

Tender Process

Our Policy

- The principles of the Treaty for the Functioning of the European Union (TFEU) and associated tendering processes apply to all procurements.
- During tendering you must state the process you will follow at each stage and this must be in line with the processes stated in the Official Journal of the European Union (OJEU) / Defence Contracts Online (DCO) Contract Notice, or other adverts, where these apply.
- You must issue Tender Documentation for all procurements including Single Source.

Purpose and Scope

1. This Commercial Policy Statement (CPS) sets the Ministry of Defence (MOD) policy and gives an overview of the tender process for all contracts. It focuses on the competitive tendering process and is created as guidance for MOD commercial officers so “you” means an action on the commercial officer.
2. The policy is applicable to all procurements, including those exempt from following the EU Regulations, mini competitions under Frameworks Arrangements and single source contracts. The [Defence and Security Public Contracts Regulations](#) (DSPCR) 2011 and the [Public Contracts Regulations](#) (PCR) 2006 and the Public Contract Regulations 2015 (the EU Regulations) set the legal framework under which you procure. Where the EU Regulations apply you should first read the relevant EU guidance. The specific chapter for tendering within the DSPCR is chapter 15, [Conducting the Tendering Exercise](#), and you can also use this guidance when procuring under PCR 2006. For procurements under PCR 2015 you must refer to the [PCR 2015 guidance](#). PCR 2015 guidance only applies to any Requirement where you placed a Contract Notice after the PCR 2015 go-live date.
3. The CPS links to case law and covers legal terminology. The details and actions of each stage of the tendering process are covered in separate CPSs and links are included at the relevant point in this CPS.
4. For procurement from the United States of America (USA), you should refer to the [Procurement from the USA topic](#), which details the specific tendering and award procedures. When conducting a standard tender process, you will follow the process set out in this CPS even if you receive a tender from US Company.

Background

5. In the context of public procurement, the Treaty for the Functioning of the European Union (TFEU) prohibits discriminatory measures and unfair treatment. The obligations that stem from the TFEU are:

- a. non-discrimination. Discrimination on the ground of nationality is prohibited within the EU;
- b. equal treatment. You must treat all potential suppliers in the EU equally;
- c. transparency. Policies and procedures, selection and award criteria, or special contract conditions that are secret or disguised are unlawful;
- d. mutual recognition. Acceptance of equivalent standards, certificates and documents among EU Member States; and
- e. proportionality. Any decision or action the procurer takes must be legitimate, suitable, and necessary with no less restrictive means available,

and the MOD upholds these principles through fair and open competition.

6. Within the MOD, only a commercial officer with a delegated licence has the authority to commit the department. Legally anyone over 18 and of sound mind can commit the department. If someone without delegated authority commits the department, they may be disciplined and / or asked to repay money. This is referred to in [Joint Service Publication \(JSP\) 895 – the MOD Simplified Purchasing and Payment Process Manual](#).

Introduction

7. Before raising a new contract you must check the Crown Commercial Service (CCS) [Buying Solution Frameworks](#) and the MOD [Framework Agreements Database](#).

8. The tender process starts after you have completed [Supplier Selection](#) (an assessment of a supplier's capability to deliver the requirement). It is assumed, in law, that all tenderers have the capability to deliver, even if supplier selection has not taken place.

9. The MOD issues tender documentation to suppliers inviting offers; this is referred in law as an Invitation to Treat. The MOD uses different terminology depending on the type of procurement, as detailed at [Annex A](#).

10. The tenderer provides the MOD with an offer. For the majority of procurements the MOD evaluates the offer and will either accept or reject it¹.

¹ If using the Negotiated Procedure, or where your procurement is outside of the EU Regulations, you may issue an offer of contract for the supplier to accept.

11. When the MOD accepts the offer this becomes a legally binding contract. You must provide unqualified acceptance of the tenderer's offer. If your acceptance does not match the offer exactly then you have given a [counter-offer](#). This means that you have made a new offer that needs to be accepted (or rejected) by the supplier for it to become legally binding.

12. Under Scottish Law, you only require offer and acceptance to create a legally binding contract. Under English Law, you must have [consideration](#) also, which is commonly money but can take other forms, such as the time taken to set up machinery or interview people to deliver services.

13. During the tender process, leading up to [contract award](#), you and your acquisition team colleagues must state in all communications that they are "without commitment to enter into a contract" or "are subject to successful conclusion of the tender negotiations", unless you intend committing. The [Golden Ocean Group v Salgaocar Mining Industries](#) case shows how easy it is to enter into a legally binding contract.

14. When buying land, buildings or ships there must also be an exchange of deeds, making it more difficult to enter inadvertently into a contract.

Intention / Implied Contracts

15. The [Blackpool Aero Club v Blackpool Borough Council](#) case shows that an implied contract exists governing the tender process, and how each party must behave. This does not imply a legally binding contract has been formed, however to reduce the risk of a legal challenge for not behaving appropriately, you must run an open and fair competition.

The Tender Process

16. The tender process needs to be thorough enough to ensure the acquisition team achieves Value For Money (VFM). However, it is in the MOD's interests, as well as its tenderers, to keep tender costs to reasonable levels. For this reason the you should:

- a. only invite tenders when a technically endorsed and financially approved Business Case and [Request for Contract Action \(RCA\)](#) exists;
- b. keep the number of potential tenderers down to manageable numbers by completing [supplier selection](#). Where appropriate use tender pre-qualification exercises, as part of supplier selection;
- c. seek to keep the process to a minimum by reducing the need for iterative rounds of tendering such as Best And Final Offers; and
- d. use [Lean Sourcing](#) principles such as Prior Information Notices (PINs) and industry days.

17. The diagram at [Annex B](#) shows the steps in the tendering process and identifies some things to consider at this stage. It is a brief overview of the process. You can find details of things to consider when drafting the tender documentation in the [Tender Preparation and Management CPS](#).

18. [Lean Sourcing](#) principles state a non-complex procurement should take no longer than 120 working days from Contract Notice to Contract Award Decision.¹ High value (including works), complex and novel requirements can take longer. The time taken to place single source contracts can also be longer due to the extensive negotiations. You must identify approximate timescales to inform the project plan.

Preparing Tender Documentation

19. The key element of the tender process is preparing the tender documentation to ensure the MOD's requirement is fulfilled. You can find details on how to prepare the tender documentation in the [Tender Preparation and Management CPS](#).

20. The tender documentation is the basis for any agreement and resulting contract. You must include all relevant documents and specifications together with details of how you will manage each stage of the tender process. You must state these processes in the OJEU and / or DCO Contract Notice.

21. It is essential that you state your tender evaluation strategy and evaluation criteria in the tender documentation. When preparing the tender documentation you also need to refer to the [Tender Evaluation CPS](#).

Managing the Process

22. You are responsible for managing the process. You must ensure the acquisition team are aware of the parameters of the procurement process. For example, you can only negotiate with tenderers if you are using the Negotiated Procedure or the procurement is exempt from the EU Regulations.

23. At every stage of the process you should ask:

- a. have I stated this in the tender documentation?;
- b. have I stated this in the Contract Notice?;
- c. does the chosen procurement procedure allow me to do this?; and
- d. is it in line with TFEU principles?

24. You must record key decisions throughout the process in the contract file minute.

¹ As of yet there is no definition for Complex Procurements, generally if using the Competitive Dialogue or Negotiated routes it is likely to be complex

25. During the process, you must check any Cabinet Office controls such as the Strategic Supplier control, in accordance with [Commercial Cascade 19/2012](#).

26. You should not use a Request For Quote (RFQ) as an alternative to issuing Tender Documentation.

Evaluating Tenders

27. You must evaluate the tenders in accordance with the evaluation strategy stated in the tender documentation. You must ensure the Tender Evaluation Panel members evaluate tenders only on the information available within the tenders; against the stated evaluation criteria and that they are suitably qualified to evaluate the tenders.

Managing Potential Challenges

28. Tenderers may challenge the MOD for not following the process stated in the tender documentation and / or the Contract Notice. If you are challenged you must contact CLS immediately and gather evidence from the contract files to demonstrate the process was followed as stated in the tender documentation. Remember all information relating to the tender evaluation is subject to Freedom Of Information and must be made available to tenderers upon request, subject to any FOI exemptions.

Closing the Process

29. You are responsible for issuing the Contract Award Decision letters, placing the Contract Award Notices, conducting any necessary debriefs, completing the DEFFORM 57 and placing contracts on Contracts Finder in accordance with the [Transparency guidance](#).

Contacts, Training and Further Information

30. The [Web Access Page](#) for this topic contains a summary of the topic, details of who you can speak to for advice, and what training is available. It also contains links to other relevant topics and information.

Annex A

Terminology

You will find the following terms used throughout the tendering suite of topics.

Term	Definition
Bidders conference	<p>the term given to a briefing day to which all potential tenderers are invited to attend.</p> <p>The day will consist of an overview of the tender documentation, the aims of the procurement and what the MOD are looking for in the tenders.</p> <p>It takes place after the issue of the tender documentation. This is different to an industry day (which takes place before the tender documentation is issued).</p>
Capability	<p>refers to the supplier's ability to fulfil the requirement which you will assess during supplier selection.</p> <p>You must not test the capability of the supplier during the tendering process, you can only test the capability of the proposed solution(s).</p>
Invitation to Tender (ITT)	<p>the documentation set issued to potential tenderer(s). Legally this is known as an Invitation to Treat and it is an invitation to the supplier to send us an offer. The MOD refers to this offer as a tender or bid. You will either accept or reject the offer made.</p> <p>ITT is a generic term; since the introduction of other terms this is more commonly associated with tender documentation that was issued using PCR 2006 under the Open and Restricted Procedure, and any tender documentation where the Regulations do not apply.</p> <p>An ITT is issued under the following circumstances:</p> <ol style="list-style-type: none">1. Competitions under the Open or Restricted Procedure2. Mini competitions under frameworks;3. Standardised Contracting, which must be carried out in accordance with the Standardised Contracting CPS; and4. Sole source procurements.

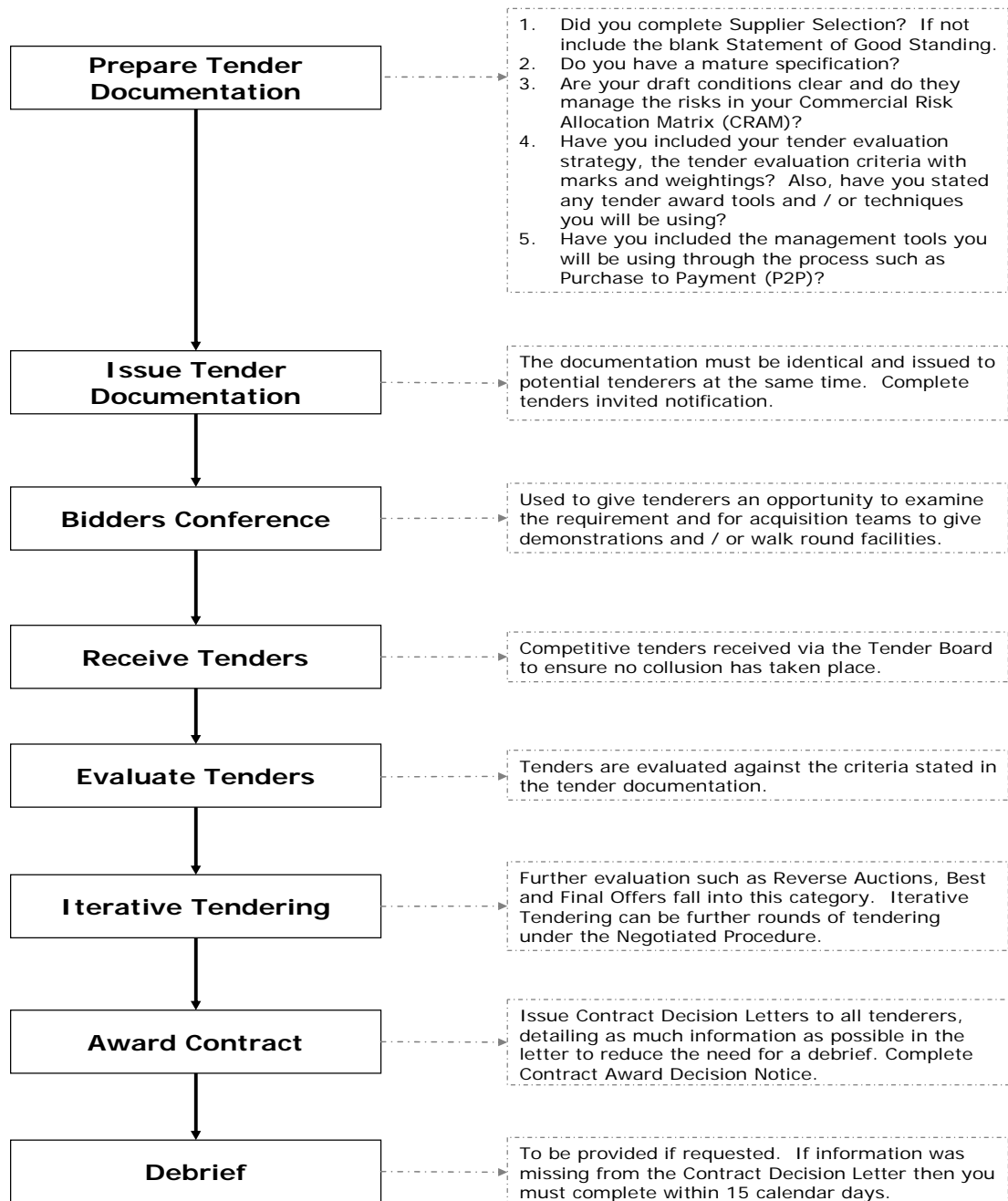
Term	Definition
Invitations To Participate in Dialogue (ITPD)	<p>legally this is an Invitation to Treat, however in this instance we are looking to clarify the requirement.</p> <p>The purpose of the ITPD is to start a dialogue with the supplier in order to clearly define the requirement. You can only use it where you place a Contract Notice under the Competitive Dialogue Procedure.</p>
Invitations To Negotiate (ITN)	<p>the documentation set issued to potential tenderer(s), legally an Invitation to Treat. This documentation is issued to differentiate and make clear that we are asking for an offer that we will then base negotiations on.</p> <p>You can only negotiate if the procurement is outside of the EU Regulations, or where you place a Contract Notice under the Negotiated Procedure.</p>
<p>You must not change from one type of tender (e.g. ITN to ITT). If you have incorrectly used one process, you must cancel the competition and re-start from the Contract Notice.</p>	
Specification	<p>the generic term given to a Statement of Requirement (SOR), Statement of Work (SOW) or any other document that describes the Key User Requirements (KUR).</p>
Potential provider(s)	<p>the term used in the PCR and DSPCR regulations for a potential tenderer(s).</p>
Potential tenderer(s)	<p>any supplier who has expressed an interest or who may have an interest in providing a Tender. You will use this term until you have issued the Tender documentation.</p>
Request For Quote (RFQ)	<p>the informal documentation sent to potential supplier(s) to improve financial estimates. This is not an alternative to issuing Tender Documentation.</p>
Tender(s)	<p>the documentation that the tenderer (potential provider) provides in response to the tender documentation. Legally this is an offer.</p>
<u>Tender Board</u>	<p>the group of people that check competitive tenders for any obvious signs of collusion, last minute alterations to the tender, and hidden prices within the technical proposals etc.</p> <p>The Tender Board ensures impartiality by maintaining that board members must be independent from the acquisition team whose tenders are due to be processed. The Tender Board members must also be independent from each other.</p>

Term	Definition
Tender documentation	the documentation set issued by the MOD. It is a generic term that covers the terms Invitation to Tender (ITT), Invitation to Negotiate (ITN) and Invitation to Participate in Dialogue (ITPD).
Tenderer(s)	the supplier(s) who were invited to provide a tender (an offer).
<u>Tender evaluation criteria</u>	the criteria that are used to identify the tender which is the most likely to fulfil the MOD's requirement. These are also referred to as contract award criteria. You must decide the criteria during <u>tender preparation</u> and evaluate the Tender against these during the <u>tender evaluation</u> .
Tender Evaluation Panel (TEP)	<p>the group of people that evaluate the tenders. They are responsible for marking the tenders and giving them a score in order to choose a successful tender.</p> <p>They will meet before the tender documentation is issued to ensure everyone knows their role and the Tender evaluation criteria is sound. They will also meet after each member has carried out their individual evaluations to give a combined score to the tenders.</p>
Tender evaluation strategy	<p>the overall plan for how the tender evaluation will be conducted. This will be decided before or during <u>tender preparation</u>.</p> <p>The tender evaluation strategy flows from the Value For Money (VFM) assessment and / or the Performance, Time and Cost (PTC) envelope. If you are looking to reduce the cost then you will most likely choose the lowest price <u>tender evaluation</u> strategy.</p>

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Annex B

MOD Tendering Process



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