

Defence and Security Public Contracts Regulations 2011

Chapter 16 - Conducting the Tendering Exercise

Purpose

1. This guidance explains how the Defence and Security Public Contracts Regulations (DSPCR) 2011 govern the conduct of the tendering exercise.
2. In particular, it explains:
 - a. contract award criteria;
 - b. the issuing of the Invitation to Tender (ITT), Invitation to Negotiate (ITN) or Invitation to Participate in Dialogue (ITPD) with other contract documents;
 - c. how to assess tenders against the contract award criteria;
 - d. the conduct of post-tender negotiations, where permitted; and
 - e. legally compliant methods to choose the winning tenderer.

What is conducting the tendering exercise?

3. By conducting the tendering exercise, we mean the process where:
 - a. procurers prepare the tender documentation, invite the selected suppliers to tender, negotiate or participate in dialogue (depending on the chosen procurement procedure);
 - b. suppliers make or submit a tender to undertake work or supply goods or perform services at a stated price; and
 - c. the procurer evaluates the tenders received against the contract award criteria to assess which supplier to award the contract to.
4. Mistakes or omissions by the procurer during tendering may result in a legal challenge from aggrieved tenderers or suppliers.

What is the legal framework?

5. The DSPCR has the following Regulations on conducting the tendering exercise:
 - a. Regulation 21 (Electronic auctions) provides the rules for use of electronic auctions as part of the contract award procedure;

- b. Regulation 31(1) (Criteria for the award of a contract) sets out the basis on which the award of a contract must be made:
 - (i) “most economically advantageous tender”; or
 - (ii) “lowest price”.

If the award is to be made on the basis of most economically advantageous tender the procurer must use criteria linked to the subject matter of the contract to work this out;

- c. Regulation 31 also deals with abnormally low tenders;
- d. Regulation 32 (Contract award notice) deals with the requirement to publish a contract award notice;
- e. Regulation 33 (Information about contract award procedures) details the information you must give at the contract award stage and the obligation on procurers to keep a record of the contract award;
- f. Regulation 49 (Means of communication) sets out the rules about the means of communication to be used during the tender and contract award stage.

Tender Documents

Preparing the tender documents

- 6. The ITT, ITN or ITPD forms part of the tender documentation you issue to suppliers selected to participate in the procurement following a pre-qualification exercise.
- 7. You must follow the contract award criteria and scoring method you chose and included in the tender documentation and award the contract to the supplier that best meets the stated criteria.
- 8. Procurers will have their own specific guidance for preparing the contract documents along with their own set of ITT, ITN or ITPD documents and instructions for use. Ministry of Defence (MOD) procurers can find further information about preparing the ITT or ITN or ITPD in the [Tender - Preparation and Process Management](#) CPS.

Contract award criteria

Award criteria

- 9. Regulation 31 of the DSPCR sets out the basis on which you may award contracts and the criteria that you may apply.
- 10. When setting the award criteria you must ensure that the Treaty for the Functioning of the European Union ([TFEU](#)) obligations of equal treatment, non-discrimination and transparency are met so as not to prejudice fair competition.

11. Regulation 31 (1) allows procurers to award a contract on the basis of the tenderer's offer which is either:

- a. the "Most Economically Advantageous Tender" (MEAT) from the point of view of the procurer; or
- b. offers the "lowest price".

12. "Lowest price" means after you check the tenders received to ensure they are commercially compliant (generally speaking they meet the minimum specifications and accept all the contract conditions), you only take into consideration the prices offered by commercially compliant tenderers and award the contract to the tenderer who offers the lowest price. No assessment is made of the quality of the bid.

13. MEAT means you assess the tenders received using a variety of objective and non-discriminatory criteria linked to the subject matter of the contract to identify the tender which is best value for money. You cannot use the criteria for any purpose other than identifying the most economically advantageous tender from the point of view of the procurer. It allows you to assess a number of factors including the technical aspects and price of a tender and to rank the tenders in the competition.

14. You must state the basis on which you will assess the tender and award the contract, i.e. whether it is the MEAT or "lowest price", in the contract notice and contract documents.

Most economically advantageous tender

15. Regulation 31 (2) states that in order to determine which is the MEAT, you must use award criteria that is linked to the subject matter of the contract and gives examples of the detailed award criteria. You must publish detailed objectively quantifiable award criteria together with their weighting (or ranking where weighting is not possible for demonstrable reasons) and the method by which you will evaluate them in the contract documents. They may include but are not limited to:

- a. quality;
- b. price;
- c. technical merit;
- d. functional characteristics;
- e. environmental characteristics;
- f. running costs;
- g. life cycle costs;
- h. cost effectiveness;
- i. after-sales service and technical assistance;
- j. delivery date and delivery period or period of completion;

- k. security of supply; and
- l. interoperability and operational characteristics.

This list is not exhaustive.

Life cycle costs criterion

16. Regulation 3 (Definitions) of the DSPCR defines “Life cycle” as meaning “all the possible successive stages of a product, including research and development, industrial development, production, repair, modernisation, modification, maintenance, logistics, training, testing, withdrawal and disposal.”

17. This set of criteria may be particularly relevant where any given stage of the life cycle of the product e.g. withdrawal or disposal is not covered by the contract but may nonetheless have future implications and costs.

Security of supply criterion

18. “Security of supply” criteria considerations could include technical capacity or ability to perform the contract, particularly in times of crisis, and during through-life maintenance, modernisation and adaption of the goods and services the contract covers.

19. You can find further details about establishing “security of supply” selection criteria in Chapter 13 – Security of Supply guidance.

Interoperability and operational characteristics criteria

20. “Interoperability and operational characteristics” award criteria must be clearly related to the relevant technical specification. With regard to operational characteristics, this relates to the operational use of the product. It must relate to the effectiveness of a requirement’s functional characteristics in a given scenario. From a MOD perspective, this may be how a piece of equipment will perform in operational theatre, and might involve using, if appropriate, MOD Modelling and the Combined Operational Effectiveness Investment Appraisal.

Choosing the award criteria

21. The Government’s procurement policy set out in [Managing Public Money](#) (MPM) is to buy the goods, works and services that it needs under a fair and open procurement process, guarding against corruption and seeking to secure value for public funds with due regard to propriety and regularity.

22. Value for money (VFM) is a key concept running through MPM. It means securing the best mix of effectiveness, efficiency and economy in the use of resources and impact on society as a whole over the period of use and disposal of the goods, works or services acquired. Based on the principles set out in MPM, the primary objective of procurers is to choose the compliant tender offering the best VFM solution.

23. For requirements valued below £5M, we advise procurers to limit the award criteria to those you consider essential to the output from the contract. Keeping it simple reduces the opportunity for mistakes that could lead to a legal challenge.
24. Whether you choose MEAT or “lowest price” as contract award criteria to achieve best VFM the criteria must:
- a. be precise, non-discriminatory and not prejudicial to fair competition; and
 - b. not be modified after they and the process for evaluating them have been specified and issued in the contract documents.
25. In the MOD, formulation of the award criteria should be an acquisition team activity.

Disclosing award criteria

26. You must list the award criteria in the tender documentation or, if earlier, in the contract notice but only if it is sufficiently mature. This should include, among other things, the weightings given to each of the criteria and the evaluation process you will use.
27. Once you publish the award criteria, you cannot change them unless there are exceptional circumstances and then only to the extent that you adhere to the procurer’s obligations of equality of treatment, non-discrimination and transparency. Depending on the circumstances, this may mean notifying all bidders of the change and repeating certain steps in the process. In these circumstances, procurers will have to go back to that stage in the procedure where no supplier can argue it has been discriminated against, which may mean re-starting the competition.
28. You can express the weightings as a range where you consider it appropriate in view of the subject matter of the contract. You must however set out how the actual figure, within this range, will be determined. If it is not possible to apply a weighting for demonstrable reasons, the procurer will indicate the criteria in descending order of importance in the contract documents and clearly explain the effect of this order on the evaluation.
29. You must disclose the methods you will use to evaluate tenders in conjunction with the evaluation criteria in order to comply with your obligation to act in a transparent way. If you intend to use specific tender evaluation tools, you must publish this in the contract documents. MOD procurers can find further information about tender evaluation tools in the [Tender - Preparation and Process Management](#) CPS.

Variations

30. Regulation 13 (Variants) covers the rules on variations, which allow you to encourage innovation by permitting tenderers to submit offers which contain variations to the specification set out in the tender documents. If the award criterion is the most economically advantageous tender, you may authorise tenderers to submit variants, where you have indicated this in the contract notice.

31. You must indicate in the tender documentation whether you will consider variant offers and if so, set out the minimum requirements that the variant offers must meet. You consider a variant tender which meets the minimum requirements (and is otherwise compliant) even when it would lead to a service contract rather than a supply contract or vice versa.

Submission of tenders

Information to tenderers

32. The tender documentation must clearly set out how to submit a tender – you must prescribe the method, language, time and place (this also applies to the “invitation to submit a final tender” in the competitive dialogue procedure.)

33. The tender documentation must contain all the provisions and information that tenderers need to submit their tenders, for example, the procedures to follow, contract award criteria, evaluation method, the documents they need to provide, contract terms and conditions to comply with and circumstances in which their tenders may be declared non-compliant. The tender documentation should also set out the consequences of non-compliance.

34. For MOD procurers, the information required is clearly set out in the MOD’s DEFFORM 47 (Invitation to Tender) which states that you must not consider tenders submitted in a different manner.

Tender Deadlines

35. While the procedures provide deadlines for receipt of requests to participate and the receipt of tenders, the DSPCR does not specify a minimum time period between receipt of requests to participate in the procurement and the issue of the contract documents to the tenderers (see Chapter 8 – Procurement Procedures). However, you must avoid any unnecessary delays to issuing of the contract documents, as delays will add to the costs for the tenderers and procurers and may also result in information becoming out of date.

36. The minimum time limits for the receipt of tenders in the restricted procedure are:

- a. 40 days from the date of dispatch of the ITT;
- b. where the procurer publishes a Prior Information Notice (PIN) on the Official Journal of the European Union (OJEU), you may reduce the period to 36 days in general (but not less than 22 days) from the date of dispatch of the ITT (this reduction is only available when there is a minimum of 52 days and a maximum of 12 months between the publication of the PIN and the contract notice on the OJEU);
- c. where contract documents are available online, you may reduce the 40 day or the 36 day period by 5 days;

d. you must extend the above time limits in the circumstances outlined in paragraph 40 below.

37. In the case of the accelerated restricted procedure, the minimum deadline for the receipt of tenders is 10 days from the date of dispatch of the ITT subject to paragraph 40 below.

38. For all procurement procedures, you must calculate the deadlines for submission by counting complete calendar days and the deadline itself must fall on a working day in the country of the procurer. If the deadline does not fall on a working day, you must extend the period to the end of the next working day.

39. The period for tender return must also be sufficient to allow the tenderers to prepare their best bid and so permit effective competitive tendering. You must take into account all the circumstances and in particular the nature and complexity of the requirement when deciding on the deadline. Too short a period may cause tenderers to submit incomplete or ill-prepared tenders.

Tender Boards

40. Procurers will have their own procedures on conducting tender boards. MOD procurers should refer to the [Tender Boards](#) CPS for further information on tender board arrangements, including maintaining confidentiality and dealing with late, incomplete or amended tenders. Tenderers do not need to submit single tenders, when there is no competition, via the Tender Board but direct to the MOD acquisition team.

Electronic auctions

41. Regulation 21 sets out the arrangements for the holding of an electronic auction as part of the contract award procedure.

42. An “electronic auction” is described in the DSPCR as a repetitive on-line process for the electronic presentation of prices to be revised downwards where you will award the contract based on lowest price or of new and improved values of quantifiable elements of tenders, including price where you will award the contract on the basis of most economically advantageous tender.

43. An electronic auction will take place after the initial evaluation of tenders run in accordance with all the principles and requirements referred to above. This enables you to rank tenders using automatic evaluation methods.

44. Except for certain service or works contracts that have as their subject matter “intellectual performance” e.g. the design of works, you may hold an electronic auction:

- a. under the restricted procedure;
 - b. under the negotiated procedure with prior publication of a contract notice;
- and

c. when running a mini-competition among the suppliers on a framework agreement.

45. Procurers may only hold an electronic auction when they can establish the contract specification with precision.

46. You must specify an intention to use an electronic auction in the contract notice. The contract documents must contain certain technical and procedural aspects of how the electronic auction will take place; see Regulation 21(7).

47. Following the initial evaluation of tenders using the published contract award criteria, procurers simultaneously issue an invitation to participate in the electronic auction to all tenderers who submitted admissible bids. The invitation will include details of how to participate in the auction and how you will conduct the process; see Regulation 21(10).

48. During each phase of the auction procurers must communicate to the tenderers sufficient information to allow them to establish their relative ranking at any time.

49. Procurers may close the auction in a number of different ways, e.g. by stating the closure date and time in the invitation to participate, at a specified time after receiving the last bid or on completion of the planned number of phases.

50. There is a requirement set out in Regulation 33(13) for procurers to document the progress of contract award procedures they conduct by electronic means. This applies equally to e-auctions as it does to other types of e-procurement methods.

51. MOD Procurers can find further guidance on electronic auctions in the in [Tender Evaluation](#) CPS.

Means of communication

52. Regulation 49 sets out the rules on the means of communication governing a number of aspects under the DSPCR.

53. The communication rules state that procurers must ensure communication methods, e.g. post, facsimile, e-mail, telephone, etc., are clearly set out in the contract documents.

54. The means of communication you specify must not restrict the access of tenderers to the tender process and the equipment you use for electronic communications must be non-discriminatory, generally available and interoperable with information and communication technology products in general.

55. If you require tenderers to transmit a tender electronically, all relevant information about the equipment and software you will use must be available to tenderers. The equipment you use must comply with the requirements of Regulation 49(6). Furthermore you must ensure that the systems used ensures the integrity and safe storage of the data communicated, that the confidentiality of tenders and requests to be selected to tender or to negotiate the contract is

maintained and that tender responses can only be opened after expiry of the deadline for submission.

Bidders conference

56. You can use a Bidders Conference after sending out the tender documentation to give suppliers the opportunity to ask questions about the tender and award process for complex or new requirements where you can clarify areas of doubt.

57. MOD procurers should refer to the [Tender Preparation topic](#) for further information to ensure the use of a Bidders Conference complies with the principles of transparency, non-discrimination and equality of treatment.

ITT queries

58. Procurers will have their own procedures for responding to ITT queries from suppliers. MOD procurers can find further information in the [Tender - Preparation and Process Management](#) CPS.

Tender evaluation

59. You must evaluate tenders in accordance with the TFEU obligations of transparency, equal opportunity and non-discrimination. The process must be confidential. You must evaluate and score tenders in a consistent manner. You must record each stage of the evaluation process. Procurers will have their own specific procedures for carrying out the assessment of tenders. In the MOD, a tender evaluation panel comprising technical, financial, commercial and other relevant subject matter experts will usually assess tenders.

60. You must consider all tenders and, reach decisions in accordance with the published evaluation criteria. Contracts remain open for acceptance by the MOD in accordance with the tender validity period set out in the contract documents. Subject to your specific obligations under the DSPCR, you must consider the need to:

- a. safeguard the public purse and secure best VFM;
- b. preserve strict equity between all tenderers; and
- c. ensure commercial confidentiality.

61. Throughout the tender assessment process, the award criteria must remain unchanged and you must adhere to the principles of transparency, equal treatment and non-discrimination.

62. Where any competition includes an in-house bid you must treat the in-house tenderer the same as all other tenderers and assess the bid in accordance with the published criteria.

Assessing Technical Standards

63. Where you define the technical specifications in terms of technical standards, you cannot reject a tender solely on the basis that the tenderer's solution does not comply with those standards provided that the tenderer can prove by 'appropriate means' to your satisfaction that the solution satisfies the requirements of the standard in an equivalent manner.

64. 'Appropriate means' may be a technical dossier of the manufacturer or a test report from a recognised body. 'Recognised body' means a test and calibration laboratory or a certification and inspection body which complies with applicable European standards (see Chapter 7 – Technical Specifications).

How is tender evaluation carried out?

65. MOD procurers should refer to [Tender Evaluation](#) CPS for details of how tender evaluations are carried out.

Abnormally low tenders

66. One issue procurers need to look out for in the tender assessment is an offer that is "abnormally low". You may reject an abnormally low offer in accordance with the rules set out in Regulations 31(6) to (9).

67. An offer is considered abnormally low where an offer made in competition which, in the view of the acquisition team, taking account of their knowledge of the market place, their understanding of the requirement and their previous purchasing experience of similar goods or services:

- a. appears much lower compared to the prices of other tenders or their 'should cost' estimate;
- b. is unlikely, even with efficient working, to cover the tenderer's costs; or
- c. seriously calls into question the tenderer's ability to resource and perform the contract satisfactorily.

68. An abnormally low offer brings with it risks for procurers and you should not accept such an offer without detailed and careful consideration.

69. You may reject an abnormally low offer, but before doing so you must:

- a. request, in writing, an explanation of the offer or those parts which you consider contribute to the offer being abnormally low;
- b. take into account the evidence provided in response to your request; and
- c. subsequently verify the offer (or parts of the offer) being abnormally low, with the bidder.

70. Where you establish that a tender is abnormally low because the tenderer has obtained State Aid (see State Aid Article 107 of the TFEU), you may reject the tender on that ground alone if, after consultation with the tenderer, he is unable to

prove, within a reasonable time limit that the aid was granted in a way which is compatible with the TFEU. In accordance with Regulation 31(9), you must send a report justifying the rejection of any abnormally low offer in these circumstances to the European Commission (“the Commission”). Procurers must follow the procedures set out in Chapter 19 – Statistics and Reports for the submission of reports to the Commission.

Post-tender clarifications and negotiations

71. After receipt of all tenders, you must treat tenderers equally and give them the same opportunities for clarification or negotiation in accordance with the procurement procedure selected, noting in particular that no negotiation is permitted under the restricted procedure.

72. You must not act in a manner that is likely to distort fair competition during post-tender negotiations or clarifications as this would breach our TFEU obligation to maintain equality of treatment.

Clarification of the tender

73. You may, in the situations set out below, seek clarification of tenders after the receipt of tenders in the restricted and competitive dialogue procedures, and the receipt of final tenders in the competitive negotiated procedure.

74. You may need to request clarification if the tender:

- a. contains inconsistent or contradictory information on specific issues; or
- b. is not clear when describing what it is offering; or
- c. contains minor mistakes or omissions.

75. Requesting clarification is not and must not lead to negotiation. Procurers must not seek or accept substantial alternations to tenders through a request for clarification, as this would breach our TFEU obligation to maintain equality of treatment. It would breach our TFEU obligation to, among other things:

- a. allow a non-compliant tender to be brought into compliance with the mandatory technical specifications;
- b. allow a change in the price quoted in the tender price (except for correction of any arithmetical errors discovered during the tender evaluation).

76. Any request for clarification, and the tenderer’s reply, must be in writing.

77. The tender board (or if there is no tender board, the acquisition team) must agree the clarification request before it is sent to the tenderer. The chairperson of the tender board (or if there is no tender board, the commercial officer) will send the clarification request. Other individual members of the acquisition team must not contact the tenderers directly in order to seek clarification of tenders.

78. You must summarise the clarification request and the tenderer’s reply in detail in the tender evaluation report, with a clear indication of whether the answers are

satisfactory to the tender board, and if not why not. You should annex any exchanged correspondence to the tender evaluation report.

The restricted procedure

79. After the receipt of tenders under the restricted procedure, you can seek clarification or supplementary information from tenderers on the content of tenders. You may also provide clarification on your requirements.

80. You cannot negotiate any aspects of the contract under the restricted procedure, as it is likely to distort competition.

The competitive negotiated procedure

81. Under the competitive negotiated procedure, you are expressly allowed to negotiate and conduct iterative tendering. You should invite tenderers to submit tenders that form the basis of post-tender negotiations, which will adapt the tenders to meet the procurers' requirements.

82. The aim of post-tender negotiations under the competitive negotiated procedure is to improve, in value for money terms, the tender submitted by the leading tenderer by adapting the tenders to the requirements specified in the contract documents. You should not award a contract until you have agreed a satisfactory price and acceptable terms and conditions.

83. You may also conduct the process in successive stages in order to reduce the number of tenders to negotiate by applying the award criteria in the contract documents.

84. As negotiations progress, you may (where this is permitted in the ITN) ask tenderers to submit a Revise Or Confirm Offer (ROCO). You would issue ROCO invitations if there are many issues to resolve and all, or most, of the tenderers remain in the competition. ROCO invitations detail either or both of the following:

- a. the specific areas requiring attention (tailored to suit each tenderer if necessary);
- b. additional or amended information from the procurer that the tenderer needs to be aware of when re-submitting its offer.

85. You may also ask (where permitted in the ITN) tenderers to submit a Best And Final Offer (BAFO). The aim of a BAFO is to obtain better VFM through a further round of tendering with all remaining tenderers. Normally, the emphasis will be on securing a price reduction, but this should not preclude seeking other improvements, e.g. delivery or performance.

86. Importantly, during the negotiations you should ensure equal treatment among all tenderers and should not provide information in a manner that may discriminate or give one or more tenderers advantage over others. In addition, you must put safeguards in place to prevent the disclosure by you to tenderers of their

commercially sensitive and confidential information including technical solutions protected by patents or copyright as well as know-how or innovative ideas.

87. MOD procurers must consult the [Tender Evaluation](#) CPS before considering the use of a BAFO or ROCO.

The competitive dialogue procedure

88. The competitive dialogue procedure allows for a formal, structured dialogue phase with pre-qualified tenderers. You must specify the contract award criteria in the ITPD you issue to tenderers to allow for the opportunity to dialogue or negotiate any aspect of the contract before tenderers submit final tenders.

89. Dialogue formally closes when you identify one or more fully matured solution(s) after down-selection (if you intend to and have set out the down-selection process in your ITPD). You then issue a final tender document, the Invitation to Submit Final Bids (ITSFB), to the remaining tenderers enabling them to prepare a final bid. On receipt of the final bids, you cannot conduct any further dialogue or negotiation though you may clarify and fine-tune the tenders.

90. The same obligations regarding distortion of competition, equality of treatment and confidentiality apply to the dialogue and negotiations you conduct under the competitive dialogue procedure as applied to all procurement processes.

Recording communications

91. You must record all post-tender communications whether in the form of clarification or negotiation. This increases certainty in the process and reduces the risk of legal challenge to a contract award decision. Procurers must conduct proceedings in a manner that is not only fair, but which all tenderers can see is fair.

Absence of Tenders, Insufficient Numbers to Ensure Genuine Competition or No Compliant Bids

No responses to the Contract Notice

92. If you receive no responses or no suitable response to an OJEU notice (i.e. no applications from suppliers who meet the minimum standards set in the DPQQ or who is excluded under regulation 23), you have the following options:

- a. review the scope of the requirement set out in the contract notice and if possible/necessary, withdraw the original advert and issue a revised contract notice with the intention of generating more interest from the market;
- b. use the negotiated procedure without prior publication of a contract notice (see Reg. 16(1)(a)(i) - DSPCR 2011) with known supplier(s) who you believe could meet the requirement. The scope of the initially advertised requirement and/or the terms of the contract must not be altered during any subsequent negotiations. In accordance with MOD policy, a VEAT (VTN) and referral to [CLS-CL](#) would be required in this case.

Insufficient Number of Responses to the Contract Notice

93. The restricted, competitive negotiated and competitive dialogue procedures all require the contracting authority to ensure that the number of economic operators who are invited to tender, negotiate or take part in dialogue is both sufficient to ensure genuine competition and is at least equal to the minimum number specified in the contract notice.

94. In the event that after carrying out the selection exercise, the number of economic operators that you are able to invite to tender, negotiate or take part in dialogue is less than the stated minimum number, you can continue the award procedure with only those economic operators who did pass the selection exercise, provided that there are still sufficient numbers to ensure genuine competition. Note that the rules governing the procurement still apply, e.g. you are not permitted to negotiate contractual changes in a competition run under the restricted procedure.

95. What is meant by ensuring genuine competition differs in each case and must be assessed on the basis of the characteristics and nature of the contract in question, taking into account matters such as the number of tenders needed to reduce the risk of collusion and the likelihood of invited tenderers within the particular market actually submitting a tender. Note that the minimum number required by the DSPCR, in respect of each of the procedures is 3, although you are free to increase this. When there is only one economic operator clearly there is no competition at all.

96. What do you do if the number of suppliers who respond to the advert or who meet the selection criteria and/or the minimum levels of ability is too low to ensure genuine competition (including when there is only one bidder?). This is a difficult area and you are advised to seek legal advice, MOD procurers are advised to contact [CLS-CL](#).

97. Your options are:-

- a. Cancel the procedure and start again. This differs from the option set out in the next paragraph as you now have the opportunity to review and revise the requirement and the sourcing strategy, including the mandatory selection criteria.
- b. Suspend the procedure and re-advertise under Regulation 17(13), 18(15) or 19(16) in the hope of achieving a better response from the market. You should however consider the potential reasons for the low interest. Perhaps the requirement itself was responsible or the minimum thresholds of the selection procedure were set too high. Note that if you take this option, you are not permitted to make any amendments to the procurement documents and you must invite the bidder(s) who passed the initial selection exercise to participate.

No responses or no compliant responses to an ITT

98. You may be faced with the situation where although a sufficient number of suppliers passed through the selection stage, you receive no tenders at all or those

received are irregular, unacceptable or unsuitable. A tender is deemed irregular where it fails to comply with the tender documents, is submitted late, where there is evidence of corruption or collusion or has been found to be abnormally low. A tender is unsuitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents. This will include where it exceeds the disclosed maximum price. An unacceptable tender is one submitted by a tenderer who fails to meet the MoD's minimum selection criteria.

99. Again, this is a difficult area and you are advised to seek legal advice, MOD procurers are advised to contact [CLS-CL](#).

100. In this scenario, you have the following options:

- a. Where you have received no suitable tenders, you are permitted to use the negotiated procedure without prior publication of a contract notice in accordance with Regulation 16(1)(a)(i) to negotiate directly with one (or more) suppliers. This is provided that the original terms of the proposed contract are not substantially altered during the procedure. You will also, in accordance with MOD procedures, have to publish a VEAT (VTN) and consult CLS-CL; or
- b. Where you discontinue the procedure because of (i) irregular tenders, or (ii) unacceptable tenders following an evaluation made in accordance with Regulations 23, 24, 25 and 26 you can use the negotiated procedure without prior publication of a contract notice in accordance with Regulation 16(1)(f). However you may only use this procedure if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered in the negotiated procedure. You must also invite all of, and only, those economic operators which submitted a tender following an invitation made during the course of the discontinued procedure (not being a tender which was excluded as a result of the application of the selection criteria) to negotiate the contract.
- c. cancel the procedure and start again after reviewing the requirement, the sourcing strategy (including the award criteria), and contract conditions.
- d. discontinue the procedure.

Cancelling the procurement procedure

101. You must comply with Regulation 33(9) which requires you to:

- a. send written notification, as soon as possible to all tenderers and other suppliers who unsuccessfully requested to participate in the procurement procedure of its decision to abandon or restart the procedure, and the reason for its decision;
- b. publish a Notice for Additional Information, Information on Incomplete Procedure or Corrigendum in the Official Journal of the European Union that announces the cancellation of the procedure.

102. You may withhold information under Regulation 33(11) from candidates and tenderers if, among other things, its disclosure might prejudice fair competition for the procurement that follows on from the cancelled procedure.

What are the key points to remember?

1. You must conduct the award process by applying the published contract award criteria. Once issued to the tenderers you cannot change this.
2. To comply with the government's procurement policy set out in *Managing Public Money*, the primary objective of procurers is to choose the compliant tender offering the best Value for Money solution.
3. During tender assessment, you must follow the principles of transparency, equal treatment and non-discrimination. Procurers must also comply with any obligations of confidentiality and protect commercially sensitive information from disclosure.
4. You must ensure that you disclose in advance any scoring method you will use during tender assessment and that it is fair and reasonable, proportionate and does not favour any tenderer.
5. To reduce the risk of legal challenge, you must carefully record all post-tender communications, clarifications or negotiations (where allowed under the DSPCR).
6. You should inform tenderers of the outcome of the tender assessment in writing by the fastest means possible.