EU Public Contracts Regulations 2006

Before Reading this topic you must read the European Union (EU) Procurement Law topic. This will help you decide whether you should be applying the Public Contracts Regulations (PCR) 2006 (the Classic Directive) or the EU Defence and Security Public Contracts Regulations (DSPCR) 2011 (the Defence Directive) to your procurement. This guidance relates **only** to those procurements under the PCR 2006.

Constraints

1. The Public Procurement Directive 2004/18/EC is implemented in United Kingdom (UK) law by means of The Public Contracts Regulations 2006 ('the Classic Directive') (referred to in this topic as 'the Regulations'), as amended by the Public Contracts and Utilities Contracts (Amendment) Regulations 2007 ('the Amending Regulations'), made under the 1972 European Communities Act.

2. Application of the Regulations may be subject to close scrutiny by Industry and the European Commission. For this reason, acquisition staff must take care to ensure that the appropriate rules and procedures are observed and that careful records are kept at all stages. The consequences for non-compliance can be severe.

3. Where the Regulations are not followed, the Commission may intervene and / or resort to legal action and tenderer(s) also have legal rights and remedies available to them. At best, alleged malpractice will cause the Acquisition team additional work and project delay. At worst, if malpractice is confirmed, contract award decisions can be set aside and / or substantial damages awarded to the injured party.

Authoritative Guidance Summary

4. All procurement is subject to the principles of the Treaty for the Functioning of the European Union (TFEU): non-discrimination; equal treatment; transparency; mutual recognition and proportionality.

5. The EU Public Contracts Regulations 2006 (PCR) apply to all procurements for non-military, i.e. civil, and non-sensitive security equipment and related goods, works and services which are not covered by a Treaty exemption and above specified thresholds. However, if your requirement is for military and sensitive security equipment and related goods, works and services then the PCR **does not apply** and you should be applying the Defence and Security Public Contracts Regulations 2011 (DSPCR) (the Defence Directive). The EU Procurement Law topic will help you decide which Regulations you should be following. The thresholds vary according to the type of goods, services or works involved and are revised

periodically. Disaggregating requirements into 'penny packets' to circumvent the Regulations is prohibited.

6. The main exemptions applicable to MOD procurement are the 'warlike stores' exemption under Article 346 of the Treaty for the Functioning of the EU and the 'security and secrecy' exemption where the contract involves special security measures. Exemptions should be construed restrictively and applied in a proportionate manner.

7. Technical specifications must normally be set out in the contract documents. Any specification, which has the effect of favouring or eliminating particular companies, is prohibited. Technical specifications in this context are not specifications of the requirement but standards, performance or functional requirements.

8. The Regulations set out different procurement procedures: the Open, the Restricted, the Competitive Dialogue and the Negotiated procedures. The Regulations allows the Negotiated procedure to be used with or without prior publication of a contract notice in the Official Journal of the European Union (OJEU).

9. The Regulations allow for certain procurement techniques - Framework Agreements, Dynamic Purchasing Systems and Electronic Auctions - that may be used in conjunction with any of the procurement procedures set out in the Regulations.

10. Procurement under the Regulations must adhere to common advertising rules and standard time-limits with regard to publication of notices in the Official Journal of the European Union (OJEU).

11. Acquisition teams undertaking procurement under the Regulations must ensure:

a. The tender and contract documents must be drafted with care to ensure the correct information is given and the correct procedures are followed;

b. The selection criteria are unambiguous and made available in good time to all potential suppliers in the supplier selection process;

c. The award criteria are unambiguous and made available in good time to all tenderers in the tender assessment process;

d. Any evaluation is carried out objectively and solely on the basis of the selection and award criteria provided to the potential suppliers, tenderers and participants;

e. All decisions are properly recorded in a registered file and readily available for scrutiny in the event of a legal challenge.

12. During competitions under the Open, Restricted, Accelerated, Negotiated or Competitive Dialogue procedure, there must be a standstill period that allows for:

a. Effective pre-contractual remedies for an aggrieved party;

b. Communication of both award decision and reasons;

c. Standstill period of 10 calendar days as a minimum between communicating the award decision to all tenderers and contract conclusion; and

d. Automatic suspension in case of application for review by the Court.

13. The DEFFORM 47 requires the successful tenderer(s) to be committed to proceed with the contract as from the end of the standstill period if the MOD calls on them to do so.

14. After contract award the Regulations require the issue of a contract award notice within 48 days, a debrief to tenderer(s) within 15 days of a request being received and the provision of information for EU statistics and records.

Authoritative Guidance

The Regulations

15. Acquisition teams must familiarise themselves with the Public Contracts Regulations 2006 ('the Regulations'), the Public Contracts and Utilities Contracts (Amendment) Regulations 2007 ('the Amending Regulations') and all other applicable amendments, as listed at Annex A, before taking procurement action.

16. The guidance that follows is designed to assist interpretation of the Regulations and highlight a number of important points and potential pitfalls. It therefore refers to, for example, 'Regulation 5' or 'Regulation 9' in the expectation that Acquisition teams will read that part of Annex A.

17. Most of the changes arising from the Amending Regulations are indicated below. However, there are other amendments to Regulation 33 (Design contests), Regulation 36 (Public works concession contracts) and Regulation 37 (Sub-contracting the work or works to be carried out under a public concession contract) that are not highlighted below.

Treaty for the Functioning of the EU Principles

18. The Treaty for the Functioning of the EU lays down fundamental principles which are generally applicable when contracting authorities are awarding contracts, including those whose value falls below the thresholds.

19. The Treaty places a general ban on discriminatory measures and unfair treatment. The five fundamental principles in the Regulations that stem from the Treaty for the Functioning of the EU are:

a. Non-discrimination, i.e. no discrimination on the grounds of nationality;

b. Equal treatment, i.e. equal opportunity to tender for work. This means amongst other things that all suppliers must be given the same information. To give tenderers the same opportunity to submit tenders, the contract documents must be clear and unambiguous and contain all the requirements in respect of the proposed procurement.

c. Transparency, i.e. the procurement process is to be characterised by predictability and openness. This includes publication of the contract award notice including the selection and award criteria.

d. Mutual recognition, e.g. acceptance of documents, certificates and equivalent standards from other nations.

e. Proportionality, i.e. the qualification requirement and the requirements regarding the subject matter of the contract must be reasonable and commensurate with the supplies, services or works that are being procured.

Applying the Regulations

20. Regulation 5 (as amended by Regulation 6(2) of the Amending Regulations) sets outs the application of the Regulations. The scope and coverage of the Regulations are summarised in the flowcharts at Annex B.

Common Procurement Vocabulary Codes

21. The Common Procurement Vocabulary (CPV) consists of 9 digit codes associated with a wording that describes the type of supplies, works or services that are the subject of the contract. CPV Codes can be accessed via Annex C which contains links to CPV search facility (via keyword or CPV code) and a downloadable spreadsheet.

Part A or B Services

22. The appropriate category of service (known as Part A or B) within the Regulations is found by identifying the CPV code(s) at Annex C and then by reference to Schedule 3 of the Regulations. The appropriate category of service for a single contract covering both elements should normally be determined by the element that has the greatest value.

23. Part A in Schedule 3 of the Regulations lists 16 categories of services which are subject to all the provisions of the Regulations. In effect, the European Commission identified these services as being of priority with regard to development of cross-border operations.

24. Part B in Schedule 3 of the Regulations 11 categories of services which are subject only to a more limited regime. Where the contract exceeds the specified threshold and no exemption applies, Acquisition teams are only obliged to apply the following Regulations:

a. Parts 1, 9 and 10; and

b. the following provisions in Parts 2 to 8:

(1) Regulation 9 (Technical Specifications);

(2) Regulation 31 (Contract award notice);

(3) Regulation 40(2) (Statistical and other reports);

(4) Regulation 41 (Provision of reports); and

(5) Regulation 42 (Publication of notices).

25. There is no legal obligation to place a contract notice in OJEU for a proposed Part B service contract, as the advertising requirements of Part 3 of the Regulations do not apply to Part B Services. However, Regulation 31 does apply to Part B services and requires publication of a contract award notice in OJEU.

Relevant States

26. The Regulations (and its counterparts in other European Union (EU) Member States) are legally binding on all EU Member States, i.e.:

Austria	Germany	Poland
Belgium	Greece	Portugal
Bulgaria	Hungary	Romania
Croatia	Ireland	Slovakia
Cyprus	Italy	Slovenia
Czech Republic	Latvia	Spain
Denmark	Lithuania	Sweden
Estonia	Luxembourg	United Kingdom
Finland	Malta	
France	The Netherlands	

27. The benefits of the Regulations are extended to nationals of relevant States under the European Economic Area Agreement (EEA). The principal effect of this is that there is an equal opportunity to bid and an equal obligation not to discriminate on grounds of nationality against suppliers or contractors in those nations, and an equal right for contractors to seek enforcement through the UK courts and the European Court of Justice. The relevant States are Iceland, Liechtensteinn and Norway

28. The Regulations also extend the benefit of the duty of compliance to contractors, service providers and suppliers who are nationals of or established in third country signatories to the WTO (World Trade Organisation, formerly GATT)

Agreement on Government Procurement (GPA). In relation to Supplies, this applies to MOD only in relation to goods specified in Schedule 5 of the Regulations. The relevant states in this connection are as follows:

GPA:

EU Member States	Hong Kong China	Liechtenstein
Armenia	Iceland	Norway
Aruba	Israel	Singapore
Canada	Japan	Switzerland
Chinese Taipei	Korea	USA

Contracting Authorities

29. All commercial officers in MOD HQ, other Top Level Budget (TLB) organisations and those working overseas in JHQ Rheindahlen, the Falklands Islands and Gibraltar are contracting authorities for the purposes of the Regulations. The only exception is in Cyprus to the extent that a Sovereign Base Area requirement is contracted by staff resident there. Therefore, the Regulations are not applicable to acquisition of goods and services required for operation of the Sovereign Base by Acquisition team members operating within the Sovereign Base.

Exemptions

30. The main exemptions applicable to MOD procurement are the 'warlike stores' exemption under Article 346 of the TFEU and the 'security and secrecy' exemption where the contract involves special security measures. European case law indicates that exemptions should be construed restrictively and applied in a proportionate manner.

31. Where an exemption is applied to a particular procurement, the rationale for its use must be kept in a registered file. Keeping proper records is important in the event of a challenge from the European Commission and / or Industry.

32. The European Commission, as guardian of the TFEU, may seek to verify whether the conditions for exempting contracts from the Regulations are being applied correctly by MOD. In such cases, the MOD will have to provide, at the Commission's request, the rationale for use of an exemption for a specific contract.

'Security and Secrecy' Exemption

33. Regulation 6(2)(b) sets out the 'security and secrecy' exemption applies if a procedure requires MOD to divulge secret or confidential contract information on acquisition of supplies, services or works essential to our national security.

34. This exemption should be considered before the 'warlike stores' exemption. If the 'security and secrecy' exemption applies, Acquisition teams do not have to comply with the provisions of the Regulations. However, the TFEU principles such as non-discrimination, equal treatment and proportionality continue to apply.

35. DDefSy ST Ind are ultimately responsible for determining whether the 'security and secrecy' exemption applies to a particular procurement. Acquisition teams must consult DDefSy ST Ind and keep their approval of the exemption in a registered file.

36. In order for the 'security and secrecy' exemption to apply, it would normally be necessary to show that the proposed contract:

a. Involved access to classified material bearing a UK Eyes Only caveat; or

b. Could potentially involve access to particularly sensitive sites / equipment for which only appropriate security cleared UK nationals can have access to; or

c. Was subject to similar restrictions required for the protection of the UK's essential security interests.

37. Application of this exemption is not sufficient justification for non-competitive procurement. Acquisition teams should follow normal MOD policy regarding justification and approval of non-competitive procurements. If only a limited competition can be conducted due to the security measures, Acquisition teams must be able to prove and keep a record of why opening up the competition to a wider group of suppliers would negatively impact on the security measures.

38. Acquisition teams are still required to treat suppliers fairly by setting out the rules under which the restricted competition is to run, ensuring those rules are complied with and giving all participating suppliers equal opportunity.

'Warlike Stores' Exemption under Article 346

39. An Interpretive Communication on the application of the 'warlike stores' exemption at Article 346 is at Annex D and its associated list of 'warlike' supplies ('the Council List') is at Appendix 1 to Annex D. An Interpretative Communication is not law but, as the official opinion of the European Commission, it is taken very seriously by the European Court.

40. If the 'warlike stores' exemption at Article 346 applies, the procurement falls outside the obligations contained in the TFEU and the Regulations.

41. The 'warlike stores' exemption is operated by first ascertaining whether the supply appears on the Council List. This exemption can also cover the procurement of services and works directly related to the goods included in the Council List.

42. The Council List has not been updated since it was drawn up in 1958 and is thus open to interpretation. Consequently, if it is not readily evident whether or not the supply, service or works appears on the Council List, the supply, service or works will need to be assessed by the Acquisition team to determine whether it is clearly military in nature using the criteria set out below.

43. In cases where there is uncertainty over classification of a supply, service or works, the following criteria should be used:

a. It is a supply that is clearly military in nature (including a supply which is adapted from a civilian specification to meet an MOD military requirement and in that form is not available in the civilian market); or

b. It is a service or works connected with the production of, or trade in 'warlike' supplies as defined above (noting that the "security and secrecy" exemption may be more appropriate for services or works).

44. After the supply, service or works has been identified as 'warlike', Acquisition teams need to decide whether the protection of essential national security interests requires that it should be exempt from the procurement procedures in the Regulations. This means that Acquisition teams have to evaluate and record:

a. Which essential security interest is concerned?

b. What is the connection between this security interest and the procurement?

c. Why is the application of the 'warlike store' exemption in this specific case necessary for the protection of this essential security interest?

45. Industrial and economic interests, although connected with the production of and trade in arms, munitions and war material, cannot justify by themselves the 'warlike stores' exemption. Security interests may, however, require the development and maintenance of national industrial capabilities to ensure the operational independence of the Armed Forces.

46. A supply, service or works will be deemed to be 'non-warlike' if not covered by any of the descriptions above and:

a. If a supply is not intended for specifically military purposes; and

b. Is available as a supply or service or works in the civilian market to the same specification.

47. In cases of doubt, Acquisition teams should consult their appropriate senior commercial mentor as necessary. In cases of real difficulty, advice should be sought from the policy sponsor via the Commercial Policy Help Desk.

International Organisation or Agreements Exemption

48. This exemption at Regulation 6(2)(d) covers any contracts governed by different procedures and awarded:

a. Under an international agreement between the UK and a State not listed in paragraphs 26 to 28 above. This exemption applies where the contract is made under an international agreement for the joint implementation or exploitation of a project. If the exemption is used, the

agreement must be sent to the Commission. The Commission expects to approve the use of the exemption on these grounds.

b. Under an international agreement relating to the stationing of troops.

c. Under the procedures of an international organisation such as NATO (North Atlantic Treaty Organisation).

Research and Development Services Exemption

49. The exemption at Regulation 6(2)(k) is available for research and technology services where ownership of intellectual property has been vested in the contractor and rights of use have been secured under DEFCONs 14, 14A, 15, 15A, 90, 91 or 705 but not where 'Crown Rights' conditions (such as DEFCON 703) are used. However, commercial officers should not use conditions which vest ownership of intellectual property in the contractor, where these would not normally be used, as a means of excluding the contract in question from the provisions of the Regulations.

Other Exemptions

50. Other exemptions include:

a. Services for acquisition or rental of land, existing buildings, or other immovable property, or right in or over land.

b. Contracts to permit the contracting authority to provide or exploit public telecommunication services.

c. Employment contracts.

d. Arbitration and conciliation services.

e. Financial services in connection with the issue, purchase, sale or transfer of securities or other financial instruments to raise money or capital, and central bank services (i.e. Bank of England).

f. Service contracts under which the work is to be carried out by another contracting authority or by a third party with exclusive rights.

Reserved Contracts

51. Acquisition teams are encouraged to use Regulation 7, where appropriate. This is the “reserved contracts” provision for supported factories and businesses (such as Remploy) where more than 50% of employees have disabilities. If Regulation 7 is used, only organisations within the EU with more than 50% disabled employees can bid for the work.

52. The ERG guidance on “reserved contracts” states that all public procurement of goods and services is to be based on value for money. Where a supported factory or business may have an interest in meeting a future requirement, the

procurement strategy should take into account wider factors, such as the Government policy on disabled people. Decisions will, however, have to be taken on a case by case basis in the context of value for money.

Thresholds

53. Regulation 8 (as amended by Regulation 2(2) and 6(3) of the Amending Regulations) sets out the rules governing thresholds.

54. The Regulations apply to all public contracts which are not subject to an exemption and which have a value (exclusive of VAT) estimated to be equal to or greater than the thresholds set out at Annex E.

55. In general terms, the value to be taken into account in determining whether a public contract reaches the threshold is the estimated value excluding VAT of the contract which the contracting authority intends to award.

56. To ensure that identical calculation methods are used throughout the EU and to prevent evasion of the procurement rules by artificially low valuations, the Regulations lay down specific rules at Regulation 8(7) to 8(20).

57. Annex E also contains points to note in relation to methods for calculating contract values, aggregation rules and framework agreements. In particular, Acquisition teams should note there is a blanket prohibition on disaggregating (i.e. splitting) a requirement with the intention of circumventing the rules on estimating the contract value and, more widely, on applying the Regulations as a whole.

58. Contracts below the thresholds are **not** subject to the Regulations. However, they are subject to the principles of the TFEU. Acquisition teams must follow the guidance within the Advertising topic in order to comply with the Treaty principles of non-discrimination and transparency.

Technical Specifications and Standards

59. Regulation 9 sets out the rules defining technical specifications. All the technical specifications the goods, works or services are required to meet must be specified in the Invitation to Tender or Negotiate (ITT / ITN).

60. Technical specifications must afford equal access for tenderers and not have the effect of creating unjustified obstacles to open competition. Technical specifications which have the effect of favouring or eliminating particular companies (and countries) are not permitted.

61. Unless precluded by technical requirements that are statutory obligations in the UK (e.g. Health and Safety), the Regulations allow for technical specifications to be drawn up as follows:

a. Technical standards; or

b. Performance or functional requirements, which may also include environmental characteristics; or

c. Performance or functional requirements with reference to technical standards; or

d. Technical standards for certain characteristics and performance or functional requirements for other characteristics.

62. Eco-labels may used by the tenderer to comply with environmental characteristics set out in the technical specification. Products eco-labelled in a national or multinational scheme give the Acquisition team assurance that their compliance with established ecological criteria has been tested by independent third parties, the national and regional Eco-label Competent Bodies. Further information on eco-labels can be found on the DEFRA website.

63. Where an Acquisition team wishes to specify environmental characteristics in terms of performance or functional requirements, they may use detailed specifications, or parts of specifications, as defined in European or multinational or national eco-labels providing:

a. The specifications are appropriate to define the characteristics of the supplies or services required;

b. The requirements for the eco-label are drawn up on the basis of scientific information;

c. The eco-labels are adopted using a procedure in which all stakeholders (e.g. government bodies, consumers, suppliers, environmental organisations) can participate; and

d. They are accessible to all potential tenderers so as to ensure transparency and equal treatment.

64. Wherever a technical specification is defined as a technical standard the words 'or equivalent' must also be incorporated. Where a technical specification has been defined as a technical standard, Acquisition teams cannot reject offers that purport to offer equivalent functionality or performance solely on the grounds that they are not based on a specified technical standard: they should be examined to establish if they offer equivalent functionality or performance to that specified.

65. Where a technical specification has been defined in terms of performance or functional requirements, Acquisition teams cannot reject offers that comply with European or international technical standards, if these standards address the performance or functional requirements which it has laid down.

66. Acquisition teams may presume that goods and services bearing the eco-label comply with the technical specifications but they must also accept other appropriate means of compliance such as a technical dossier from the tenderer or a report from a recognised body.

67. Specifications should not normally include references to particular makes, sources or processes that have the effect of favouring some suppliers or goods, or of discriminating against others. The only exception is if it is essential to do so because the goods cannot otherwise be described by reference to technical specifications that are sufficiently precise and intelligible to all tenderers. Where it is essential to refer to a trademark, patent, origin or process, it must be qualified by the words 'or equivalent'.

Variations

68. Regulation 10 sets out the rules for variations. Where the award criteria is the most economically advantageous tender, Acquisition teams may authorise tenderers to submit variants. The DEFFORM 47 must indicate whether or not variant offers will be considered. If variants are authorised then the DEFFORM 47 should state the minimum requirements to be met. A variant compliant with these minimum requirements should be taken into consideration even it would lead to a service contract rather than a supply contract or a supply contract rather than a service contract.

Procurement Procedures

69. The following procurement procedures are available under the Regulations: the Open, the Restricted, the Competitive Dialogue and the Negotiated procedures. The main features of each procedure are described below and the process for selecting a procedure is illustrated at Annex F.

70. The Regulations allow a free choice between using Open or Restricted procedures. However, the Competitive Dialogue procedure may only be used in the limited circumstances specified in Regulations 18(1) and 18(2) and the Negotiated procedure may only be used in the limited circumstances specified in Regulations 13 and 14.

71. In Open and Restricted procedures, Acquisition teams are allowed to request further information from tenderers so as to clarify or assess their tenders more fully, but may not negotiate the conditions of the contract with them. Negotiation with tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices are strictly ruled out.

Open Procedure

72. Regulation 15 describes the Open procedure. The Open procedure requires that you issue the tender documentation to all prospective tenderers upon request. There is therefore no control over the number of tenders submitted and requiring evaluation. In an Open procedure, the tenderers will provide you with evidence of their capabilities to meet the selection criteria alone with their tenders. The supplier selection stage in the Open procedure is limited to ensuring the tenderers

are eligible and qualified, see paragraph 278. If the tenderers meet the selection criteria, you must evaluate their tenders.

73. To avoid extra work from the additional number of tenders, the Open procedure should only be used for basic or standard goods, works or services under PCR 2006 where:

a. the requirement is clearly defined and easily understood,

b. the tenderers only have to demonstrate a minimum standard of economic and / or technical capability levels; and

c. expanding the number of tenderers is likely to improve value for money by fully testing the market.

74. In additional Acquisition teams using a Dynamic Purchasing System, which is described at paragraph 205 below, can use the Open procedure. The Crown Commercial Service has detailed Standard Operating Procedures for the Open Procedure.

Restricted Procedure

General

75. Regulation 16 (as amended by Regulation 6(6) of the Amending Regulations) describes the Restricted procedure, which works by a strict process of invitation to tender, followed by receipt of tenders with the award of the contract to the supplier that meets the advertised award criteria.

76. Under the Restricted procedure, Acquisition teams undertake a pre-qualification exercise and invite only short listed candidates[1] to tender. Acquisition teams must **intend** to invite a minimum number of tenderers to ensure genuine competition, which shall not be less than five.

77. The actual number of tenders invited will depend on how many potential tenderers meet the minimum standards of the pre-qualification exercise. Acquisition teams can continue the Restricted procedure if less than five tenderers are available, where, following pre-qualification, carried out in accordance with the Regulations, there are less than five potential suppliers with whom the authority would be prepared to place a contract.

78. Negotiations with tenderers are not permitted on fundamental aspects of the contract in order to avoid distorting the competition. However, discussions with tenderers are permitted for the purpose of clarifying or supplementing the tenders submitted that this dialogue does not involve discrimination. Acquisition team must take care to ensure all tenderers are treated equally during any discussions.

[1] Candidate is 'one who has sought an invitation to take part in a restricted, negotiated procedure or competitive dialogue' (Classic Directive 2004/18/EC)

Restricted Procedure - Iterative Tendering

79. The Regulations do not make clear the extent to which iterative tendering techniques may be used under the Restricted procedure, particularly the exclusion of some tenderers from the process in the first or subsequent iterations.

80. Acquisition teams may use iterative tendering where this is necessary to clarify tenders or where such an approach offers scope to improve value for money. To avoid a legal challenge, iterative tendering **must** only be conducted within the confines of the award criteria set out in the contract notice and the tender documents.

81. Acquisition teams may only engage in iterative tendering with all those tenderers who responded to the original ITT. Moreover, if one tenderer is allowed the opportunity to clarify his tender by submitting an amended tender, then all the other tenderers should normally be given the same opportunity - even if there is a belief that it may not result in an improved tender.

82. Any decision to exclude tenderers from iterative rounds of tendering under the Restricted procedure should err on the side of caution and only be contemplated where the degree of non-compliance is significant and a sound case for exclusion can be made and defended in the context of the award criteria that was issued in the contract documents.

83. In circumstances where Best and Final Offers (BAFO) are sought, the MOD may only invite those tenderers judged to be most in contention to respond although the decision to call for a BAFO must be fully justifiable in the context of the award criteria that was issued in the contract documents.

Accelerated Restricted Procedure

84. An accelerated form of Restricted procedure may be used where, for reasons of urgency, e.g. urgent operational requirements, suppliers cannot be allowed the periods normally required under Restricted procedure. The minimum time–limits under the accelerated procedures should allow procurement to be completed in a period of around six weeks.

85. Any decision to use the accelerated procedure should be scrutinised carefully and approved at Band B level and a note kept on the commercial file. The European Commission regards use of this accelerated process is an exception which is likely to restrict competition. Therefore, it should be construed strictly, i.e. reserved for cases where MOD can prove the objective need for urgency and the genuine impossibility of allowing the normal periods prescribed for this procedure.

86. The use of an accelerated procedure must also be limited to the types and quantities of products which it can be shown are urgently required. Other products must be supplied under a normal procedure.

87. It should be noted that the accelerated procedure is not designed to recover internal MOD administrative delays.

88. Acquisition teams are required to indicate in the contract notice published in the OJEU the grounds for using the accelerated form of the procedure. This justification must be included in Section IV.1.1 of the contract notice submitted to OJEU (Standard Form 2).

89. Acquisition teams should ensure that notices placed under the accelerated procedure are dispatched by means of either facsimile or email and should be clearly marked 'Accelerated Restricted' or 'Accelerated Negotiated' as appropriate in Section IV.1 of Standard Form 2.

Changing From Restricted To Negotiated Procedure

90. Acquisition teams should carefully review Regulation 13(a) or 14(1)(a)(ii) when it becomes apparent that the Restricted procedure has failed to deliver a compliant tender, as it may be possible to initiate the Negotiated procedure if this would result in further progress toward delivering the requirement.

Competitive Dialogue Procedure

Background

91. Competitive Dialogue came into effect on 31 January 2006. The principal provisions are found in Regulation 18. The intention behind the procedure was to introduce;

> "… a flexible procedure which preserves not only competition between economic operators but also the need for contracting authorities to discuss all aspects of the contract with each candidate" (Recitals to Classic Directive 2004/18/EC)

This does not abolish the Negotiated procedure. However the Competitive Dialogue procedure should be considered ahead of the competitive Negotiated procedure which should only be used in the future in exceptional circumstances and only after CLS advice has been sought.

92. If used appropriately the key advantage of Competitive Dialogue is the ability for the MOD to have a "structured" negotiation with bidders whilst competition remains. Competitive Dialogue gives the parties the opportunity to dialogue or "negotiate" the relevant aspects of the project after issue of the Invitation to Participate in Dialogue (ITPD) though dialogue should not be needed on every aspect of the project. Throughout the process, the selection criteria are to remain unchanged and the principles of transparency, equal treatment and confidentiality must be adhered to. Further information on award criteria is covered in paragraphs 112 and 126.

93. The Crown Commercial Service and HM Treasury have developed the guidance that is set out at Annex G to assist contracting authorities undertaking this procedure.

The "particularly complex project" test

94. The Competitive Dialogue procedure is for use in the award of complex contracts. A contract can be considered "complex" where MOD is not able to objectively:

a. Define the best technical means capable of satisfying its needs or objectives, e.g. for complex Information Technology (IT) projects, a variety of technical solutions may be available and MOD might not be able to define the best technical means of satisfying its needs at the outset; and / or

b. Specify the legal or financial make-up of a project, e.g. for Public Private Partnership / Private Finance Initiative (PPP / PFI) contracts where the financial or legal make-up cannot be defined in advance because issues such as risk allocation, how the project will be undertaken and financed and who will be responsible for which services, will be the subject of discussion with potential providers.

95. For complex contracts, there is no presumption that Competitive Dialogue will be the most appropriate procedure. The Regulations make it clear that the Competitive Dialogue procedure will be available for complex contracts only where it is considered that the Open or Restricted procedure will not allow the award of a contract.

96. Having matured the requirement as far as possible, if an Acquisition team is able to place the contract without the need for discussion with industry then the Restricted procedure must be used. However in some cases the team may come to the conclusion that there is a real benefit to be had from "dialoguing" certain aspects of the project with industry. Where this is the case then it may well be that Competitive Dialogue is the appropriate procedure to use.

97. Where the Competitive Dialogue procedure is adopted the reasons for its use must be recorded along with all key decisions, and kept in a registered file. Keeping proper written records is important in the event of a challenge from the European Commission.

98. A flowchart of the Competitive Dialogue process is at Annex K.

Preparation

99. Those considering using Competitive Dialogue should be aware of the amount of preparatory work that is needed before embarking on the process, especially before issuing the ITPD. Competitive Dialogue does not relieve Acquisition teams of the need to specify and mature their requirement before embarking on the procurement process.

Pre-dialogue Phase

OJEU Notice

100. Like other EU procurement procedures, Competitive Dialogue commences with publication of an OJEU Notice. The requirement must either be set out in the Contract Notice or the DEFFORM 47. In addition, the Contract Notice may provide for the Competitive Dialogue procedure to take place in successive stages in accordance with Regulation 18(22). Best practice is for the OJEU Notice to advise that the dialogue may take place in successive stages and reserve the right to do so even if development of the requirement may result in this being unnecessary.

101. The OJEU Notice must also specify the minimum number of bidders the Acquisition team intends to invite to participate in the dialogue and the objective and non discriminatory criteria which will be used to limit the number to be invited to participate in that dialogue.

102. The award criteria must be specified in the Contract Notice or the DEFFORM 47, see paragraph 112 below.

Pre-Qualification and Short Listing

103. The Competitive Dialogue procedure provides for a pre-qualification process similar to that used under the other procedures. The Acquisition team is permitted to exclude those who:

a. are ineligible on one of the grounds specified in Regulation 23; and / or

b. fail to meet a minimum standard of economic and financial standing or technical or professional ability.

104. The Regulations provide that the number of bidders invited to participate in the dialogue by Acquisition teams shall be sufficient to ensure genuine competition and in any event shall be not less than three (Regulation 18 (12)) where they meet the pre-qualification criteria.

105. What is an appropriate number will be dependant upon

a. the nature and complexity of the project; and / or

b. the number of bidders likely to be interested in participating; and / or

c. the number of rounds of dialogue which the Acquisition team anticipates before identifying its preferred solution.

106. In relatively simple procurements under Competitive Dialogue where a straightforward dialogue phase with no down-selection of solutions before closing dialogue is expected, it may be that a small number of bidders can be invited to participate in the process. For more complex high value projects where bidders are likely to form consortia, Acquisition teams should be aware of the potential for the structure of consortia themselves to change as the process unfolds and participants

decide to withdraw. The potential for this to occur should be borne in mind when selecting the number to participate in the project.

Dialogue Phase

107. After the selection of participants, Acquisition teams start the dialogue phase by the issuing an ITPD to each of the selected candidates. The dialogue phase can involve a combination of discussion and tendering and ends when the Acquisition team can identify a solution or solutions capable of meeting the MOD's requirement.

Practical arrangements

108. The ITPD must deal with practical issues such as:

a. The Acquisition teams contact details.

b. How the dialogue will be run. The agenda, time, date and venue for each dialogue sessions should be specified. This will be bespoke to each project and requires careful thought and planning before embarking on the Competitive Dialogue process.

c. The draft programme for the project, through dialogue, to project close. Although careful planning is required to enable planning and management of resources, the Acquisition team should guard against religiously following a predetermined programme which, due to unforeseen consequences, would benefit from adjustment at a later phase.

109. The Acquisition team should also consider how to resource Competitive Dialogue generally and this phase of the process in particular. The level of resources needed to produce the ITPD (and any subsequent Invitation To Continue Dialogue (ITCD)) and then to run the dialogue phase need careful assessment. The Acquisition team will have to address the question of how and when the issues arising out of dialogue are going to be taken forward and resolved when the team may all be engaged virtually full time in dialogue. The level of resources required to dialogue with each additional bidder will also need consideration.

Obligation to issue contract documents with the ITPD

110. The MOD must issue its contract documents either in the Contract Notice or in the descriptive document i.e. the DEFFORM 47 (Regulation 18(5)). This may be difficult to comply with at this point of the process as one of the justifications for using Competitive Dialogue is that the MOD is unable to specify the legal, financial or technical means of meeting its objective. Acquisition teams should therefore issue draft contract documents with as much detail as is available at this phase whilst highlighting those areas which will be the subject of discussion and/or require further development.

111. For Private Finance Initiatives using the Competitive Dialogue process, MOD can use the standard project agreement (PAV1) which is based upon the HM

Treasury's standard project agreement for use on PFI projects (Standardisation of PFI Contracts Version 4 (SOPC 4)).

Award Criteria

112. The contract must be awarded on the basis of the most economically advantageous tender (Regulation 18(27). Regulation 18(18)(d) requires that all the evaluation criteria need to be specified in the DEFFORM 47 (if not published with the Contract Notice). These must be given relative weightings, a range or be set out in descending order of importance. This is an inherent challenge in using Competitive Dialogue which requires the early disclosure of evaluation criteria whilst the Competitive Dialogue process itself is designed to permit authorities to dialogue until such time as they identify the solution or solutions which meet their requirement. Recent cases have highlighted the need for total transparency in respect of evaluation criteria when conducting public procurements under the EU Regulations. This should be managed as part of the projects risk assessment process. See paragraph 126.

How many rounds of dialogue are required?

113. One of the benefits of Competitive Dialogue is that the Regulations are not very prescriptive and so, to an extent, the process can be tailored to suit the needs of the individual project.

114. The regulations give the MOD flexibility and it is left to decide how many rounds of dialogue it deems appropriate for its project. Regulation 18 (22) provides that "the contracting authority may provide for the competitive dialogue procedure to take place in successive stages in order to reduce the number of solutions … by applying the award criteria".

115. There is no obligation to have numerous rounds of dialogue. The Acquisition team must be able to identify those issues which it feels warrant detailed dialogue with bidders in advance of embarking on the Competitive Dialogue procedure. Any additional issues which are identified by bidders are unlikely to change the process which the Acquisition team uses. A single but detailed dialogue phase should enable the team to resolve all issues, close the dialogue and issue the final invitation to tender.

116. Where there is more than one round of dialogue Acquisition teams should consider issuing an ITCD with the aim of producing "initial bids" that specify the candidates' proposals in writing, which can be further clarified during the dialogue stage.

117. Complex projects may need two or more successive rounds of dialogue at the end of which solutions are evaluated in accordance with the published award criteria and down-selected.

118. It is recommended that Acquisition teams avoid numerous rounds of dialogue. It is unlikely that this will succeed in producing sufficiently mature solutions to enable evaluation and down selection. Furthermore it is expensive and

resource intensive for both the MOD and bidders. Instead more focused and detailed dialogue may ultimately achieve greater maturity of solutions over a shorter period of time.

Equality of Treatment and Confidentiality

119. The regulations impose specific obligations on authorities to ensure equality of treatment among all participants and not to reveal confidential information which may be received during the dialogue process (Regulation 18(21). There is often a careful balancing act to be performed in ensuring each participant is treated equally without revealing confidential aspects of participants' solutions. This risk should be kept under constant review throughout the dialogue phase and Acquisition teams also need to develop a mechanism to ensure such obligations are complied with.

120. One approach may be to require participants to specify both in written submissions and during dialogue which aspects of their solutions they consider to be confidential. It is not acceptable to say that all submissions and the entire dialogue process are confidential. Although the onus is on participants to identify such information, the Acquisition team must exercise judgement in determining whether to accept or challenge such an assertion. As a general guide it is reasonable to consider information confidential where it is unique to a particular participant's bid, but it may not be reasonable where that information is of general applicability to the dialogue. Practical measures such as requiring confidential aspects of solutions submitted in writing to be highlighted in a particular colour and for participants to put up a red flag, real or imaginary, when discussing confidential aspects of their solutions can be put in place relatively easily.

121. These measures can help the Acquisition team to control and manage the confidential information it receives, and to issue non-confidential information to bidders as required. Information should not however be issued to all the bidders automatically simply because it is not deemed confidential. It is good practice for information to be released to all the bidders only where such a release is necessary to maintain equality of information between them, for example where the information relates to a clarification of the MOD's requirements.

122. Any measures that are taken to protect confidentiality need to be balanced by the need to maintain equality of treatment. This principle is enshrined in EU law and needs to be an underlying principle of any procurement undertaken in accordance with EU principles.

123. One way of achieving this, and considered good practice, is for notes of dialogue sessions to be produced by Acquisition teams covering generic details but excluding confidential information. These notes should then be approved in writing by the individual participants and issued to all bidders for information. It also has the advantage of ensuring that issues raised by participants holding their dialogue sessions later on in the process can still be shared by those who would otherwise be disadvantaged by going first when all the points would not necessarily have occurred to the MOD. Should Acquisition teams wish to retain a more complete

record of the dialogue then a confidential version of these notes can be retained for project purposes only.

124. Where foreign contractors are involved in the competitive dialogue process, care will also need to be taken to ensure that any restrictions imposed on the disclosure of information by export controls are properly observed.

Down-selection

Reducing the number of solutions

125. As set out above, Regulation 18(22) permits the MOD to reduce the number of solutions but can only do so by applying the award criteria. The intention to do so must be specified in the Contract Notice (Regulation 18(6)).

126. Whilst the intention of down-selection must always be to take forward the best solutions capable of meeting the MOD's requirement, there are a number of risks (practical and legal) of down-selecting solutions during the dialogue phase. For example:

a. Acquisition teams should not start a procurement under Competitive Dialogue unless and until they have defined the requirement as clearly as possible. However during the dialogue process the participant's solutions and the MODs requirement may mature to the point that MOD needs to develop, and even possibly change, its requirement. This is a legal risk for the procurement process.

b. The dialogue process may also see maturity of award criteria. There is a risk to the project where this leads to a change in the award criteria. Bidders are likely to object if they formulate their solution on a set of evaluation criteria which are later adjusted, on the grounds that they would have taken a different approach to their solution. As a mitigation, and depending upon the complexity of the project, award criteria should initially be set at a high level which can be matured as the Competitive Dialogue process leads to greater maturity of solutions when lower level criteria can then be identified. In any event the award criteria must continue to be based on most economically advantageous tender.

Multiple Solutions

127. Where the Acquisition team wishes to have the opportunity to consider a number of different possible technical solutions, participants may be permitted to submit multiple solutions to be evaluated and down-selected during the dialogue phase. However, such an approach does present practical and legal risks in evaluating a large number of solutions for example the administration time in handling the dialogue process associated with different solutions.

128. The regulations provide for the down-section of solutions not participants. This means that down-selection of solutions will not necessarily lead to the down-

selection of bidders. If, for example, a participant's solutions have been ranked second and last, then clearly the MOD could not down-select that bidder.

De-briefing down-selected bidders

129. There is no legal requirement to de-brief bidders engaged in Competitive Dialogue other than on contract award. Acquisition teams may receive requests and /or may chose to de-brief bidders on down-selection; if they do so care should be exercised.

130. Where a bidder is no longer taking part in the competition due to down-selection commercial confidentiality of other solutions needs to be maintained. Where the bidder still has one or more solutions in the procurement process it is essential to ensure equality of treatment between bidders. The bidder(s) who has had solutions down-selected should not be put in an advantageous situation and the de-briefed bidder should also not receive information indirectly which will enable it to improve its remaining solution(s). Consideration should therefore be given to delaying any de-briefing of a bidder until all of their proposed solutions have been down-selected.

Post Dialogue Phase

131. Once the Acquisition team has identified the solution(s) that meet its requirement, the dialogue is formally brought to a conclusion and the Acquisition team issues the Invitation to Submit Final Bids (ITSFB) to the candidates still involved in the dialogue.

When to close the dialogue

132. The Regulations require the dialogue to continue until the Acquisition team has identified one or more solutions capable of meeting its needs (Regulation 18(24)). However, since closing dialogue triggers the next phase of the process, during which further restrictions placed upon the Acquisition team, this should not be done until there is / are fully mature solution(s).

133. Once dialogue is closed, the procedure then becomes similar to the Restricted procedure. Acquisition teams must issue a final tender document (the ITSFB) to enable participants to prepare a final bid containing everything necessary for the performance of the project on the basis of the solution that they presented during the dialogue i.e. the technical proposal and commercial agreements from the last stage of the Dialogue Phase.

134. Once in receipt of those tenders Acquisition teams can only clarify, specify and fine tune issues with bidders. The precise meaning of this is not defined in the regulations and there is no case law on this subject. Until the meaning is tested by the Courts it is not possible to give definitive guidance. However any change which could have lead to a change in the outcome of the competition or discriminates against one or more of the bidders will almost certainly fall outside the scope of "clarification, specification and fine tuning".

135. Having formally closed dialogue Acquisition teams will not want to receive bids containing "surprises". A mitigation to this risk is to have bidders submit a bid before closing dialogue. This will not necessarily add significantly to bid time and costs as it will shorten the assessment period after the close of dialogue at which phase bidders can confirm their previous bid subject to any changes which may have been discussed in the meantime.

Funders' Due Diligence in Private Finance Initiatives

136. The practice which became common place under the Negotiated procedure whereby, to reduce the risk of incurring abortive bid costs, the preferred bidder was announced before the fine detail of the project was agreed, is not permitted under Competitive Dialogue. Acquisition teams need to ensure that industry is fully aware of this and the time and resources required to mature the contract documentation prior to the close of dialogue.

137. This is particularly relevant where the project involves third party funders (e.g. Private Finance Initiatives). Under the Negotiated procedure, funders' lawyers and technical advisers were often not engaged to any great extent before announcement of preferred bidder. Under Competitive Dialogue, funders will be expected to have carried out a full due diligence exercise before the dialogue is closed.

138. There may well be two phases of clarification, specification and fine tuning. Initially with those bidders who remain in the competition at the close of dialogue and later, to a certain extent, with the preferred bidder.

Negotiated Procedure

139. Regulation 17 describes the Negotiated procedure. A Negotiated procedure is one where the MOD consults the supplier(s) of its choice and negotiates the terms of the contract with one or more of them.

140. In a Negotiated procedure, the Regulations enables MOD to act flexibly not only at the time it awards the contract but also during the prior discussions. However, MOD still has to apply the principles of non-discrimination and equal treatment with regard to the supplier(s) of its choice.

141. According to circumstances, the Regulations allows the Negotiated procedure to be used with or without prior publication of a contract notice in the OJEU. Competition should normally apply unless there are sound reasons to the contrary such as where the requirement is for a proprietary item.

142. Where the Negotiated procedure is adopted for a particular procurement, the rationale for its use must be kept in a registered file. Keeping proper records is important in the event of a legal challenge.

Negotiated procedure with Prior Publication in OJEU

143. The circumstances permitting the Negotiated Procedure with prior publication of a contract notice are detailed at Regulation 13 (as amended by Regulation 6(4) of the Amending Regulations).

Irregular or Unacceptable Offers Regulation 13(a) permits the Negotiated procedure with prior publication of a contract notice to be used where an Open, Restricted or Competitive Dialogue procedure has produced only:

a. Irregular offers, i.e. not compliant with the tender requirements, in which prices are sheltered from normal competitive forces or which comprise unconscionable (e.g. unreasonably excessive) clauses; or
b. Unacceptable offers, i.e. tenders received late, submitted by tenderers who do not have the requisite qualifications or whose price either exceeds the contracting authority's budget or is abnormally low.

144. Since the original procedure failed to produce regular, acceptable requests to participate or tenders, it is necessary to close the procedure officially and start again, but this time use of the Negotiated procedure is permitted so that negotiation can be used to avoid the former irregular or unacceptable aspects of the offers.

145. Using the Negotiated procedure in this way is only permitted if the contractual conditions are not substantially modified. The European Commission considers that changes to, inter alia, the financial arrangements, contract duration, or technical specifications are substantial modifications.

146. Regulation 13(a) is subject to Regulation 14(1)(a)(i). The contract notice may, therefore, be dispensed with provided all, and only, the suppliers invited to negotiate include the tenderers or candidates who, in the original procedure, submitted tenders and satisfy the pre-qualification criteria for selection.

147. **Overall Pricing Not Possible** Exceptionally, when the nature of the requirement or the risks associated with the requirement do not permit prior overall pricing, i.e. tenderers would not be able to put in a fixed overall price for the requirement but would have to incorporate contingencies which render a straight-forward comparison of pricing impossible. The Competitive Dialogue procedure should be considered ahead of the Negotiated procedure here.

148. **Contract Conditions Cannot Be Specified with Precision** Exceptionally, when the nature of the services to be procured is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures. The Competitive Dialogue procedure should be considered ahead of the Negotiated procedure here.

149. **Research and Development (Works)** The Negotiated procedure may also be used where public works contract are carried out solely for the purpose of research, experiment or development, and not with a view to establishing commercial viability or recovering research and development costs.

Negotiated Procedure with Prior Publication – Pre-qualification and Tendering

150. Under this Negotiated Procedure, acquisition teams under take a pre-qualification exercise to select the candidates it invites to take part in the negotiated procedure from among those expressing an interest in the requirement following publication of the contract notice in the OJEU.

151. Acquisition teams must intend to invite a minimum number of candidates to negotiate in order to ensure genuine competition, which shall not be less than three. The actual number of candidates invited to negotiate will depend on how many potential tenderers meet the minimum standards of the pre-qualification exercise.

152. In most circumstances, it will be appropriate for candidates selected to be invited to submit tenders. These will provide a basis for any negotiations into which the acquisition team may wish to enter. However, there is no mandatory requirement for tenders to be invited. The acquisition team may proceed direct to negotiation.

153. The Negotiated procedure exists for the purpose of conducting negotiations with tenderers and a phased down-selection may form a part of the process. This should be set out in the contract notice or contract documents.

154. Iterative tendering under the Negotiated procedure is therefore perfectly acceptable providing all tenderers are treated in accordance with the principles of non-discrimination and equal treatment.

Accelerated Negotiated Procedure with Prior Publication in OJEU

155. An accelerated form of Negotiated procedure with prior publication of a notice may be used where, for reasons of urgency, suppliers cannot be allowed the periods normally required under negotiated procedures. The minimum time–limits under the accelerated procedures should allow procurements to be completed in a period of around six weeks.

156. Any decision to use an accelerated procedure should be scrutinised carefully at Band B level. The considerations set out above in paragraphs 87 to 89 above in connection with accelerated restricted procedures also apply here, and contracting authorities also have to indicate in the notice the grounds for using the accelerated form of the procedure.

Negotiated Procedure without Prior Publication in OJEU

157. The circumstances permitting the Negotiated Procedure without prior publication of a contract notice are detailed at Regulation 14 (as amended by Regulation 6(5) of the Amending Regulations). Acquisition teams should keep a record of the reasons for using Regulation 14 at the time the decision was made.

158. **Absence of Tenders**. Regulation 14(1)(a)(ii) allows the Negotiated procedure to be used without a contract notice in the absence of tenders or of suitable tenders or applications in response to an Open or Restricted procedure, provided that the original terms of the contract are not substantially altered. The Acquisition team must close the original procedure and inform the OJEU.

159. Tenders are considered not to be suitable when they are unacceptable or irregular as explained above at paragraph 143 **and** their content has no relevance to the procurement. For this reason, such tenders are consequently regarded as not having been submitted.

160. **Technical, Artistic and Exclusive Rights**. The Negotiated procedure without prior publication may also be used where for technical or artistic reasons or for reasons connected with protection of exclusive rights, the goods supplied can be manufactured or delivered only by a particular supplier.

161. This rule therefore lays down two conditions, both of which must be proven to be satisfied: (1) the goods, services or works must have special technical or artistic features or must be protected by exclusive rights, and (2) there must be only one potential supplier. It does not apply if the exclusive right is licensed to other parties or can reasonably be obtained on licence.

162. Technical reasons must be justified on a case by case basis, e.g. where only one supplier has the specific know-how, tools or means to modify or retrofit complex military equipment. Technical reasons may also derive from specific interoperability or safety requirements. In addition it should be borne in mind that technical expertise can always be bought. In many cases advertising the requirement may be the only way of ensuring that the technical reason can be justified.

163. **Extreme Urgency**. The Negotiated procedure without prior publication may also be used for reasons of extreme urgency brought about by events that could not be foreseen by and are not attributable to the contracting authority, the time limits laid down for: (1) Open or Restricted (including accelerated) procedures; or (2) Negotiated procedure with prior publication of a notice (including accelerated procedures); cannot be met.

164. The extreme urgency ground may only be invoked where strictly necessary and the urgency must not be attributable to the actions or failure to act of the MOD. It also cannot be used for a requirement which continues for any length of time such that it loses its quality of urgency, e.g. a requirement for urgent services may be justifiable for a month's, but not a year's, duration.

165. **Research and Development (Goods)**. The Negotiated procedure without prior publication may also be used where goods to be purchases or hired solely for the purpose of research, experiment or development, and not with a view to establishing commercial viability or recovering research and development costs.

166. Regulation 14 sets out other cases where the Negotiated procedure without prior publication of a contract notice may be used as follows:

a. **Additional Purchase or Hire of Goods**: for additional deliveries by the original supplier, where:

(1) they are intended, either as –

i. a partial replacement of normal supplies or installations; or

ii. the extension of existing supplies or installations; and in either case;

(2) a change of supplier obliges the contracting authority to acquire material having different technical characteristics which would result in either -

i. incompatibility with the supplies or installations covered by the original contract; or

ii. disproportionate technical difficulties in operation and maintenance.

The length of such contracts and of recurrent contracts may, as a general rule, not exceed three years. Acquisition teams need to assess the actual length in the light of complexity of the equipment and associated requirements for interoperability and standardisation.

b. **Repetition of Works or Services**: for new works or services consisting of the repetition of similar works or services entrusted to the original supplier to which the MOD has awarded an earlier contract. Four conditions must be satisfied:

(1) The new works services must conform to a basic project for which a first contract was awarded.

(2) When the first contract was advertised, notice was given that the negotiated procedure might be adopted for the procurement of additional services.

(3) The total estimated cost of the subsequent services must be taken into consideration in estimating the value of the contract for the purposes of determining the applicability of the Public Contracts Regulation 2006.

(4) Recourse to the negotiated procedure without a contract notice takes place within three years of the original contract.

c. **Additional Works or Services**: for additional works or services not included in the project initially considered or in the contract first concluded but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein. Three conditions must be satisfied:

(1) The contract for the new works or services is awarded to the supplier who supplied the original works or services;

(2) The additional works or services:

i. cannot be technically or economically separated from the main contract without great inconvenience for the MOD, or

ii. although separable from the performance of the original contract, are strictly necessary for its completion;

(3) The aggregate estimated value of contracts awarded for additional services does not exceed 50% of the amount of the main contract.

d. **Purchases or Hire of Goods on Commodity Market**: where goods are quoted and purchased on a commodity market, there is not a requirement for competition.

e. **Bankrupt Stock**: where to take advantage of particularly advantageous terms in a closing down sale or where a supplier is bankrupt; insolvent or being wound up.

f. **Design Contest (Services)**: where the contract concerned follows a design contest awarded after competition and must, under the rules applying, be awarded to the successful candidate or to one of the successful candidates. In the latter case, all successful candidates must be invited to participate in the negotiations.

Amending Contracts

167. The Regulations allow for a new contract to be awarded to an existing supplier in certain limited circumstances (see Regulations 14(1)(b)(ii); and 14(1)(d)). Whilst practically this may be done by extending the existing contract, from the perspective of the Regulations, this is not an amendment, but a new contract. This will require a Contract Award Notice to be published in the OJEU.

168. Acquisition teams should be aware that amending an existing contract may give rise to the award of a new contract which is subject to the Regulations if the amendment is materially different in character from the original contract.

169. The European Court of Justice has said that an amendment is materially different in character from the original contract if any of the following applied:

a. The amendment introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.

b. The amendment extends the scope of the contract considerably to encompass services not initially covered.

c. The amendment changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

170. If the amendment is materially different in character from the original contract, the award of a new contract is subject to the Regulations and may therefore need to be advertised.

171. In order to avoid future problems, Acquisition teams should consider including more detailed variation provisions in the contract, for example to cover potential additional services, as long as those services were included in the original OJEU Contract Notice.

Framework Agreements

General

172. Regulation 19 describes the rules for Framework Agreements. A Framework Agreement sets out general terms for a series of future contracts so that the Authority is able to award individual contracts (call-offs) to participating suppliers without having to go through to a full procurement exercise for each individual contract.

173. MOD practice is to use legally binding Framework Agreements. £1 consideration is paid by the MOD to the contractor to ensure that the Framework Agreement binds the framework supplier(s) for the duration of the contract.

174. Where no consideration is paid, a non-legally binding Framework Agreement will arise. It is this form of Arrangement, where the Framework Agreement itself cannot be readily classifiable as a contract, which is addressed explicitly in Regulation 19.

175. A Framework Agreement where there is an obligation on the MOD to purchase goods, works or services could arguably be treated in the same way as any other contract under the Regulations.

176. The European Commission however takes the view that all types of Framework Agreements and Arrangements are covered by Regulation 19. Where the Regulations are applicable, Acquisition teams should, therefore, seek to follow

the procedures for Regulation 19 for all Framework Agreements and Arrangements in order to avoid any unnecessary risk to the procurement.

177. Regulation 19 does not apply to Part B services. However, Acquisition teams should consider following the procedures laid out in Regulation 19 as a useful way of ensuring compliance with the general principles of non-discrimination and transparency which do apply to Part B services.

Types of Framework Agreements

178. Regulation 19 expressly authorises two main types of Framework Agreements:

a. Single supplier Framework Agreement;

b. Multi supplier Framework Agreement with the following two methods of placing contracts:

(1) The choice of framework supplier for each call-off is based solely on their original tender.

(2) A mini-competition is conducted amongst every framework suppliers within the Framework Agreement capable of performing the contract.

179. A multi supplier Framework Agreement may be divided into categories, each covering different supplies, services or works. This allows the Acquisition team to call-off or run mini-competitions only amongst the suppliers in the categories that cover the subject of the call-off.

180. When setting up Framework Agreements, after the selection of framework suppliers using the appropriate procurement procedure, Acquisition teams should consider using the award criteria to limit the number of framework suppliers to 5 or 6 for the Framework Agreement or for each category under the Framework Agreements.

Award Procedures for Framework Agreements

181. A Framework Agreement is a mechanism that may be used for purchasing in accordance with the procurement procedures set out in the Regulations. Acquisition teams have to follow either the Open, Restricted, Negotiated or Competitive Dialogue procedures to place the Framework Agreement.

182. The other provisions of the Regulations regarding specifications, selection of candidates and contract award must be adhered to

183. Framework Agreements have to be advertised in the OJEU if the estimated value over its lifetime exceeds the relevant threshold and no exemption applies to the procurement. The contract notice must state:

a. That a Framework Agreement is being awarded;

b. The contracting authorities entitled to call-off under the Framework Agreement either by using individual names or generic descriptions;

c. The proposed number of framework supplier(s) (including the proposed maximum, where appropriate);

d. The estimated total value and frequency of the call-offs for goods, works or services;

e. The length of the Framework Agreement. If the duration is more than 4 years, the contract notice must give the reasons.

184. The Regulations do not explicitly address how contracting authorities must identify the users of the Framework Agreement. The European Commission takes the view that is not sufficient to publish a generic description of the contract authorities entitled to use the Framework Agreement. OGC's guidance recommends where generic descriptions are used "it is advisable to include, in the notice, a reference to where details of the authorities can be obtained."

185. Acquisition teams, who are setting up Framework Agreements in which other users participate, should specifically identify any entities (where known) that will, or may, use the Framework Agreement and the anticipated total of their requirements in either the OJEU notice or in the subsequent Invitation To Tender.

186. Acquisition teams should ensure there is a plausible rationale to justify the estimated total value of the Framework Agreement, which must be kept in a registered file. The legality of the Framework Agreement or call-offs will not be affected by small variations from the estimated value. However, if the payments to the supplier(s) exceed the estimate by a material amount (i.e. an amount that could have affected a supplier's decision to tender) then the legality of the Framework Agreement or call-offs could be questioned.

187. The requirement to give in the OJEU notice an estimate of the value of orders to be placed under the Framework Agreement, in practice, imposes significant limits on the extent to which other users can decide to use a particular Framework Agreement after it has been established.

188. At Regulation 19(10) the duration of Framework Agreements is limited to four years apart from exceptional cases which must be properly justified. What constitutes "exceptional circumstances" is not defined in Regulation 19. In considering whether a Framework Agreement of more than four years is justified, it is necessary for the Acquisition team to take into account amongst other things:

a. The precise nature of the goods or services, including where proprietary rights or technical or artistic reasons would limit a future competition and prevent achieving value for money;

b. The market in which the supplier(s) operate, in particular whether the scope for future competition would be affected by a duration of longer than four years, see Regulation 19(12);

c. Any investment required from the supplier(s) to fulfill the contract and the need for reasonable security for the framework supplier(s) to allow a reasonable return on any investment made;

d. The estimated benefits and savings from a duration longer than four years.

189. Acquisition teams that intend to enter into a Framework Agreement with duration beyond four years must ensure that there is credible rationale for the decision kept in a registered file.

190. The rationale for any extension beyond four years should also be explained in the contract notice so that suppliers understand why the longer duration is required and have the ability to challenge the decision if they believe the decision is not appropriate. It is, therefore, important that the reasons for the decision are sufficiently plausible, as a challenge may result in its review by a Court.

191. At Regulation 19(12), the prohibition on hindering, preventing, limiting or distorting competition recognises the possibility that MOD could effectively close off a market from regular competition if its contracts were too long in duration or too broad in their subject matter. It is linked therefore not only to the length of Framework Agreements, but also to the range of products and services covered

192. Acquisition teams must, therefore, restrict the range of each Framework Agreement to those goods and services for which a single set of selection and award criteria can reasonably be applied and which does not unreasonably shut out potential suppliers from the market.

Framework Agreements: Call Offs

193. Call offs based on the Framework Agreement are undertaken in accordance with Regulation 19 unless the call-off itself is subject to a specific exemption such as the “warlike stores” exemption under Article 346 (formerly Article 296).

194. For single supplier Framework Agreements, call-offs should be awarded within the terms laid down in the Framework Agreement. There should be no substantial changes to the specification or the terms and conditions of the Framework Agreement. An example of a 'substantial change' would be a framework advertised as covering stationery and later extended to cover computers.

195. For multi supplier Framework Agreements with three or more framework suppliers, there are two possible options for call-offs set out below.

196. First, where the Framework Agreement is sufficiently precise to cover the particular call-off, the terms of the Agreement can be applied and the call-off awarded to the framework supplier who provides the most economically advantageous offer based on the award criteria. The choice of supplier for each call-off is based solely on their original tender. This method is akin to purchasing from a "catalogue" and allows a range of suppliers with different strengths.

However, it is difficult to capture qualitative issues and is therefore likely to be impractical for complex requirements.

197. Second, where not all the terms of the proposed contract are laid down in the Framework Agreement, then the terms of the Framework Agreement may be supplemented in a mini-competition. The distinction between selection and award criteria must be maintained amongst those who could potentially undertake the contract. Award criteria and their respective weightings must not include selection criteria (i.e. financial standing and technical or professional ability) as the selection procedure will have been carried out when the framework agreement itself was awarded. New award criteria may be added as long as they relate to the award criteria set out in the Framework Agreement and weightings may be varied to reflect the particular requirement, so long as it has been made clear in advance those weightings may apply to certain award criteria. For more detail see Award Criteria section below.

198. The Authority should hold a mini-competition with all suppliers within the Framework Agreement who are capable of meeting the particular call-off requirement.

199. This method allows for more flexible procurement, as the terms may be adjusted to meet individual requirements. However, it will be expensive to administer especially where there are a large number of framework suppliers.

200. The mini-competition in essence is run by refining and / or supplementing those basic terms to reflect the particular circumstances, e.g.:

a. Delivery timescales;

b. Invoicing arrangements and payment profiles;

c. Additional security needs;

d. Particular mixes of quality and rates;

e. Associated services, e.g. installation and training.

Amending Framework Agreements

201. The purpose of setting up a Framework Agreement is to establish the terms on which contracts can be entered into. Finalising the terms of any call-off contract under a framework agreement should involve nothing more than use of the mechanism, i.e. it should not involve negotiation of any of the terms already established by the Framework Agreement.

202. Acquisition teams must, therefore, avoid any substantive change to the terms of the Framework Agreement if the change might have affected how suppliers' responded when the Framework Agreement was placed.

203. Amendments to Framework Agreements, e.g. to comply with new legislation, are permitted provided they do not require re-negotiation of the terms which

featured in the award criteria or alter the competitive position of framework suppliers in relation to unsuccessful bidders for the requirement.

204. Upgrading the product, service or works required is permitted providing the upgrade remains within the scope of the original specification. Acquisition teams must, therefore, avoid any substantive change to the specification if the change might have affected how suppliers' responded when the Framework Agreement was placed.

Dynamic Purchasing System

205. A "Dynamic Purchasing System" means a completely electronic system of limited duration which is:

a. Established by MOD to purchase commonly used goods, works or services; and

b. Open throughout its duration for the admission of suppliers operators which:

(1) Satisfy the selection criteria specified by MOD; and

(2) Submit an indicative tender to MOD or the person operating the system on its behalf which complies with the specification.

206. Regulation 20 describes the rules for Dynamic Purchasing Systems. In conjunction with Regulation 20, Acquisition teams will need to use the open procedure at Regulation 15 to establish a Dynamic Purchasing System but then the purchase of items under the System is under Regulation 20. It is designed for making purchases of items generally available on the market, i.e. regular "off the shelf" purchases.

207. The duration of the System must not exceed four years in other than exceptional circumstances justified on a case by case basis, which may based, for example, in order to ensure effective competition in the award of the System where four years would no be sufficient to provide a return on investment.

208. Acquisition teams must first advertise the System through a contract notice in the OJEU setting out the specification and award criteria. The specification must indicate the nature of the purchases envisaged under the System as well as all necessary information concerning the purchasing system, the equipment used and technical connection arrangements and specifications.

209. Suppliers who satisfies the selection criteria may join the System at any time on the basis of an initial 'indicative tender' in response to the contract notice in OJEU that complies with specification and other contract documents. An "indicative tender" is a tender prepared by the supplier that sets out the terms on which they would be prepared to enter into a contract if the Acquisition team decided to award the supplier a contact under the System. Once admitted to the System suppliers can also improve their indicative tender by submitting a new version at any time.

Acquisition teams must offer all potential suppliers direct and full access to the specification and other documents throughout the lifetime of the System.

210. When a specific purchasing requirement arises the Acquisition team must publish a simplified contract notice in OJEU inviting all interested suppliers to submit an indicative tender in response to the said notice. All indicative tenders must be evaluated by MOD before it issues an ITT for a particular order to all suppliers admitted to the System. The award must be made to the tenderer who submits the best tender on the basis of the award criteria set out in the contract notice setting up System. If appropriate, the award criteria may be formulated more precisely in the invitation to submit tenders.

Electronic Auctions

211. An 'Electronic Auction' means a repetitive on-line process for the electronic presentation of prices to be revised downwards or of new and improved values of quantifiable elements of tenders, including price, which:

a. Takes place after the initial evaluation of tenders; and

b. Enables tenders to be ranked using automatic evaluation methods.

212. Regulation 21 describes the rules for Electronic Auctions. Regulation 21(3) states that certain service or works contracts that have as their subject matter "intellectual performances", e.g. design of work, may not be the object of Electronic Auctions. Acquisition teams may hold an Electronic Auction:

a. Under the Open procedure;

b. Under the Restricted procedure - in practice, the Restricted procedure will probably be the most appropriate;

c. Under the Negotiated procedure where the Open, Restricted or the Competitive Dialogue procedure was discontinued because of irregular tenders or unacceptable tenders;

d. When running a mini-competition among the parties to a Framework Agreement; or

e. Opening of competition for contracts to be awarded under a Dynamic Purchasing System.

213. Acquisition teams must specify the use of Electronic Auctions in the OJEU contract notice. The contract specification needs to include amongst other things:

a. The quantifiable features / values in figures or percentages that will be the subject of the auction;

b. Any limits on the value that may be submitted;

c. The information to be available to tenderers in the course of the auction and if appropriate when it will be made available;

d. The relevant information concerning the electronic auction process;

e. The bidding conditions including the minimum differences that will, where appropriate, be required when bidding;

f. Information regarding electronic equipment, the arrangements and technical specifications for connection.

214. Expressions of interest are invited in accordance with one of the allowable procedures at paragraph 69. Following an initial evaluation using the award criteria in contract notice or bid documents, the Acquisition team simultaneously issues an invitation to participate to all tenderers who have submitted admissible bids. The invitation will include amongst other things:

a. The connection details and the date and time of the auction;

b. The mathematical formula used to determine the ranking based on new prices or values, which must include the weighting of the award criteria;

c. Where variants are permitted, a separate formula must be provided for each variant;

d. Where the auction is to be conducted in phases, the invitation must state the number of phases and associated.

215. Auctions must be based on lowest price or most economically advantageous offer, as stated in the contract notice or bid documents. During each phase of the auction Acquisition teams must communicate to the tenderers sufficient information to allow them to ascertain their relative ranking.

216. Acquisition teams may close the auction in a number of different ways:

a. By stating the date and time in advance in the invitation to participate;

b. When no new prices or values are received, provided that the invitation to participate states the time that will elapse after receiving the last bid;

c. When the number of phases in the auction advised in the invitation to participate have been completed.

Common Advertising Rules

Contract Notices

217. The Regulations establish transparent procedures which provide equal opportunities for all interested economic operators to tender in open procedures, or submit an expression of interest in restricted, competitive dialogue and negotiated procedures. Such transparency is achieved through the publication of a series of notices about the contract in the Official Journal of the European Union (OJEU).

Prior Information Notice

218. Regulation 11 (as amended by Regulation 2(3) of the Amending Regulations) sets out the rules for Prior Information Notices (PIN). As soon as possible after the beginning of each financial year, MOD is required by the Regulations to publish indicative PINs in OJEU, if it intends to take the option of shortening time limits for the receipt of Tenders as allowed for under the Open and Restricted procedures.

219. In addition to submitting PINs to OJEU, the Regulations encourage contracting authorities to publish the PIN on the internet in a Buyer Profile. This may also include the technical specification and supplementary documents. The Buyer Profile may also include details of possible future purchases, ongoing invitations to tender, contracts awarded and general information that may be useful to suppliers. It is unlikely that Buyer Profiles will be suitable for MOD procurement.

220. In the case of public supply contracts or framework agreements for the purchase or hire of goods, indicative PINs should outline by product area (as established by reference to the Common Procurement Vocabulary (CPV) nomenclature) at Annex C, requirements subject to the Regulations for which Tenders are expected to be sought, and contracts awarded, over the following 12 months.

221. In the case of public service contracts or framework agreements for the provision of Part A services, indicative PINs should outline by category (as defined in Schedule 3 of the Regulations), requirements subject to the Regulations for which Tenders are expected to be sought, and contracts awarded, over the following 12 months.

222. Acquisition teams may issue PINs for their areas using Project Online, providing the estimated value of all such supplies and services they expect to purchase during the financial year which either individually, or under the aggregation rules, would amount to not less than the current thresholds (see Annex E). Finance Officers should provide the necessary information.

223. In the case of works contracts, Regulation 11 requires MOD to publish an individual PIN in OJEU if it intends to take the option of shortening time limits for the receipt of tenders. This should be done as soon as possible after the decision to approve the planning of a works contract has been taken.

Contract Notice

224. The obligation to publish a contract notice permits economic operators from all Member States to be fully informed about contract opportunities all over the EU and allows sufficient time for prospective contractors to express an interest in the requirement.

225. An individual contract notice must be published before any Open, Restricted, Competitive Dialogue procedure, Negotiated procedure with prior publication or design contest. However, MOD may award a contract for Part B Services (see

paragraph 23 to 25 above) that does not involve placing a contract notice in the OJEU.

226. The Regulations requires that notices in the MOD Contracts Bulletin (or other electronic media or publications) must contain the same information as that published in the OJEU. The aim is to ensure the same level of information for all economic operators, irrespective of their Member State. For the same reason, notices cannot be published in national official journals or in the local press before the date of dispatch to the OJEU. Acquisition teams therefore must be able to supply proof of the date of dispatch. This date should also be mentioned in any other advertisement.

227. Project Online – the MOD's e-notice creation and submission system - has adopted the new EC Standard Forms series used to prepare a contract notice in the standard layout required under these procedures.

228. The Regulations require that Acquisition teams use the CPV as the reference nomenclature for public contracts. The CPV codes (for Supplies) and the CPV equivalent of the Central Product Classification (CPC) code (for Services) are to be inserted in the contract notice (See Schedule 3 of the Regulations for these). The contract notice should be drafted with care to ensure it:

a. Specifies the requirement accurately as significant changes to the advertised requirement (for example a quantity change of more than 25%) may result in a need to re-advertise;

b. Openly records any proposed exceptions (for example national health and safety requirements or exceptions to British and European Standards);

c. Indicates, where appropriate, that variant offers will be considered;

d. Properly reflects the intention to invite a minimum number of tenderers to submit tenders; and

e. Sets out the award criteria.

f. In the case of the Open Procedure, the notice **must** include:

(1) persons authorised to be present at the opening of tenders; and

(2) date, time and place for such opening.

This applies whether or not there is an intention to allow attendees from outside the contracting authority to attend.

229. The Official Publications Office has a procedure for handling notices that are not compatible with the Regulations. In summary, the procedure is as follows:

a. If the minimum time limits are not respected in an OJEU contract notice, the Official Publications Office will ask the originator for an amended contract notice to be sent within 48 hours (24 hours in the case of an

accelerated procedure). If this is not done, the contract notice will be published and the case reported to the European Commission.

b. If a contract notice is received too late for publication within the time limit laid down by the Regulations, or if the contract notice is illegible or incomplete, the originator will again be given 48 hours (24 hours for an accelerated procedure) in which to submit a corrected contract notice. Failure to respond will be reported to the European Commission.

c. For a contract notice whose length exceeds 650 words, the originator will be given 10 days in which to submit an acceptable contract notice. Again, failure to respond will be reported to the European Commission.

d. It should be noted that in the case of amended notices, the time limits in the subsequent procedures are calculated from the date the amended contract notice is sent to the Official Publications Office.

230. Whenever a procurement process is cancelled it is important that all parties are informed of the fact as soon as the decision is taken. It is also necessary to notify the OJEU if a contract notice had previously been issued. You should do this by submitting a Standard Form 14 – Notice for additional information, information on incomplete procedure or corrigendum. Section VI.2 has a tick box to say that the awarding procedure has been discontinued. Authorities are encouraged to submit this form to cancel the contract notice as failure to do so could mean that the authority will receive the automated reminders which the OJEU office send to authorities who have failed to submit an award notice.

Voluntary Transparency Notice (VTN)

231. The VTN announces an intention to enter into a contract where a Contract Notice has not been published in OJEU due to the contract being placed under the Negotiated Procedure Without Prior Publication of a Contract Notice, under Regulation 14. A VTN is not required for procurements exempt from the Regulations.

232. The VTN is the term in the Regulations for the Voluntary Ex Ante Transparency Notice set out in EC Directive 2007/66/EC.

233. The VTN is to be published before the contract is awarded so that industry has an opportunity to see that MOD intends to place a contract and to raise an objection if they think the award is illegal and / or in breach of the Regulations.

234. In the event of a legal challenge, the VTN provides a defence against the remedy of ineffectiveness that would otherwise allow the Court to strike down the contract if it decides that a Contract Notice should have been issued. An aggrieved supplier will only be able to apply to the Court for damages if the contract has been awarded, or damages and setting aside the contract award decision if the contract has not been awarded.

235. After publication of the VTN, the Contract Award Notice must still be placed in OJEU following the conclusion of the contract.

Publishing the VTN

Negotiated Procedure without Prior Publication of a Contract Notice

236. Acquisition teams placing a single source contract using the Negotiated procedure without prior publication must publish a VTN as soon as the procurement strategy decision is made to award a single source contract under the provisions of Regulation 14. They must also keep a clear record of why it has decided that Regulation 14 applies to the procurement.

237. The contract cannot be entered into before the end of a period of at least 10 clear calendar days beginning with the day after the date on which the VTN is published in the OJEU. For example, where a VTN is published in OJEU on 1 December, the contract cannot be awarded until 12 December at the earliest.

Part B Services Contract

238. As of 1st January 2014 acquisition teams are no longer required to publish a VTN for Part B services contracts.

Completing the VTN

239. Acquisition teams are only required to complete the mandatory fields on the VTN notice, which are:

a. Section I.1 – name address and contact point;

b. Section II.1.1 – title attributed to contract;

c. Section II.1.2 – Type of contract and location of work or place of performance;

d. Section II.1.4 – short description of contract;

e. Section II.1.5 – Common Procurement Vocabulary (CPV) code;

f. Section V.3 – name and address of supplier to whom a contract is to be awarded;

g. Annex D – Justification for the award of the contract without prior publication of a notice.

240. Acquisition teams are required to tick the relevant sub-paragraph in Annex D that applies to their procurement. The options are:

a. Sub-paragraph a) to j) lists the provisions of Regulation 14 which permit the award of a contract under the Negotiated procedure without prior publication;

b. Sub-paragraph m) is **not** used if the contract falls outside the scope of the Regulations under Article 346 of the Treaty for the Functioning of the EU (formerly Article 296 of the EC Treaty) or any other general exclusion at Regulation 6.

241. Acquisition teams are also required provide a written explanation at Annex D, not exceeding 500 words, explaining why the decision was made to place a single source contract under Regulation 14. Teams must make reference to the relevant section of Article 31 of the Directive rather than Regulation 14 in their justification. **Until further notice, the wording of this explanation must be reviewed by Central Legal Services - Commercial Law Division to assist in reducing the risk of challenge.** This requirement will be continually reviewed.

242. Acquisition teams should keep this explanation as concise as possible. Accuracy is also vital. If a supplier considers that the reasons given for using Regulation 14 are incorrect or misleading then they could bring a legal challenge.

Contract Award Notice

243. Regulation 31 (as amended by Regulation 6(7) of the Amending Regulations) sets out the rules for the Contract award Notice.

244. Acquisition teams which have awarded a contract must, irrespective of the procedure used, publish a notice setting out the most important points concerning the conditions in which the contract has been awarded.

245. For service contracts, the notice will be published in the case of public contracts for Part A services listed in Schedule 3 of the Regulations. In the case of Part B services, the award notice will be published only if the contracting authority has indicated its agreement. The award notice must still be submitted.

246. The Regulations recognise the need to withhold certain information where public release would:

a. would impede law enforcement;

b. would be contrary to public interest;

c. would prejudice commercial interest; or

d. might prejudice fair competition between suppliers.

247. MOD Policy is that information on contract award will be published using Project Online where MOD would not reasonably expect to withhold it under the Freedom of Information Act. The tenderers will be given advance notice using DEFFORM 47, so they can identify specific harm in disclosing the information, which may be withheld on an exceptional basis. Where publication is not appropriate, Acquisition teams should insert either 'Commercially Sensitive' into the field(s) in the form on Project Online.

248. The contractor's name; nature of the goods or services to be supplied; award criteria; rationale for contract award; and headline price of the winning tender will be published in all but the most unusual circumstances. Acquisition teams must consult the Policy Sponsor, via the Commercial Policy Help Desk, before deciding not to publish this information.

249. Annex D of the Contract Award Notice is the same as Annex D of the VTN. It requires the justification for awarding a contract without publication of a contract notice in OJEU. Please see guidance on completing Annex D of the VTN above. Acquisition teams must ensure that the justification is exactly the same as the information that would already have been submitted as Annex D for the VTN. **Until further notice, if a VTN was not sent to OJEU, the wording of this justification must be reviewed by Central Legal Services - Commercial Law Division to assist in reducing the risk of challenge.** This requirement will be continually reviewed.

Time-limits

General Rules

250. In order to give all potential suppliers throughout the EU a chance to tender for a contract or seek an invitation to take part in an award procedure before the closing date, the Regulations lays down minimum periods to be allowed at the different stages of the procedures. Acquisition teams may not set shorter deadlines than those specified in the Regulations, but are free to allow longer periods and must do so in certain cases.

251. The time-limits for return of tenders and requests from companies to be selected to tender must take into account the complexity of the contract and the time needed to prepare tenders. They must allow for the time required for the examination of forms of tender which may be unfamiliar to the suppliers or any site visits or late information from MOD needed to produce tenders and must exceed where necessary the minimum periods set out in the Regulations.

OJEU Time-limits

252. The Official Publications Office has to publish contract notices within 12 days from the date of despatch by post or fax of the contract notice, or within 5 days from despatch electronically of the contract notice, or within 5 days when the accelerated procedure is used.

253. The Official Publications Office should send a copy of the advertisement to the originator to confirm its publication. If this is not received within 14 days, or 7 days in the case of the accelerated procedures, hastening action should be taken by the Acquisition team.

Open Procedure Time-limits

254. **Minimum** deadlines for receipt of tenders in the Open procedures are set out below:

a. 52 days from the date of dispatch of the contract notice for publication in the OJEU;

b. Where the contracting authority has published a PIN in accordance with Regulation 15(7), the period may be reduced to 36 days in general (but not less than 22 days) from the date of dispatch of the contract notice;

c. Where the contract notice is sent electronically, the period may be reduced by 7 days;

d. In cases where contract documents are available online, the period may be reduced by 5 days; and

e. The above time limits must be extended in the circumstances outlined paragraph 251 above.

255. **Maximum** time limit for the dispatch of contract documents and other supporting documents is fixed at 6 days after the receipt of the request (provided that the request has been sent in good time).

256. **Maximum** time limit for the dispatch of additional information relating to the contract documents is 6 days before the final date fixed for receipt of tenders, provided such information has been requested in good time.

Restricted Procedures Time-limits

Normal Restricted

257. **Minimum** deadline for receipt of requests to participate/ expressions of interest in normal Restricted procedures:

a. 37 days from the date of dispatch of the contract notice for publication in the OJEU;

b. Where the contract notice is sent electronically, the period may be reduced by 7 days;

c. In cases where contract documents are available online, the period may be reduced by 5 days.

258. There is no minimum period for the time between receipt of expressions of interest and issue of the invitation to tender.

259. **Minimum** deadline for the receipt of tenders in normal Restricted procedures:

a. 40 days from the date of dispatch of the invitation to tender;

b. Where the contracting authority has published a PIN in accordance with Regulation 16(18), the period may be reduced to 36 days in general (but not less than 22 days) from the date of dispatch of the invitation to tender;

c. Where contract documents are available online, the period may be reduced by 5 days.

d. The above time limits must be extended in the circumstances outlined paragraph 251 above.

260. The **maximum** time limit for the dispatch of additional information relating to the contract documents is 6 days for normal Restricted procedures before the final date fixed for receipt of tenders, provided such information has been requested in good time.

Accelerated Restricted

261. **Minimum** deadline for receipt of requests to participate in accelerated Restricted procedure:

a. 15 days from the date of dispatch of the contract notice for publication in the OJEU;

b. Where the contract notice is sent electronically, the period may be reduced by 5 days;

262. **Minimum** deadline for the receipt of tenders in accelerated Restricted procedures:

a. 10 days from the date of dispatch of the invitation to tender;

b. The above time limit must be extended in the circumstances outlined paragraph 251 above.

263. The **maximum** time limit for the dispatch of additional information relating to the contract documents is 4 days for accelerated Restricted procedures before the final date fixed for receipt of tenders, provided such information has been requested in good time.

Competitive Dialogue and Negotiated with Prior Publication Procedures Time-limits

Competitive Dialogue and Negotiated Procedures

264. **Minimum** deadline for receipt of requests to participate in the Competitive Dialogue and Negotiated with prior publication procedures:

a. 37 days from the date of dispatch of the contract notice for publication in the OJEU;

b. Where the contract notice is sent electronically, the period may be reduced by 7 days in normal negotiated procedures;

c. In cases where contract documents are available online, the period may be reduced by 5 days.

Accelerated Negotiated Procedures

265. **Minimum** deadline for receipt of requests to participate in accelerated Negotiated procedure:

a. 15 days from the date of dispatch of the contract notice for publication in the OJEU

b. Where the contract notice is sent electronically, the period may be reduced by 5 days.

Procurement Decisions and Debriefs Time-limits

266. Timescales for all procurement procedures:

a. Notification of decisions with regard to supplier selection and contract award – as soon as possible

b. Debriefing on request – as soon as possible but within 15 days of request.

Method of Calculating Time Limits

267. Under the rules for calculating closing dates for the receipt of tenders and requests to participate, periods expressed as a certain number of days from a particular event:

a. run from the day following the day on which the event takes place;

b. begin at 00h00 on the first day, as defined in (a), and end at 24h00 on the last day of the period;

c. end, if the last day of the period falls on a public holiday or a Saturday or Sunday, and the period is not expressed in hours, at 24h00 on the following working day.

268. Periods expressed in hours, which are common for certain acts to be performed by contractors, end at the time and date stated.

269. Periods include public holidays and weekends unless these are expressly excluded or the periods are expressed as a certain number of working days.

Re-Advertising Requirements

270. In order to avoid a potential breach of the Regulations Acquisition team should consult the policy sponsor, via the Commercial Policy Help Desk:

a. where there will be a prolonged delay in the issue of the ITT from the date envisaged when the contract notice was published in OJEU; or

b. if any fundamental aspect (e.g. price, quantity, duration) of the requirement significantly changes from the requirement previously advertised in OJEU.

271. The test for whether a procurement procedure needs to be started again by re-advertising In OJEU will be:

a. could the prolonged delay or changed requirement attract bidders that did not respond to the original notice or have affected the way in which bidders responded; or

b. could the changed requirement call into question a decision made earlier in the process, such as the basis on which a potential supplier was not selected for inclusion in the tender list.

Supplier Selection and Award Criteria

General

272. Part 4 and 5 of the Regulations therefore lays down common rules on participation which contain provisions on procedures for granting permission to bid and set the criteria for selecting potential suppliers and those for awarding contracts.

273. The logic behind the Regulations is that the procedures for (1) selection of tenderers and (2) awarding the contract are distinct operations and are governed by different rules.

274. The basic principle is that criteria for selection of tenderers are to be on the basis of economic and financial standing and technical or professional capability. These must not be used as the contract award criteria.

275. Acquisition teams should consider at the **start** of the procurement the **implications of a legal challenge** on time, capability and cost. The possibility of a challenge should be entered in the project risk register and can be mitigated by ensuring:

a. The selection criteria are unambiguous and made available in good time to all potential suppliers in the supplier selection process;

b. The award criteria are unambiguous and made available in good time to all tenderers in the tender assessment process;

c. Any evaluation is carried out objectively and solely on the basis of the selection and award criteria provided to the potential suppliers, tenderers and participants;

d. All decisions are properly recorded in a registered file and readily available for scrutiny in the event of a challenge.

Supplier Selection

276. The Regulations do not explicitly refer to the use of a Pre-Qualification Questionnaire (PQQ) in the selection process. However, where an Acquisition team uses a PQQ, it should be aware of recent case law which establishes that the obligation of transparency requires disclosure of PQQ marking information. Potential suppliers must therefore be made aware of specific mark allocations, weightings, minimum standards and pass marks. It should also be made clear if any questions are sufficiently important that an unsatisfactory answer could result in a supplier being excluded, regardless of its total score.

277. Potential suppliers are assessed against predetermined selection criteria in Open procedures as well as Restricted, Competitive Dialogue and Negotiated procedures. However, a favourable assessment does not produce the same effect in the four procedures.

Open procedures

278. In the Open procedure, tenderers meeting the predetermined selection criteria, have an automatic right to participate in the competition. The Acquisition team is obliged to examine all the offers made by the qualifying tenderers. To meet this requirement the Acquisition team:

a. must state in the Contract Notice the minimum economic and / or technical levels (if any) required as selection criteria;

b. must ensure all the tender documentation is ready to be issued when the Contract Notice is placed;

c. must issue the tender documentation to any supplier that requests the information. These requests must be received 6 days before the competition closes. To reduce the number of requests for tender documentation the tender documentation can be published at the same time as the Contract Notice;

d. can carry out the tender evaluation in 2 stages:

(1) firstly the acquisition team will establish whether tenders meet the selection criteria, this is a pass / fail element of the tender evaluation.

(2) secondly, the remaining tenders are evaluated for Value For Money. Areas within the MOD and the Met Office have found that companies often do not submit a tender if they cannot meet the minimum requirements.

Restricted, Competitive Dialogue and Negotiated procedures

279. In Restricted, Competitive Dialogue and Negotiated procedures, potential suppliers who satisfy the predetermined selection criteria can be excluded from the

award procedure because the Acquisition team may limit the number of candidates to be invited to tender or to negotiate.

280. Acquisition teams are not obliged to invite all the candidates who satisfy the predetermined selection criteria. Those who are invited, on the other hand, can only be chosen on the basis of the objective and non-discriminatory criteria laid down at the commencement of the procedure.

281. Acquisition teams can therefore only limit the number of candidates invited to tender or negotiate by taking the candidates who have the best qualifications in the context of the selection criteria laid down in the contract notice.

282. To limit the number of candidates, Acquisition teams must indicate in the contract notice the number or range of candidates which would be selected to tender or negotiate. In the absence of such indication, all candidates who present correct candidatures and who have the required qualifications must be selected to tender or negotiate.

283. It is possible that, having fixed a minimum number of candidates in the contract notice, there are an insufficient number of candidates having the qualifications required for the contract. In such cases tenders may only be invited from all the candidates who meet the qualification criteria.

284. Acquisition teams should carefully follow the guidance in the Supplier Selection topic in order to avoid any possibility of a legal challenge from a potential supplier who was not invited to tender.

Selection Criteria

General

285. Regulations 23 to 25 set out the selection criteria that may be taken into account in deciding which companies should be invited to tender.

286. The Regulations allow the Acquisition team to set the levels of economic and financial standing or ability and technical capacity necessary for a particular contract. They also determine the references or means of proof which may be produced by the potential supplier to establish such level of standing and capacity.

287. Any minimum levels of “economic and financial standing” or “technical or professional ability” should set out in the OJEU contract notice in accordance with Regulation 15(12) or 16(12) or 17(12) or 18(15) depending on the procedure adopted.

Mandatory Exclusion of Economic Operators

288. Subject to the derogation at Regulation 23(2), Regulation 23(1) requires that Acquisition Teams exclude suppliers from public contracts if the contracting authority has "actual knowledge" that the supplier has been convicted of an offence listed at Regulation 23(1). However Regulation 23(2) allows an exception to Regulation 23(1) being justified where the contracting authority is satisfied that

there are "overriding requirements in the general interest", e.g. an Urgent Operational Requirement should qualify for this exception. Further guidance on how to obtain information from potential suppliers and decide whether or not to exclude them from the contract award procedure is in the Supplier Selection: Excluding Ineligible Suppliers CPS.

Award criteria

289. Regulation 30 sets out the rules for the award criteria. Acquisition teams must award the contract either on the basis of the "lowest price only", or on the basis of the "most economically advantageous tender".

290. "Lowest price" means only the prices offered by the tenderers are taken into consideration and the contract must be awarded to the tender who offers the lowest price.

291. "Most economically advantageous tender" is based on various criteria and sub-criteria depending on the contract in question. Regulation 30(2) provides examples of such criteria. This list is not exhaustive. However, any criteria used must be objective and strictly limited to the subject matter of the contract.

292. Industrial Participation (or offset) **must not** form part of the contract award criteria or tender evaluation process, as this may be seen as impeding freedom of trade.

293. Where an Acquisition teams intends to award a contract on the basis of the most economically advantageous tender, the Regulations require that the award criteria, including all sub-criteria, and their respective weightings (or ranking if weightings are not used – see below) are set out in the contract notice or contract documents. Acquisition teams must make sure that they follow the scoring method as advised to potential suppliers. This should include full details of the award criteria and scoring available. It should also be made clear if a maximum score can only be given on a particular question by a response which exceeds the specific requirement.

294. To introduce some flexibility this weighting may be expressed as a range or if weighting is not possible **for demonstrable objective reasons**, the descending order of importance should be specified.

295. Where weightings are only expressed as a range, Acquisition teams must ensure the demonstrably objective reasons why weightings is not possible is kept in a registered file in the event of a legal challenge.

296. The European Court of Justice has ruled that a contracting authority cannot apply weightings and sub-criteria to award criteria set out in tender documentation unless those weightings or sub-criteria have been previously brought to the tenderers' attention. It is not acceptable to provide a high level summary of the award criteria if a more detailed distinction will be used in the evaluation because the sub-criteria will impact the award decision.

Tendering and Contract Award

Electronic Tendering

297. The submission of electronic tenders, where such technology is in place, is permitted under the Regulations provided equal treatment is given to traditional means and the use of electronic tendering does not restrict access to specific sectors of the EC.

298. Where the MOD chooses to adopt electronic tendering, the method must:

a. enable each tender to contain all the information necessary for its evaluation;

b. maintain the confidentiality of tenders pending their evaluation; and

c. provide for tenders to be opened only after the time limit for their submission has expired.

Tender Documents

299. In **all** cases, you must indicate in the DEFFORM 47 (Invitation To Tender) which Regulations apply to your procurement.

Required Information

300. Where the Restricted procedure is used, Acquisition teams should ensure that the DEFFORM 47 includes all of the information listed in Regulation 16(15).

301. Where the Negotiated procedure with prior publication is used, Acquisition teams should ensure that the DEFFORM 47 includes all of the information listed in Regulation 17(17).

302. Where the Competitive Dialogue procedure is used, Acquisition teams should ensure that the DEFFORM 47 includes all of the information listed in Regulation 18(18).

303. The award criteria and weightings are unambiguous and should be clearly stated in a prominent manner in the DEFFORM 47.

304. The DEFFORM 47 should also make clear, where applicable, whether the assessment will involve an iterative down selection process, the results of which may ultimately determine the contract award.

305. DEFFORM 47 should be issued in accordance with the relevant Topic guidance.

Variant Tenders

306. The DEFFORM 47 includes information on whether it is acceptable for variant offers to be submitted where these provide better value for money. In such cases, however, you must chose the appropriate option on the DEFFORM 47 and the

contract award must be on the basis of the most economically advantageous offer with the award criteria clearly stated.

UK Site Visits

307. Where tendering entails a prior visit to a UK site, the tender return date in the DEFFORM 47 should make adequate allowance for tenderers outside the UK to conduct the visit in a reasonable time.

Tender Evaluation

308. The tender evaluation process should be decided upon and agreed prior to the issue of the DEFFORM 47. Any evaluation is carried out objectively and **solely** on the basis of the award criteria, sub-criteria and weightings provided to the tenderers.

Abnormally Low Tenders

309. If an abnormally low tender is received, Acquisition teams should request the tenderer to provide an explanation of the offer and should take that explanation into account when considering the tender. Acquisition teams may, however, only decline an abnormally low tender on the basis set out in Regulation 30(6), 30(7) and 30(8).

The Standstill Period

310. The Court of the European Union decided in the Alcatel case that unsuccessful bidders should have the opportunity to ask a Court to set aside the decision of a public authority to award a contract before the contract is placed where a breach of the Regulations that has prejudiced the bidder.

311. The Amending Regulations therefore make provisions for a standstill period of 10 clear calendar days between contract award decision and the conclusion of the contract.

312. A flowchart to illustrate how the MOD operates the standstill period is set out at Annex H. Use DEFFORMs 158A, B and C. The process for running the standstill period under DSPCR 2011 is in Chapter 16 of the DSCPR 2001 Guidance.

Does the Standstill Period apply?

313. The standstill period is applied to all awards of contracts or framework agreements under the Regulations including the procurement of Part B services. However, where you have excluded a tenderer's offer from consideration, i.e. as part of the down-selection or iterative tendering process, and you notified the tenderer of this exclusion, you do not need to send a DEFFORM 158B or C to the tenderer if 3 months have elapsed from the "date of knowledge".

314. The "date of knowledge" is the date of one of the following:

a. the Voluntary Transparency Notice (VTN) for non-competitive procurement;

b. the Contract Award Decision Notice (CADN) for competitive procurement;

c. the Contract Award Notice (CAN) if there is no VTN for non-competitive procurement or an aggrieved party does not receive a CADN.

Calculating the Standstill Period

315. The mandatory standstill period begins the day after the Contract Award Decision Notice is issued by fax or email to all tenderers and (if applicable) candidates. Commercial Officers must fax or e-mail all Notices on the same day. When issuing Notices by fax or e-mail, the standstill period ends at midnight at the end of the 10th day after the relevant sending date. So, if a fax or e-mail is sent on 1 December, the contract cannot be awarded until 12 December at the earliest. Time limits become much more complex if notices are sent by post. You must therefore only issue notices by post as a last resort, and only after consulting CLS-CL.

316. No extra allowance should be made if some of the tenderers are located outside the UK or for public holidays which occur **during** the standstill period.

317. However, if the standstill period **ends** on a non-working day (being a Saturday, a Sunday or a public holiday), it must be extended to midnight at the end of the next working day.

Standstill Period for Call-Offs Under Framework Agreements

318. The Amending Regulations extend the remedies regime to call-off contracts under framework agreements. Acquisition teams should note that the new arrangements do **not** apply to any call off from a framework already in existence or where the competition for the framework started before 20 December 2009.

319. The standstill period must be applied to call-offs from a framework where:

a. the value of the call-off is above the threshold of the Regulations used for normal contracts; and

b. the call-off is awarded following a mini-competition under the framework.

320. Acquisition teams must ensure that Regulation 19 is strictly adhered to when placing and operating frameworks. Applying the standstill period to such call-off contracts should prevent the call-off being declared ineffective by the Court if there is a successful legal challenge. This may occur if the Court considers that the call-off was awarded in breach of the mini-competition rules in the framework.

321. The standstill period is not to be used for call-off contracts where the goods, services or works are:

a. urgently required (for example, for military operations or civil emergencies); or

b. purchased on commodity market (for example, oil or agricultural products) where price cannot be held during the standstill; or

c. procured through brokers (for example, air or ship charter) where price or availability cannot be held during the standstill.

322. If the standstill period for call-off contracts (placed under PCR 2006) applies, the Commercial Officer should:

a. for the winning tenderer issue DEFFORM 158A;

b. for unsuccesful tenderers issue DEFFORM 158B; and

c. for all other suppliers on the framework agreement notify them of the contract award by issuing DEFFORM 158C. This applies to suppliers who expressed an interest in the requirement but were not invited to tender.

If the call-off contracts were placed under DSPCR 2011 then you should refer to Chapter 16 of the DSPCR 2011 Guidance.

Standstill Period for PFI / PPP Contracts

323. The mandatory standstill period in PFI / PPP procurements under the Competitive Dialogue or Negotiated procedures will start on the day after the notification of the selection of the Preferred Bidder to the Preferred Bidder and other tenderers.

324. For PFI / PPP procurements that have announced their Preferred Bidder before February 2006 but have not yet reached commercial close, the application of the standstill is to take place at a time when all matters material to the contract award decision to the winning tenderer has been resolved. This should be interpreted as being prior to commercial close.

Debriefing during Standstill Period - Procurements Started Before 20 December 2009

325. Acquisition teams must provide additional debriefing within the mandatory standstill period only if an unsuccessful tenderer requests it by the end of the second working day of the standstill. For the avoidance of doubt, this specific requirement to debrief during the standstill stems from the previous version of the Regulations and **does not apply to procurement procedures started after 20 December 2009**.

326. Acquisition teams must allow for three working days between this additional debriefing and the end of the standstill period. Acquisition teams may, accordingly, need to extend the standstill around public holiday periods.

327. Acquisition teams should not allow tenderers to use this requirement to stretch the standstill period indefinitely if they, for example, request a face to face debrief and claim their diaries are full for a month.

328. Debriefing may take place by phone, e-mail or letter. In any event, this additional debriefing must take place within the standstill period.

329. Where a request for additional debriefing arrives within the standstill period but after the two working days deadline, Acquisition teams are not required to provide further debriefing within the standstill but still need to provide it within 15 days of receiving a written request, as per the normal rules set out below.

Creating the Option

330. To ensure that the introduction of the standstill period does not encourage successful tenderers to indulge in last minute re-negotiations, the MOD requires successful tenderers to be committed to proceed as from the end of the standstill period if the MOD calls on them to do so.

331. It is not possible within the rules for the MOD to do this by placing the contract with a later effective date or placing it conditionally. So the MOD will take an option to place the contract on the winning tenderer if there is no court challenge or, if there is a challenge, once that challenge has been disposed of by the court in MOD's favour.

332. The DEFFORM 47 includes an obligation on the tenderer to that, once the MOD announces a winner and until the contract is entered into with the winner, any bidder declared to be the winner will hold open its offer to contract with the MOD on the terms of the winning tender irrevocably and unconditionally.

333. The Option remains valid for 30 days unless there is a legal challenge, in which case that period can be extended. Acquisition teams should note that this option period is different from the standstill period. The calculation of the standstill period is explained above. Moreover, the standstill period must be concluded within the period that the option remains valid.

Standard Notice of Contract Award Decision

334. For procurement procedures started after 20 December 2009, as soon as possible after the decision to award the contract or framework agreement has been made by the Acquisition team, the Commercial Officer will issue the appropriate Contract Award Decision Notice (DEFFORMs 158A / B / C, as appropriate) to the winning tenderer and the unsuccessful tenderers by fax or e-mail. For the avoidance of doubt, the “decision to award the contract or framework agreement” refers to the decision of the tender assessment panel or the approving authority, whichever is the later.

335. Commercial Officers must also inform all other candidates of the decision using Contract Award Decision Notice (DEFFORM 158C) i.e. all suppliers who:

a. did not pass the PQQ but were not told the full reasons at the time due to commercial sensitivities. This should be a rare occurrence; or

b. were invited to tender or negotiate the contract, or be a party to a framework agreement, but who withdrew from the process before submitting a tender; or

c. were not invited to submit a final tender at the end of the dialogue phase of the Competitive Dialogue procedure (that is, their solution was rejected during the dialogue phase).

336. Before 20 December 2009 there was a two stage process of contract award decision and then debrief. Commercial Officers and Acquisition Teams must note that the requirement is now for the full debrief to be given in the Contract Award Decision Notice. Therefore you will need to take this into account during your planning process as the requirement for full debrief now occurs earlier.

337. You must give Tenderers and candidates the full reasons for the award decision. The information provided should detail the characteristics and relative strengths of the successful tender against the award criteria (and sub criteria if applicable), **and** (other than for candidates) by comparison to the unsuccessful tender to whom the notice is being sent. This could be achieved by providing the scores (of the winning tenderer and the unsuccessful tenderer to whom the notice is being sent) against each criteria and a supporting narrative which explains why the winning tenderer scored more heavily in the relevant areas. The information which the unsuccessful tenderer must be given must be sufficient in detail to ensure it has enough information to be able to determine whether the MOD's decision to award the contract to the winning tenderer is well founded in accordance with the published evaluation criteria. In providing this information, Commercial Officers should take care to protect the confidential aspects of the winning tender (e.g. the supplier's intellectual property, line item or unit costs). For further advice on protecting commercially sensitive information, see the Protection of Information topic.

338. For procurement procedures started before 20 December 2009 where the previous version of the Regulations applies, Acquisition teams must issue Annex I – Previous Standard Notice of Contract Award Decision EC (Edn 02/11 revised).

Standard Notice of Entry into Contract

339. Once the standstill period has passed, or legal proceedings have been finally determined in the MOD's favour, or any injunction lifted, the Acquisition team enters into the contract by issuing Annex L (Standard Notice of MOD's Entry into Contract EC (Edn 02/11)) to this guidance or Annex D to Chapter 16 of the DSPCR 2011 guidance as appropriate. This serves written notice on the winner that the

tender is accepted. Where the tender has been amended as a result of negotiation under the negotiated procedure, this should be recorded in the Notice.

340. The contract will at that point be brought into existence and the Contract Award Notice is to be sent to the OJEU within 48 days.

Debriefing

341. If the competition commenced on or after 20 December 2009, there is no longer a two stage debrief process. The full debrief is put in the contract award decision notice.

342. It is possible that unsuccessful tenderers may want to ask some questions about the information you have given them, which might only be looking for general 'clarity improving' information. You will need to provide this as it is probably being requested to help them form a view. However, if the request highlights to you that your original debrief information was in some way deficient (e.g. it did not contain the full reasons), then you should consider whether to restart the standstill period, this time providing the full reasons. Not providing full information could result in a legal challenge.

343. An unsuccessful tenderer can also request additional information in writing and a you must give a response within 15 days. However, you should have already given them all the relevant information. If you have any questions, please contact CLS-CL for advice.

344. Although openness and transparency are key principles of the EU Public Contracts Regulations there are certain situations where a Contracting Authority may withhold debriefing information, such as where its disclosure would:

a. impede law enforcement;

b. be contrary to the public interest;

c. prejudice the commercial interests of any person; or

d. prejudice fair competition between suppliers.

Legal Challenges and Remedies

345. To minimise the risk of a successful legal challenge from an aggrieved supplier, it is important that all MOD Acquisition Teams properly observe the Regulations. Any supplier can make a claim against the MOD either before or after contract award.

346. The Regulations make a range of legal rights and remedies available to tenderers who suffer, or risk suffering, loss or damage as a result of failure by the MOD to comply with the requirements of the Regulations.

347. You can find more detailed guidance on the above in the Legal Challenges and Remedies Commercial Policy Statement which also covers ways to mitigate against challenges from aggrieved suppliers.

Statistics and Records

348. The Regulations require the MOD to submit a return to the Efficiency Reform Group (ERG) by 31 July each year. The return must provide information on each contract awarded under the Regulations in the previous calendar year and the overall value of contracts placed in that year which were below the relevant threshold.

349. The policy sponsor will co-ordinate this task each year, on behalf of MOD. Using DEFFORM 49 (EC STATS), Acquisition teams must forward information on each contract placed under the Regulations to the policy sponsor within 15 working days after contract award. Classification is now to be made by the use of CPV Codes. One CPV code should be used for each contract awarded. If necessary a higher level code should be used which adequately describes the requirement.

350. Information on contracts below the relevant thresholds and therefore placed without advertisement will be collated by the policy sponsor from the DEFFORM 57 statistics.

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