible. It must also produce a written justification, setting out why it considers that the subcontractor does not meet the criteria, except in the circumstances set out in Regulation 33(11) (Grounds for withholding information) which include where the release of the

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<sup>2</sup> Government Furnished Assets (GFA) are Government owned assets (e.g. equipment, material, resources) supplied to industry in support of Government contracts. Performance risk in that respect rests with Government.

information would be contrary to the public interest and, in particular, defence and security interests.

## **Liability**

80. Procurers should note that while Article 21(7) of the Directive states that the subcontracting requirements 'shall be without prejudice to the question of the principal economic operator's liability', this does not mean that the successful tenderer will always bear the sole responsibility for liability if the procurer invokes the subcontracting obligations.

81. You will need to carefully assess liability for subcontracting and address it in the contract. One key issue will be who should bear the liability arising from the rejection of a subcontractor during the term of the contract. In order to safeguard the position of the procurer, it is important that commercial staff seek advice from their commercial policy and legal advisers before rejecting a subcontractor.

82. In these cases, factors such as the timing of and reasons for rejection will be important, as there would be a strong argument that, where the rejected subcontractor did not meet the procurer's published criteria, the liability should rest with the successful tenderer.

83. Procurers should consider how to allocate risk between the successful tenderer and the procurer in respect of these liabilities. In a negotiated procedure or competitive dialogue, you could determine the exact content of such an arrangement through negotiations between the procurer and the successful tenderer.

## **Remedies**

84. Part 9 (Applications to the court) of the DSPCR sets out the provisions which apply where an aggrieved supplier alleges that there has been a breach of the DSPCR or any other enforceable EU obligation.

85. These remedies provisions only apply in relation to alleged breaches by procurers of the duties they owe to suppliers in the EU. Therefore, a supplier that takes part, or would be interested in taking part, in a competition for a subcontract organised by the successful tenderer cannot seek remedies under Part 9 of the DSPCR against the successful tenderer unless the successful tenderer is also a procurer.

86. Where the procurer specifies in the contract that the successful tenderer is obliged to use Regulations 40 to 45 the procurer may set out what the position will be if the successful tenderer fails to comply with these obligations. Some (but not all) cases may ultimately result in the contractual right to terminate the main contract, if the subcontracting provision is fundamental to the contract performance and the successful tenderer does not remedy the breach within a reasonable time of notice for cure being given by the procurer.

87. Procurers should carefully consider the process they wish to put in place to deal with breaches of the subcontracting obligations by tenderers and ensure that they reflect this in the contractual terms. Liability for costs and delays arising because of a successful tenderer's breach of the subcontracting

obligations should lie with the tenderer. You should seek legal advice where appropriate.

88. Part 9 of the DSPCR does not provide specific remedies for aggrieved subcontractors (or potential subcontractors) against successful tenderers who are not also contracting authorities within the meaning of the DSPCR. To what extent a remedy (if any) will be available will depend on the terms of any contract and the governing law.

89. Procurers should also be aware that tenderers may challenge the procurer where they believe that there has been an infringement of the subcontracting rules during the award of the main contract. For example, where a tenderer considers that the subcontracting requirements set by the procurer go beyond what is admissible under the DSPCR or where a successful tenderer wants to challenge the rejection of a subcontractor.

## **What are the key points to remember?**

1. You should encourage successful tenderers to make voluntary use of competition when they place subcontracts and advertise subcontract opportunities, where appropriate, in the:
  - a. Defence Contracts Online;
  - b. Government’s Contracts Finder portal; and
  - c. Official Journal of the European Union.
2. You may choose to oblige a successful tenderer to advertise and award all or part of its identified subcontracts in accordance with the rules set out in Regulations 40 to 45, where appropriate.
3. When considering obliging the successful tenderer to advertise and award subcontracts under the rules of Regulations 40 to 45 you must first consider:
  - a. if the proposed obligations are relevant to the main contract, and proportionate to the value, nature and complexity of the main contract;
  - b. requiring tenderers to use Regulations 40 to 45 for contracts valued below £10M is likely to discourage SMEs from bidding for the main contract;
  - c. the structure and level of competition in the market;
  - d. security of supply or intellectual property rights issues that would affect subcontract competition; and
  - e. the impact of any subcontract obligation on the tenderer and the timescales for performance.
4. If you decide to require the use of Regulations 40 to 45, you must indicate this (or an intention to consider this option) as early as possible in the procurement procedure and in the contract.
5. You have the right to reject the successful tenderer’s choice of subcontractors but you must base any rejection on the selection criteria for the main contract.
6. For all subcontracts that are not covered by one of the above requirements, the successful tenderer remains free to select its subcontractors
7. If Part 7 applies, you should carefully consider the liability issues arising from rejection of a subcontractor in order to ensure you appropriately cover this contract risk.