

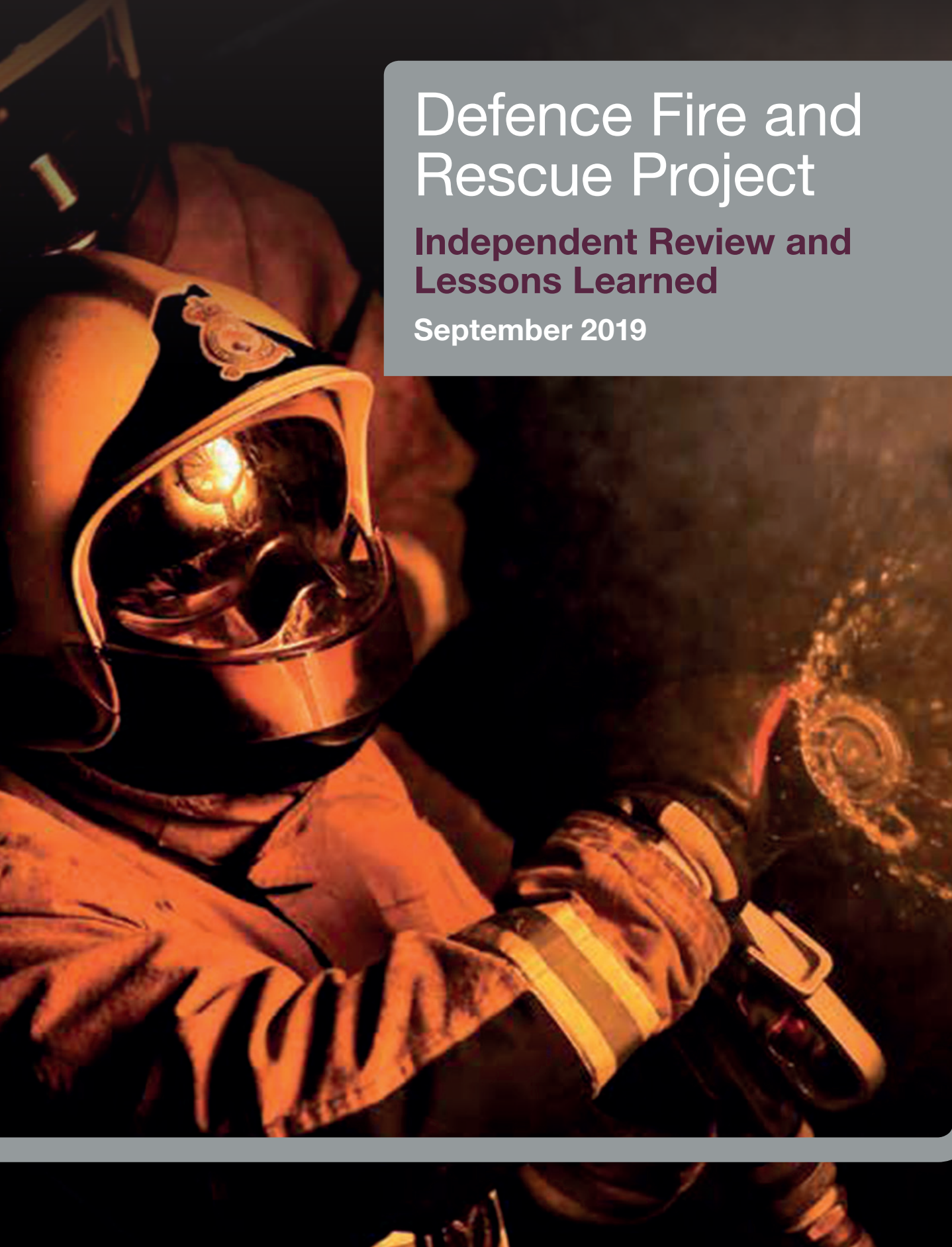


Ministry  
of Defence

# Defence Fire and Rescue Project

**Independent Review and  
Lessons Learned**

September 2019





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# Background, Conclusions and Recommendations

## Background

1. Fire and rescue services for the Ministry of Defence (MOD, or the Department) are currently provided both on permanent bases and on operations by Defence Fire and Rescue (DFR, formerly called DFRMO – the Defence Fire Risk Management Organisation). Approximately 1,900 personnel are drawn from the military, MOD civil servants, locally employed civilians overseas and contractors.
2. The Defence Fire and Rescue Project (DFRP or the project) arose out of the Strategic Defence and Security Review in 2010, when a decision was made to seek efficiencies in a number of areas. One was to consider outsourcing the DFR service. The project to do so was initially led by a central MOD team. In 2013, when the project received its initial formal approval, responsibility was transferred to the Army. A project team was established under a director-level civil servant who worked for the Adjutant-General and to whom the role as the Senior Responsible Owner (SRO)<sup>1</sup> was later delegated.
3. In 2014, the Department's official-level Investment Approvals Committee (IAC) agreed a procurement process using competitive dialogue. This involves a series of structured bilateral discussions with bidders to shape a solution before holding a final tendering round, and gives flexibility to clarify elements of the requirement and propose solutions during the procurement. At that stage, the team estimated that contract award would take place in February 2017.
4. The competition was run under the Defence and Security Public Contracts Regulations (DSPCR) 2011. Thirty companies expressed an initial interest, of which eight submitted a pre-qualification questionnaire. In December 2014, four passed pre-qualification. They submitted outline solutions with indicative costs in April 2015. Alongside the outsourcing option, MOD also developed an in-house value for money benchmark against which to compare proposals.
5. Following three rounds of dialogue, in September 2016 the IAC considered the project's Main Gate Business Case.<sup>2</sup> It gave approval in March 2017 to call for final tenders for a 12-year contract once the bids were sufficiently mature.<sup>3</sup> By this time, two bidders had withdrawn, leaving two companies bidding: Capita Plc (Capita) and Serco Group Plc (Serco). The competition was important to both bidders, both because of its size and 12-year duration and because the winner would become the dominant provider for Fire and Rescue services across MOD as a whole.
6. The invitation to submit final tenders was issued in July 2017 and the companies submitted final bids in September 2017. Final tender evaluation took place from September 2017 to January 2018.
7. On 15 January 2018, the project sought approval to award the contract to Capita. However, on the same day Carillion, a major contractor for outsourced government services, went into liquidation. As a result,

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<sup>1</sup> The senior responsible owner (SRO) is accountable for ensuring that a programme or project meets its objectives, delivers the projected outcomes and realises the required benefits. He or she also typically chairs the project board and is responsible for ensuring that the right expertise and governance is in place.

<sup>2</sup> The document that sought approval to issue an invitation to submit final tenders and for the expected time, cost and performance parameters for the project.

<sup>3</sup> IAC approval dated 3 March 2017.

under arrangements coordinated by the Cabinet Office covering all major contracts, the Department undertook a further thorough review of aspects of the project. This meant there was an extended period before contract award.

8. Approval to award the contract to Capita was eventually given within Government on 14 June 2018.<sup>4</sup> The projected value of the contract to Capita over the 12-year contract period was then around £500m at outturn prices, while the project as a whole was assessed to cost in total some £1.4bn at outturn prices. This total included continuing MOD costs - mainly from military and locally employed overseas personnel who would remain MOD employees.
9. On 18 June 2018 a written ministerial statement was laid before Parliament to announce the award and the two bidders were sent letters notifying them of the result and of the overall scores and costs of both tenders. On 22 June Serco sent a pre-action protocol letter to MOD alleging, amongst other things, breaches in the evaluation of both bids and lack of transparency in cost evaluation. They sought an extension of the standstill period ahead of the award of contract and disclosure of further information. Serco were dissatisfied with the response received, and on 17 July issued formal legal proceedings challenging the decision. This automatically suspended the award of the contract.
10. The suspension was lifted in May 2019 following an MOD application to the court. On 18 July 2019 MOD announced that it had completed arrangements to award the contract to Capita at an outturn price of £525m and that the litigation with Serco had been settled out of court.
11. As a result of the challenge to the procurement, in June 2019 the Permanent Secretary of MOD asked a small team from outside the Department to carry out this independent review to establish the lessons

that should be learned, focusing on the final stage of the process between September 2017 and the issue of Serco's claim in July 2018. Our terms of reference are at Annex A.

12. We have not carried out a review of the process before September 2017 but have referred to some earlier events where relevant. Nor have we carried out a forensic investigation or audit; or considered the comparison of the bids to the public sector option, the due diligence carried out by MOD into the financial sustainability and technical expertise of the bidders, or MOD's dealings with Serco and Capita since July 2018. Our work was carried out between June and August 2019, based on documents provided by MOD and interviews with a range of those involved from MOD, Serco, Capita and Deloitte. This timetable allowed meetings with Serco and Capita that could not be held until after the contract was awarded in July.

## Conclusions On Key Findings

13. Our conclusions are:
  - C1 We have found nothing to show that there was actual bias in the treatment of the final two bidders to make the procurement open to challenge.
  - C2 The evaluation methodology was fit for purpose. We see no fundamental flaws in it, or in the financial model used for the evaluation.
  - C3. However, there were several deficiencies in the conduct and recording of the final evaluation that did make the procurement open to challenge:
    - a. The criteria for evaluating MOD's confidence in the technical elements of the bids were described too generically. Technical subject matter experts should have been more involved in preparing the evaluation criteria and the application of the criteria should have been tested more fully before the process went live;

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<sup>4</sup> DFRP Treasury Clearance Note approval 14 June 2018.

- b. Evaluation records often used language that did not properly reflect the scoring criteria. Many referred to concerns about bidder responses that nonetheless scored 'Good Confidence' or 'High Confidence'. On the face of it this should not have been possible. It arose with both bidders, but there were more examples in Capita's scoring than in Serco's;
  - c. In scoring some of Capita's responses, moderation notes referred to reliance on the presence of "commercial levers" (i.e. contractual measures to increase the likelihood of things being done), which should not have been taken into account. We heard that this did not affect the scores awarded, but references to an extraneous factor do not give confidence about the process or the way it was recorded;
  - d. The evaluation did not entirely follow the process that had been set out for explaining risk adjustments to each bid: some adjustments were not fully and transparently communicated to bidders;
  - e. There was no consolidated evaluation report prepared at the end of the process. This made it difficult for the project team to articulate the outcome confidently or convincingly;
  - f. MOD was further exposed to litigation because the decision letter to Serco did not contain sufficient information to explain why they did not win the bid; the record keeping and absence of a summary evaluation report then made it difficult to assemble information to respond to Serco's requests for disclosure; and examination of the evaluation records themselves revealed some of the deficiencies referred to above, which led to delays in responding.
- C4. MOD ultimately decided to award the contract to Capita because it had higher confidence in Capita's solution and Capita's whole life cost was some 0.8% lower than Serco's. We have found no evidence that this position would have been reversed by any of the individual deficiencies we have identified, and we consider it unlikely that a more robust process would have led to a different outcome to the competition. But in our view the deficiencies were sufficient to justify MOD's decision to reach a settlement with Serco, given the resource and cost that would have been involved in defending the claim and the significant risk that the claim would have been successful.
  - C5. Lessons should also be learned from certain underlying factors in DFRP that helped to cause the deficiencies in the conduct and recording of the evaluation and reduced the chance that the risk of legal challenge would be fully recognised and addressed:
    - a. At the time of the evaluation there was only limited central guidance in Government on best practice in outsourcing contracts and bid evaluation;
    - b. DFRP was not treated as a high priority in the Army or by customers more widely. The SRO and the project team lacked the degree of support and challenge that might have been expected for a project of this importance;
    - c. The SRO attached a high level of importance to adhering to the agreed timetable for the final stage evaluation. This was understandable given the impact of continued uncertainty on DFR personnel and the projected financial and other benefits to be derived from concluding a contract that was by then running behind schedule. However, the timetable and resourcing for the final stage evaluation required very intensive working from the evaluators and consensus leads, which seems to have left insufficient time for quality control of the process and record-keeping;

- d. There was inadequate governance and oversight of the project and no route to escalate concerns, for example about resourcing or risks. The board responsible for governing the project did not meet often enough, does not appear to have considered key risks in depth, and did not have representation from outside the project team to consider legal risks;
  - e. The assurance of the arrangements for and outputs from bid evaluation was insufficient;
  - f. The Investment Approvals Committee did not give much consideration to the adequacy of the governance or assurance arrangements;
  - g. The legal advisers could have had a wider role to contribute to the design of the evaluation, advise on its conduct and consider the risk of legal challenge. This should have helped to identify the need for better record keeping and risks of inconsistency in the conduct of the evaluation;
  - h. The financial advisers should have been used more extensively.
- C6. The size of the contract and extended timetable for the competition together created a risk that the award would be challenged. A lot was at stake and after a long competitive dialogue process both bidders were likely to gain confidence that there were no major concerns with their proposals. This was exacerbated by the period of over nine months between submission of final tenders and announcement of the result, which itself gave rise to concerns on the part of the bidders that there was something questionable in the process.

## Recommendations on Lessons to be Learned

- 14. We recommend that the following actions are taken to reduce the risk of similar issues arising on current and future projects in Defence and across wider Government:
  - R1. Cabinet Office should continue its current work to provide further central guidance to departments on outsourcing contracts and bid evaluation, building on the Outsourcing Playbook published in February 2019.<sup>5</sup> This should cover best practice for scoring and recording evaluations, and appropriate communication with bidders.
  - R2. MOD should provide projects with fuller guidance and training on best practice for conducting and recording evaluations. In particular:
    - a. Evaluator and consensus lead training should emphasise the importance of capturing reasons and evidence to support evaluation scores, and using language consistent with evaluation criteria;
    - b. Consensus leads should not also be evaluators and should be independent of the project;
    - c. The evaluation process should incorporate quality assurance to ensure that the stated process is followed and that records are fully consistent with scoring criteria;
    - d. There should be appropriate second- and third-line assurance of evaluation outputs, including financial modelling;
    - e. It should be a requirement to have a consolidated evaluation report; and there should be one storage place for all records that may be needed to support the report, including emails and documents prepared by other government departments or external advisers;

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<sup>5</sup> The Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting, February 2019.



- f. When preparing award letters and bidder debriefs, more emphasis should be given to transparency and timely and clear explanation of the evaluation outcomes.
- R3. MOD should ensure that all major contracting exercises have in place a governance and assurance plan that considers the factors highlighted in the Infrastructure and Project Authority's Government Functional Standard for Project Delivery.<sup>6</sup> These plans should establish:
- a. responsibility for governance oversight;
  - b. the role of governance in assessing risk, including resourcing and timetable, and the need for assurance;
  - c. the presence on governance boards of independent expertise not only in finance and commercial but also in legal matters and procurement risk; and
  - d. appropriate assurance arrangements in line with the guidance on three lines of defence.
- R4. MOD should consider whether the IAC's remit, as well as giving approvals, is to review the adequacy of governance and assurance. If it is, then this part of its role should be clarified and reinforced.
- R5. MOD should ensure that:
- a. Major projects have legal and financial advisers, whether internal or external, with a remit and sufficient resource not only to advise on specific matters as asked but also to help design the procurement, comment on how it is conducted and advise on the risk of legal challenge;
  - b. Legal support is available to cover all substantive dialogue, clarification or negotiation meetings with bidders where issues are likely to arise which could have legal implications. This should particularly be considered where the bidders are using legal representation.
- R6. Cabinet Office should reflect recommendations 2 to 5 in its guidance and ask other departments to assess whether the lessons learned here are being applied to their own procurements.
15. In our view all these recommendations are important and merit an early response from MOD. We recognise that recommendations 2 and 3 will take time to implement across the Department and that there will be other more urgent priorities; but we believe it would be reasonable for the Permanent Secretary to require significant actions to be taken on all the recommendations by the end of the second quarter of 2020.

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<sup>6</sup> Government Functional Standard GovS 002: Project Delivery Version 1.2 dated 1 August 2018.



# Fuller Description and Assessment

## Methodology for the Evaluation

16. MOD published its Evaluation Strategy and Criteria (ESC) for the final stage of the competition on 25 July 2017 as part of its Invitation to Submit Final Tenders (ISFT). This set out the following stages once tenders had been submitted:

- a. Review to check that bids are compliant;
- b. Apply a confidence score to the proposed solutions for the 39 'Requirements of Response' (or RoRs) with a predetermined weighting for each, producing an overall confidence score;
- c. Determine the risk-adjusted whole life cost<sup>7</sup> of each bidder's solution in Net Present Value terms; and
- d. Combine b and c to determine the Most Economically Advantageous Tender (MEAT).

17. In relation to the confidence score at (b):

- a. Requirements were in three categories: technical, weighted at 78%; commercial, weighted at 20%, and financial management, weighted at 2%. Individual RoRs in each category were also weighted. For example, a bidder's mobilisation and migration plan (given the largest weighting) carried 10% of the total technical marks, while the proposals on Cyprus locally engaged civilian employees carried only 1%;
- b. Evaluators assigned a confidence level for each RoR based on their expert judgement of the evidence the bidder had provided to support its proposed solution. Confidence scores were divided into 'High Confidence'

(scored as 100), 'Good Confidence' (70), 'Minor Concerns' (40), 'Major Concerns' (20) or 'Critical Concerns' (0);

- c. Once responses for each RoR had been evaluated, 'consensus' leads led moderation meetings to reach a single consensus confidence level for them.

The outcome of this evaluation was an aggregate confidence score for each bidder.

18. For the whole life cost evaluation at (c) above, the financial aspects of bidders' tenders were put into a financial model to calculate the cost of each bid. The figures were then subject to two forms of risk adjustment referred to as a discrete risk adjustment and a pricing risk adjustment:

- a. For the discrete risk adjustment, the financial evaluators, working with commercial and technical colleagues, determined the likelihood of the bid creating risk or leaving risk with MOD and the expected impact of this on MOD's own costs,<sup>8</sup> and made an adjustment accordingly. MOD costs represented two thirds of total project costs. The discrete risk adjustments themselves differed between the bidders by about 0.1% of total project costs;
- b. For the pricing risk adjustments, financial evaluators considered the projected impact on price of three scenarios: costs as estimated, a 30% cost over-run, and a 10% cost under-run. The mean of the three scenarios was then used to calculate an adjusted projected cost to MOD.

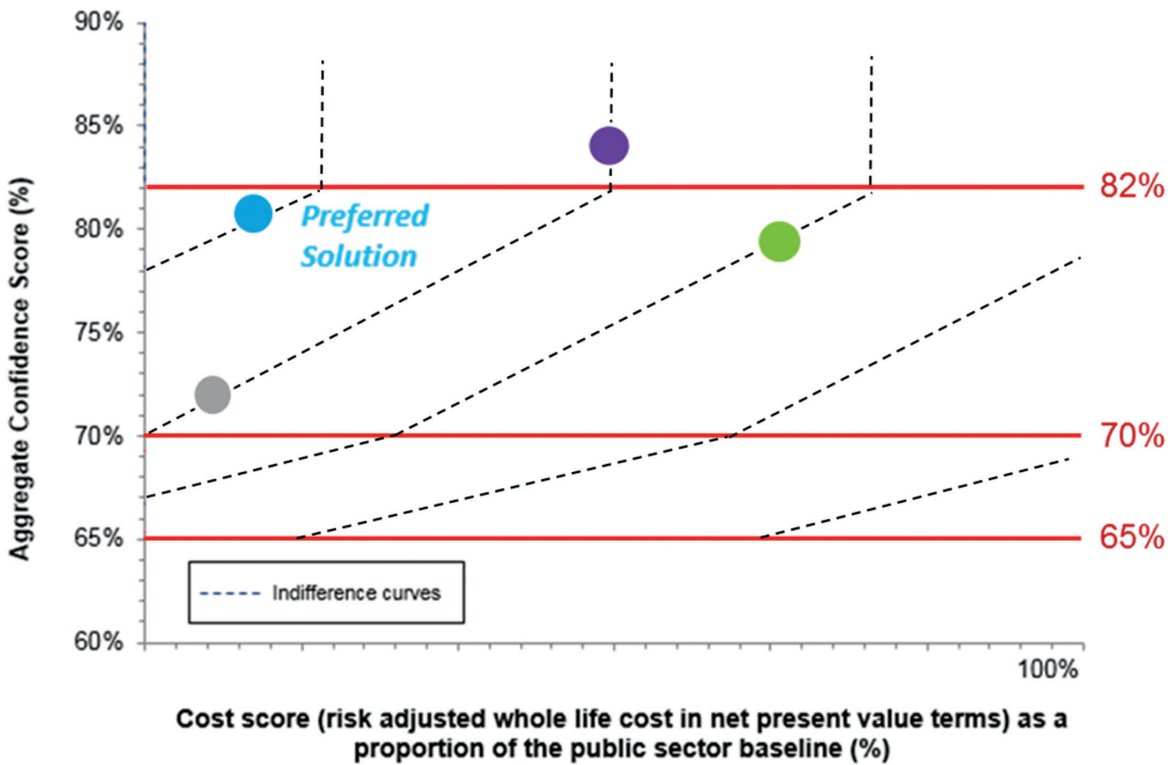
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<sup>7</sup> The total cost of DFRP over the length of the contract.

<sup>8</sup> The majority of the risks related to the future cost of activities carried out by personnel, principally firefighters, still employed by and paid for by the Department but tasked by the contractor, the few fire services provided under separate contracts and the short-term cost of the training college at Manston before its closure.

19. Once the discrete risk adjustments and the pricing risk adjustments had been applied, the NPV of each bidder's whole life cost to MOD was calculated.
20. The final step - combining the confidence scores and the projected whole life cost - was then made in a separate part of the financial model that attached predetermined weightings to each score to make the combined calculation of the MEAT.<sup>9</sup>
21. The weighting scale in this competition was on a sliding scale that gave very heavy weight to achieving at least a 70% confidence score, much less weight to achieving a higher confidence score (between 70% and 82%) and no further value at all to confidence above that level. In order to create a figure that could be combined with the confidence score arithmetically, the whole life cost was converted to a percentage by dividing the risk adjusted whole life cost into MOD's own projected cost of the existing DFR arrangements.
22. Results were then summarised by plotting them on a chart in which confidence scores were plotted on the y axis and cost scores on the x axis, as shown in figure 1. Lines ('indifference curves') show the points at which, given MOD's decision about the relative weight it would give to cost and confidence at the stated confidence levels, different combinations of the two would be assessed as equally advantageous. In this illustration we have shown four hypothetical bids. The Most Economically Advantageous Tender would be the bid on or above the indifference curve nearest the top left-hand corner (in this case, the blue dot). The bids represented by the grey and purple dots would be assessed as equal to each other but inferior to the blue. The bid indicated by the green dot would be the least advantageous.

**Figure 1: Most Economically Advantageous Tender (MEAT) Graph**



<sup>9</sup> 20180111-Cost Model used for TCN v193-OSC

23. This approach to evaluation is provided for in both the Public Contracts Regulations 2015 (PCR) and DSPCR 2011, and is a recognised way to obtain best value for money in public procurement. It is designed to incentivise and select the bid which delivers the most economically attractive combination of satisfactory - and preferably superior - technical quality with an efficient price. It avoids the risk of incentivising and paying for unnecessarily high levels of delivery confidence which would not provide value for money.
24. In our view, the DFRP evaluation methodology was fit for purpose and the explanatory materials provided to bidders were generally clear.

## Evaluator Training

25. Evaluator briefing and training for the Final Stage evaluation took place in June and August 2017. The June briefing materials included a 130-page evaluator pack, which included a briefing on the competition, an explanation of the RoRs and the scoring system for each, and a two page “DFRP Evaluation Do’s and Don’ts”. This guidance was sensible and covered most of the key points for evaluators. However:
- It did not emphasise the importance of evaluators taking a full note of their process or being precise and consistent in language to reflect the scoring criteria; for example, that it would be inconsistent to record that the evaluator had minor concerns and give a confidence score of Good Confidence without explaining why;
  - It did not include any guidance for consensus leads on how to quality control individual evaluator reports, or on how to chair and record moderation discussions.
26. The August training session included further short guidance for evaluators on do’s and don’ts (again correct in content but very high level). Guidance was provided on the moderation process but was aimed largely at

helping evaluators understand the concept of moderation rather than actually training the consensus leads.

27. In summary, while the training appears to have been sensible and relevant, in our view there were significant gaps, particularly on record keeping. This proved to be significant and should be addressed for future procurements of this size and complexity.

## Did MOD Follow the Stated Evaluation Process?

28. The project team conducted the final stage evaluation largely in accordance with the published documentation. However, there were certain limited exceptions.
29. First and most important, there were apparent discrepancies in the way some of the consensus confidence scores were assessed:
- In scoring four out of 39 of the Capita responses, reference was made in moderation notes to the presence of “commercial levers”, which were thought to mitigate certain concerns and so to help justify a score of Good Confidence. We were told these referred to contractual remedies or incentives. According to the scoring criteria, contractual remedies or incentives for performance failures should not have been evaluated in a technical response. We heard that scores of Good Confidence would have been given even without the contractual levers. However, the inclusion of these matters in the moderation notes raises a question as to whether these four responses were evaluated fairly. No Serco responses had been recorded as benefitting from the presence of such “commercial levers”. However, concerns were also noted against each of their equivalent four responses, all of which also received a score of Good Confidence despite such issues. This suggests to us that there was some leniency in the assessment of both bids;

- b. The methodology specified a confidence score of Minor Concerns where a bidder's solution provided MOD "with minor concerns". However, there were several instances where moderation reports referred to "concerns", but evaluators awarded an overall score of Good Confidence rather than Minor Concerns. This arose for both bidders; but caused Serco to question whether all of the Good Confidence scores awarded to Capita were justified, because the scoring criteria suggested that a Good Confidence score could only be awarded where there were no concerns of any kind. This is not how the scoring methodology was actually applied;
- c. In recording a score of Good Confidence many of the moderation reports referred to the relevant bidder having provided an "adequate" level of confidence that the response met the MOD's aims. From interviews, it was clear that these responses were considered to meet a Good Confidence threshold. However, anyone considering a challenge to the decision could clearly argue that "adequate" is less than "Good" and that scores of Good Confidence should not have been awarded in these circumstances. Better quality control and review of the moderation notes should have caught this discrepancy.
30. Members of the project team who acted as evaluators told us that the way the confidence scoring criteria had been drafted proved unhelpful when recording consensus decisions, in particular when choosing between Good Confidence and Minor Concerns. After reviewing the documentation, we have concluded that these discrepancies arose partly because the marking methodology for the technical RoRs was written generically and not specifically tailored RoR by RoR. The descriptions of each confidence score were also circular. For example, for a score of High Confidence the criteria said that a bidder had to "provide a solution that: ... provides the MOD with a high level of confidence as to the proposed solution". Any further statements on what would constitute "a high level of confidence" were also written generically. This left evaluators without clear and specific guidance to help them record accurately why they had scored any concern as major, minor, or simply as an issue to be noted.
31. The criteria for scoring should have been better defined. Both the definitions and the quality of recording evaluation judgements could have been improved if technical subject matter experts had been more involved in preparing the evaluation criteria, and if the application of the criteria had been tested with evaluators before the process went live.
32. However:
- based on a sample which we have reviewed, the generic criteria appear to have been applied equally to both bidders;
  - both bidders received scores of Good Confidence where the evaluators noted some remaining "concerns". On the face of it this should not have been possible. Our analysis suggests that this occurred more often with Capita than with Serco, which could give the impression of bias. However, having interviewed members of the project team, and given our other findings about the evaluation process, we believe it is more likely to reflect the poor recording of moderation decisions;
  - While the references to "commercial levers" should not have been made, we see no evidence that these affected the scores awarded. We have reviewed the moderation notes for the four RoRs for which this occurred. In each case, both Capita and Serco's responses had concerns noted against them, and in each case a consensus confidence score of Good Confidence was awarded. Even if Capita had been awarded scores of Good Confidence when it should have received scores of Minor Concerns, we conclude the same would probably have been equally true of Serco.

33. Accordingly, we think it is unlikely that the factors described here disadvantaged one bidder relative to the other.
34. Secondly, as noted above, there were deficiencies in the recording of the moderation processes. Paragraph 18.1.4 of the ESC stated that consensus leads would “Maintain a full audit trail of all documentation pertaining to the evaluation.” In fact, in a number of responses strong concerns were raised at evaluation stage but apparently resolved at consensus stage, leading to an overall consensus confidence score of Good Confidence but without adequate supporting evidence of how concerns had been addressed. Examples include:
- a. For RoR 2.1.2 (“Management & Maintenance of Vehicle at Overseas Locations and on Operations and Exercises”) there was initially a Major Concern about a specific element of Serco’s solution relating to the provision of appropriate vehicles in Cyprus, although overall the evaluator then scored Serco as Minor Concerns. In moderation, Serco then received a score of Good Confidence for the RoR, but with a comment that there was a concern about vehicle sufficiency in Cyprus. While it seems from this that the concern was discussed during moderation, we have not been shown any record of how that final consensus confidence score was reached;
  - b. For RoR 1.4.1 (Defence Airfields), Capita’s response scored Good Confidence, despite the moderation report stating that the evaluators were “of the opinion that the Bidder did not understand the requirement of the Falkland Islands” and that Capita’s “proposed solution would not meet the requirement...”. In the underlying evaluation reports, one evaluator stated “there appears to be no appreciation for the actual scale of operations that take place in the Falklands...” and that the proposals were “doomed to fail”; yet that evaluator eventually gave an overall confidence score of Minor Concerns. Again, while it seems from the moderation report
- comments that issues with the Falkland Islands solution were discussed, there is no record of how the concern was satisfactorily addressed and why the process resulted in a consensus confidence score of Good Confidence.
35. In our view, as a result of the issues described in paragraphs 28-34, the conduct of the evaluation and the way it was recorded left significant scope for challenge. This could have been avoided or mitigated by more specific definitions of scoring criteria, more use of technical subject matter experts in finalising the criteria and testing the scoring methodologies, and more quality control and review of completed evaluation and moderation notes.

## Discrete Risk and Pricing Adjustments

36. The adjustments explained in paragraph 18 were small compared to the difference in confidence scores for each bid. Our review confirms that their size was not sufficient to outweigh the difference in confidence scores arising from the confidence evaluation and we have seen nothing to suggest that the process used to determine them was anything other than fair and professional.
37. However, a number of the adjustments involved a degree of discretion and bidders were given no written explanation of them. Paragraph 12.1.3 of the ESC stated that adjustments would “be exposed to the Bidder at the Detailed stage of Dialogue” and that bidders would “have the opportunity to challenge”. In fact, while the project team made clear to bidders during dialogue that their bid prices would be subject to adjustments and alerted them where specific points were likely to attract an adjustment, bidders were not proactively informed about the size of adjustments.
38. In addition, 39.9% of the adjustments by value were not communicated at all to Serco because the project team considered them irrelevant to evaluation on the ground that they were largely identical for both bidders.





However, in fact there was a £0.87m difference between the bidders. This was not sufficient in itself to make a decisive difference to the outcome of the competition given the difference between the bidders' confidence scores. However, as the project team did not disclose them during the process, and the financial aspects of the evaluation were in a tight range, the lack of explanation increased the risk of bidders not fully understanding the position, and therefore the risk of challenge.

39. It would have been preferable to give bidders an indication of the amount assigned to each risk, to explain how it had been determined and to consider any points the bidder then raised.

## Resourcing of the Evaluation

40. The number of RoRs and the requirement for bidders to provide method statements as part of their responses created a large volume of material to be evaluated. Each tender comprised approximately 9,000 pages of A4.
41. In planning resources, an average of five minutes per page was allowed for the evaluation process. This took account of the fact that different people read different sections, so that every evaluator did not read every page. It also reflected the fact that, by the time of the final assessment, the team were familiar with much of the content from the successive stages of dialogue.
42. Although five minutes is probably an adequate time to read a page of method statement or technical response, several members of the project team reported during our interviews that there was not time to cross-check references where supporting evidence was spread across multiple pages or where bidders referred to other parts of their tender.
43. As significant cross-referencing was required in evaluation, some of the evaluators worked extremely long hours to meet evaluation

deadlines. This included regular weekend working and repeated late nights over a nine-week period by a number of people, some of whom were the only specialist for an aspect of the assessment. While evaluators were able to meet deadlines, they have said they were not able to record clear notes of their decision-making processes. The papers we have reviewed show evidence that they did not do so.<sup>10</sup>

44. Some members of the project team said that concerns were raised over the lack of sufficient time for evaluating tenders, recording outcomes and holding moderation meetings; but that they were told that the timetable had to be met.
45. Nothing we have seen suggests that lack of time impacted the fairness of the evaluation process or the outcome. However, in our view it affected the standard of record keeping. This made it much harder for MOD to evidence the robustness of its process and much easier for an unsuccessful bidder to challenge apparent anomalies.

## Moderation Process

46. Ten of the forty-nine evaluators also acted as consensus leads for moderation meetings. The current view across Government is that evaluators should not also act as consensus leads. This is partly because a consensus lead's role includes quality assurance of evaluations and an evaluator cannot quality assure their own work; partly because it risks the consensus lead's evaluation score having undue weight in moderation discussions; and partly due to the workload of balancing both evaluation and consensus lead roles.
47. Guidance on these matters could not have been known to MOD or the project team at the time, because it is only now being prepared by the Cabinet Office. However, in our view, the dual role of consensus leads and the recording of the moderation process may have increased the risk of successful legal challenge.

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<sup>10</sup> See paragraphs 28-34.

## Summarising and Explaining Evaluation Results

48. The evaluation process as a whole was largely managed through the AWARD® e-procurement system.<sup>11</sup> This system is used by MOD for a wide range of procurements. It allows the issue of tender documentation to bidders, covers the clarification process between bidders and the MOD and records evaluator and consensus confidence scores. It therefore provides the basis for recording the large majority of the process.
49. However, the project team did not prepare a consolidated evaluation report at the end of the process to record and explain the outcome. This would have been done as a matter of course under Regulation 84 of PCR 2015, under which most UK public procurement takes place, and which sets out record keeping requirements for procurement. However, DFRP was conducted under the DSPCR 2011 regulations, which do not contain an equivalent obligation.
50. We have heard that all material that would have been included in an evaluation report was available either in AWARD or in other documents such as the investment appraisal, just not in a consolidated form. Even if this is the case, the lack of a single consolidated report created difficulties in providing a clear and simple explanation to Serco of why their bid had not been successful and seems to have been one of the factors that caused delay and lack of confidence in responding to Serco's disclosure requests in June and July 2018.
51. In our view, it is good practice to have a consolidated evaluation report as an audit trail and to provide the basis for decision letters and explanations to bidders.

## Use of the Financial Model

52. The project team used a central financial model,<sup>12</sup> also referred to as a cost model, to collate and analyse all information received from the bidders. Bidders were provided with a template that aligned with the model in which to submit their financial responses. The data in the templates was then transferred into the model. Once populated, the model was used to produce the total projected whole life cost for each bid. It also included all other calculations, including the incorporation of discrete risk and pricing risk adjustments, the confidence scores transferred into the financial model from AWARD, and the calculation of the MEAT scores.
53. The financial model was principally an established management accountancy tool used in the Army. Finance team members were either familiar with the model from using it on previous projects or had time to familiarise themselves with it before the ISFT stage. The part that combined confidence and cost scores into a combined MEAT score was added by the project team with particular input from Deloitte.
54. We have reviewed the arrangements for assuring the model. In January 2018, the project team engaged MOD's Cost Assurance and Analysis Service (CAAS) to carry out assurance of the input of the bidders' templates into the model. Line by line cost information and assumptions were extracted from the templates by the project team and given to CAAS in a separate spread sheet. CAAS checked 576 cost lines to assure that they calculated correctly and were based on the correct inputs. Three of them were given a status of Red. Of the three, two related to Capita (total value £0.67m which represented 0.1% of output cost) and one related to Serco (total value £23.37m which represented 1.8% of output cost). In all cases the concern was about insufficient evidence for the input numbers rather than errors in calculation.

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<sup>11</sup> The AWARD® suite is a collaborative web-based solution designed specifically to support complex and strategic procurement projects.

<sup>12</sup> 20180111-Cost Model used for TCN v193-OSC (1)

CAAS stated that “the project team were not available to give a comment due to the very tight timescales involved”. With 99.7% and 98% respectively of all the lines deemed valid across the two bidders, this satisfied CAAS’ criteria, so they concluded that the “data in the model is of appropriate maturity and sourcing to be deemed as fit for purpose”. The project team did not seek further evidence to address the concerns because they were satisfied they understood the source of the numbers.

55. CAAS did not assure the risk adjustments. The scrutiny report said ‘there is evidence to indicate that a detailed risk adjustment has been made to the bids. No independent validation of this risk adjustment appears to have been undertaken’.<sup>13</sup> A validation of these adjustments by people external to the project team would have been best practice, even though the adjustments were small.
56. The model was not subjected to any final assurance once all the inputs and adjustments were made to test that the MEAT result was calculated correctly. We have looked at a sample of the MEAT calculations and found no inaccuracies. However, it would have been best practice to have had assurance external to the project team to provide confidence that this additional element of the model and MEAT result was correct.

## **Adjustments made by Bidders in the Final Stage to Address Affordability**

57. Towards the end of 2016, the project team had identified that both bidders’ proposals presented affordability challenges because – while the bids were judged to represent value for money against the public sector benchmark in Net Present Value terms over the contract as a whole – there were some early years in which the bids exceeded MOD’s current budgets. To address this, they issued a paper to each bidder in

November 2016 showing the level of cost reduction needed in the early years of the contract and requesting that they make proposals for addressing the issue.

58. Capita’s proposal was to use what was referred to as a “receivables funding” (RF) product. This involved raising bank debt to finance some costs in the early years so that contract charges in those years could be reduced to remain within MOD’s budget. This finance would be repaid from cashflows later in the project. In order to establish security for this bank financing, Capita proposed that MOD should agree to ring-fence a fixed part of its payment obligation under the contract and recognise this as a firm commitment that MOD would be obliged to meet in the event of termination of the contract, regardless of cause.
59. The short-term affordability issue in Serco’s own bid was significantly smaller than Capita’s because of a different phasing of cashflows. Perhaps for this reason, Serco’s response to MOD’s invitation did not propose a third-party debt-financed solution. Instead it re-phased certain cashflows to a more limited degree than Capita and sought analogous but lesser protections under the contract for its additional early funding.
60. The project team decided that it would not be appropriate to tell Serco that a debt-financed solution was an option, as this would in their view have meant sharing confidential Capita bid information with Serco.
61. MOD, having consulted HM Treasury, initially indicated that it was content with the Capita proposal, because it addressed the affordability issue in years 1-3 and provided a better value for money option than Capita funding the rephasing of spend itself at a higher cost of capital. As a result, Capita were informed in principle of the acceptability of the RF product and they included it in their final bid in September 2017. The project team did not ask the Treasury for a view on Serco’s proposal.

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13 Scrutiny report dated 19 January 2018

62. In the event, contrary to their previous view and as result of discussions across Government and with the NAO about the definition of contingent liabilities across Government, in May 2018 Treasury expressed concern that the RF arrangement proposed by Capita might constitute a contingent liability. This was then confirmed to be the case. A contingent liability for the ring-fenced amount was therefore reported to Parliament at the time of contract award on 18 June 2018. Although it was not considered at the time, we understand that had Serco's tender won then it would probably also have given rise to a contingent liability.
63. While Serco had received the same letter as Capita in November 2016, they only became aware that consideration was being given to debt finance as a result of the statement to Parliament on the date they were notified of the results of the competition.
64. The project team have shown us that they analysed what the difference would have been between the bids if, instead of using the RF proposal, Capita had internally funded the change in bid profile using their own capital. The analysis showed that Capita's whole life cost would have been higher, which would have narrowed the cost gap between the Capita and Serco bid. However, Capita would still have had the lower whole life cost; and because of the significant weighting given to the bidders' confidence scores and their higher rating for confidence, Capita would have still have had a higher MEAT score than Serco.
65. The disclosure of the RF arrangement at the time of contract award was one fact among several that led Serco to believe they had been treated unequally. We have therefore considered whether the handing of this matter raises issues of fairness. We do not believe that it does:
- a. While it might arguably have been preferable for MOD to indicate to both bidders in 2016 that external finance could be proposed as part of their submission, in our view raising debt to smooth cashflows is a common arrangement that either bidder could have proposed. There was no need specifically to request consideration of it;
  - b. We agree with the view reached by the project team that it would not have been appropriate to inform Serco of the nature of Capita's proposal after it had been submitted in March 2017 or during the final evaluation;
  - c. The potential whole life cost impact of the contractual amendments proposed by the bidders were understood and appropriately taken into account. This was not done through an arithmetic calculation of changes to potential termination liabilities, because evaluation was carried out on the basis that services would continue to be delivered for the full life of the contract. However, we are satisfied that this was a reasonable approach.

## Governance, Assurance and Approvals

66. The current Government Functional Standard for Project Delivery sets out guidance on commercial standards for the direction and management of programmes.<sup>14</sup> Although the standard dates from 2018, the concepts it describes are of long standing. It covers governance, assurance and approvals:
- a. Governance includes authorising, directing, empowering and overseeing management;
  - b. Assurance means checking and confirming that work is controlled, on track and aligned with policy and strategy; and
  - c. Approvals should make timely decisions by evaluating proposed approaches and alternative choices against agreed criteria.

<sup>14</sup> Government Functional Standard GovS 002: Project Delivery Version 1.2 dated 1 August 2018.

These three elements of project delivery for DFRP are described below.

## Governance

67. MOD guidance<sup>15</sup> on governance is largely directed at equipment procurement projects. It says that a project should have a sponsor supported by a sponsoring group.
68. In March 2014 the project team prepared a governance strategy, which was approved by the project team leader. Governance was to be provided by a Project Board chaired by the SRO. Subordinate to the Project Board was an Operations Board, chaired by the Project Director. The role and membership of both boards was to review key documents, risks, assumptions and benefits, agree trade-offs and resolve issues. The IAC scrutineers were broadly content with this proposal although they questioned why the strategy had not been approved by the Project Board.<sup>16</sup> The governance strategy was then revised in 2015 so that the Operations Board had day-to-day delegation to act as the Project Board, which had not met since 2013.
69. The MOD guidance recommends that members of governance boards should include experts from the subject areas that make up a project, such as training, infrastructure or equipment, together with representatives from finance, commercial and risk “as required”. The membership of the DFRP Operations Board comprised mainly senior members of the fire and rescue community and their customers. Experts external to the project team included the Head of Army Commercial, the lead scrutineer to the Investment Approvals Committee and representatives from HR and finance. In our view, best practice would have been to include more people independent of the project procurement, including some with legal and risk expertise
- who would have been well placed to take a wider view on the approach the project was taking and the risk of legal challenge.
70. It had been intended that the Operations Board would meet around the time of key project milestones and at least quarterly. In practice, it met only once in 2017, in March soon after Main Gate approval and before issue of the invitation to submit final tenders; and once in 2018, in May while the project was in the process of obtaining final clearance to proceed to contract award. Minutes of the two meetings suggest that, while there were some substantive discussions, for example on an organisational safety assessment, much of the agenda involved briefings on progress from the project team without the Board reviewing decisions, giving guidance or considering major risks.
71. The project team have explained that meetings were taking place outside this forum with scrutineers and other experts, and that Board members were regularly kept informed of progress outside meetings. However, in a period in which important final evaluations were being conducted, in our view it would have been best practice for the Board to have met more frequently to discuss progress and risks.
72. At the Operations Board meeting in May 2018, delay due to legal challenge was shown in papers as a high risk. At that time, the project team was confident that adherence to the evaluation strategy meant that any challenge could be successfully defended.<sup>17</sup> Risk registers in the Main Gate Business Case in September 2016 and the investment appraisal also highlighted the risk of a legal challenge caused by inadequate communication with bidders or failure to conduct the competition in a fair and transparent manner. The mitigation was shown as being to demonstrably

<sup>15</sup> Capability Management Practitioners' Guide Release 2.1 dated 23 September 2013/Policy (Direction & Guidance for Staff Undertaking SRO Roles in MOD) Version 6 dated 28 September 2015.

<sup>16</sup> Email from scrutineers to project team dated 24 April 2014.

<sup>17</sup> Record of Decisions of the DFRP Operations Board held 4 May 2018.

- follow the stated process, with effective communication and transparency, engagement with MOD's Central Legal Services (CLS), effective information management and appropriate feedback being put onto the AWARD system.
73. With hindsight, it is clear that more attention should have been paid to the management of these risks. It appears this did not happen because the Board did not have a clear role and did not give sufficient consideration to risk as a whole.
  74. There are two routes through which DFRP could have received greater governance oversight and support. The first was the Defence Major Programmes Portfolio (DMPP). Projects are included in DMPP according to their size, complexity and risk. DMPP projects make a quarterly return to the centre of the Department on a range of issues such as dependencies, resources, risk and performance against milestones. The SRO of a DMPP project also has a six-monthly challenge and support meeting with senior officials to review progress and issues.
  75. A 2017 review of DMPP's scope identified DFRP as a possible candidate for the Portfolio but did not recommend its inclusion. It was not considered as high risk as some other projects. In our view, this was probably the wrong decision. Consideration should have been given to the potentially contentious nature of a major outsourcing involving safety risks, and attention should have been paid to the need for governance for a project that did not have strong natural ownership at the centre of the Department or in any single Top Level Budget (TLB).<sup>18</sup> Inclusion in the portfolio would probably have provided stronger governance of the project and identified and addressed the factors which contributed to the procurement process being open to challenge.
  76. The second mechanism for providing governance in MOD would have been via the portfolio system operated within individual TLBs. Projects in this system, of which there are currently 38 in the Army, are overseen by the TLB holder's Portfolio Office which reports quarterly on progress to a committee chaired by the Deputy Chief of the General Staff who programme SROs also meet every six months for a project review. DFRP was already in existence when this system was established, and we have been advised that, as it was a legacy project, the decision was taken not to include it in the portfolio.
  77. The mechanism for governance and oversight of DFRP in the Army therefore consisted only of quarterly performance reporting against the Corporate Plan and arrangements set up by the project itself. Under the former, DFR reported performance each quarter against a range of activities related to maintaining its service including a "RAYG"<sup>19</sup> chart showing the direction of travel on DFRP with a short commentary. This is reported through the chain of command with significant issues ultimately raised to the centre of the Department.
  78. In our view, DFRP's governance arrangements left the project team with inadequate oversight or routes for escalation of issues. The Operations Board for DFRP was the sole potential source of governance for the project team and had only limited effectiveness.

## **Assurance**

79. Government central guidance<sup>20</sup> is that assurance should be provided in three Lines of Defence (LODs). This is also consistent with corporate best practice. The first line consists of the project team carrying out its own checks that appropriate standards are being used.

<sup>18</sup> For budgeting and administrative purposes, the MOD is divided into a hierarchy of budget areas of which the Top Level Budget is the highest. The Army, Navy and Air Force are all Top Level Budgets as are organisations such as the Defence Infrastructure Organisation.

<sup>19</sup> Red/Amber/Yellow/Green – A widely used method of indicating the status of a project in terms of it meeting its expected progress and other measurement criteria.

<sup>20</sup> Government Functional Standard GovS 002: Project Delivery Version 1.2 dated 1 August 2018.

The second consists of consideration by those with no first line responsibilities to ensure that first line defence is properly designed and operating. The third is normally undertaken by internal audit or an independent external body. Guidance is also that assurance reviews should be scheduled prior to significant decisions.

80. MOD guidance is that SROs should seek appropriate assurance through Gateway reviews and from Defence Internal Audit. These are intended to provide the third line of defence. We note that another source would have been review from the Infrastructure and Projects Authority (IPA).
81. For DFRP the lines of defence were as follows:
  - a. LOD 1 assurance within the project team itself, which included the role of considering the evaluation process;
  - b. LOD 2 assurance was shaped largely by the scrutineers supporting the Investment Approvals Committee. The project was provided with a list of the evidence needed to support its Main Gate Business Case. This was then considered by the scrutineers. Further assurance was provided by the reports from MOD's Cost Assurance and Analysis Service (CAAS) on the financial model (see paragraphs 54-55);
  - c. LOD3 consisted of a Gateway 3 review by independent experts within MOD considered the project in 2016.<sup>21</sup> It made recommendations about the provision of additional commercial, legal and project management staff and assessed all these as critical. Subsequently one project manager was recruited but, following discussions with Army Commercial and CLS, it was decided not to obtain further resource in other areas.
82. Our view on the effectiveness of the three LODs for DFRP is:
  - a. LOD1: The project team did not pay sufficient attention to the importance of recording evaluation results, as described in paragraphs 28 to 34. or to its own internal assurance of the records; and it did not seek additional assurance from LODs 2 and 3;
  - b. LOD2: MOD scrutineers were mainly content with the Main Gate Business Case requesting approval for contract award, while noting that there appeared not to have been an independent validation of the risk adjustments made to the bids. They could have raised more questions on the risk of legal challenge and the steps taken to mitigate it. In addition, the CAAS assurance of both the financial model and the risk adjustments should have been more extensive, even though this does not appear to have been a critical factor;
  - c. No LOD3 assurance was called for from Defence Internal Audit or external advisers in the period we are reviewing. The Gateway 3 review report suggested that there could be value in a further Gateway report before contract award, but this was not carried out.
83. In our view, the assurance activity was not sufficient and falls short of best practice. The SRO or governance arrangements should have increased the level of assurance of the bid evaluation.

## **Approvals**

84. As a Category A project, the highest level of project in the Ministry of Defence, DFRP was considered by the Department's Investment Approvals Committee. The IAC has responsibility for considering major investment proposals on behalf of the Defence Board and making recommendations to Ministers as appropriate. Its terms of reference require it to establish whether the projects it considers, among other things, meet the requirement, are value for money and are deliverable through sound project management.

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<sup>21</sup> MOD Integrated Assurance Review -Gateway 3: Investment Decision dated 17 March 2016.





85. DFRP was considered by the Committee at several points and required IAC approval to move from one major stage to the next. During the period covered by this review, the SRO sought approval to award the contract to the winning bidder.
86. The IAC did not appear to think that its role included consideration of the governance and assurance environment for the project, which in our view should be part of considering the ‘sound project management’ referred to in its terms of reference.
87. We also note that, before the period covered by the review, the original SRO - the then Adjutant-General - had delegated the role to the Project Director because he believed the project did not require an owner at his level and the Project Director was better qualified for the task and would have more time to devote to it. There was no approval required for the role to be delegated. MOD guidance does not prescribe who should appoint SROs or their equivalents to projects that are neither part of the DMPP nor part of a TLB’s portfolio. It says they can be appointed by a senior member of the TLB with the delegated authority of the TLB holder. Had approval been required from the IAC or the Permanent Secretary it could have given an additional opportunity to consider the need for better governance.
90. The legal advisers were not integrated fully into the project. They were used as an expert service and instructed on an “advice and review” basis - meaning that they were instructed by the project team on discrete topics as and when required; for example, on TUPE matters arising for transfers of employees. They provided input into the evaluation strategy but did not advise on the evaluation process and the criteria to be used.
91. The allocation of legal resources to MOD as a whole and to their main projects is decided annually as part of the MOD budget setting process. CLS concluded at the outset of the DFRP procurement process that it had the capability and capacity itself to advise the project without appointing a private firm of lawyers.
92. The Gateway report of March 2016 said that the review team “considers... dedicated commercial legal support to the project to be necessary in order to capture the negotiation discussion in a timely manner across all three concurrent dialogues”. The legal resource available was therefore reviewed at the request of the project team.<sup>22</sup> CLS confirmed their view that there was sufficient resource available in the legal team to provide the required support without the need to have recourse to private sector lawyers, although they considered that the project team’s own resources could benefit from being reinforced.

## Use of External Legal and Financial Advisers

88. The team had legal advice and support from the Department’s Central Legal Services - “CLS”, which is part of the Government Legal Department (“GLD”); and financial advice and support from Deloitte.

### Legal Advisers

89. The project was advised by a team of three lawyers supported by a Deputy Director (“DD”) from CLS. Their expertise included procurement, contract, pensions, TUPE and employment law.
93. Later in the procurement process, when detailed dialogue was underway with both bidders, MOD chose to attend some meetings without legal support, even though the bidders themselves were legally represented. Serco commented to us that they believed the presence of lawyers would have facilitated the procurement process by maintaining consistency of approach and perhaps identifying the departures from the agreed process.
94. In our view it is normal practice for parties to have legal representation where legal issues are expected to arise. Lack of legal

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<sup>22</sup> See paragraph 81c.

representation at commercial negotiations or other substantive dialogue meetings may have been a mistake if legal issues did in fact arise.

95. The project team have said to us that they would have welcomed more comprehensive legal support. They have also said that in their view appointment of a private firm would probably have made it easier to access this resource quickly at times of peak demand.
96. Our conclusion is that legal advisers should have been given broader roles to consider the design of the tender evaluation, how it was conducted and how to minimise the associated risk of legal challenge. Additional legal resource appropriately deployed could also have helped maintain a focus on record keeping where project team resource was stretched. There is some evidence to suggest that this level of resourcing might have been easier to achieve with an external firm of legal advisers, but we cannot reach a conclusion on this.

### ***Financial Advisers***

97. Deloitte were initially involved in helping to design the bid evaluation process. Latterly they were used largely on a task driven basis, with the level of support provided designed to reduce over time. It was felt that in the earlier stages of the project there was a greater need for structuring and strategic support, while later only more limited support was needed assisting with the financial model and certain discrete tasks.
98. By the time of evaluation there was only one Deloitte consultant regularly engaged with the project team. Although we heard from Deloitte and others that the requirement for their input at this stage had indeed significantly reduced, this seems unusually light. We would typically expect a project team working on a procurement of this size and complexity to benefit from greater support. In particular, Deloitte were not asked to give advice or support in

assessing the robustness of recording of the evaluation process or giving any assurance on the matter.

99. Our conclusion is that there was appropriate financial expertise available to serve the project properly, but it could have been used more extensively in the final stage.

### **Issuing of Award Letters and Related Information Provided to Bidders**

100. The letters to the two bidders notifying them of the outcome of the competition (the Contract Award Decision Notification or “CADN letters”) were prepared by the project team with input from CLS.
101. The data used to inform the content of the letters was drawn from the AWARD platform, but in the absence of a consolidated evaluation report it was not in a form which could readily be used to draft the letters to the bidders. The project team therefore collated the relevant information and contacted CLS with a first draft of the letters on 16 March 2018. From then until 8 May there were regular e-mail exchanges as well as meetings and telephone calls with the lawyer conducting the review of the drafting. The focus was on the content of the letter to Serco.
102. CLS advised that the risk of legal challenge was high and that it was important the letter to Serco clearly set out why the losing bid had not won. They questioned whether the content of the proposed CADN letter provided a sufficiently detailed explanation. The lawyer did not think that the information provided, both generally and particularly about the discrete risk adjustments, was sufficiently transparent to enable the losing bidder to satisfy itself why the bid had not been selected and to have confidence in the figures provided.
103. The project team concluded however that sufficient information was being provided because there had been a very lengthy

dialogue process, as a result of which both bidders understood how the costs were calculated and the way in which the risk adjustment had been approached. On this assumption, the CADN letter to the losing bidder was adjudged ready to send.

104. In our view, notwithstanding the earlier engagement with bidders, a clearer explanation was required in the CADN letter to enable the bidders to understand and have confidence in the derivation of the final figures.
105. On 18 June, letters were sent to both bidders. The content of both included a graph of the type shown in paragraph 22 plotting the confidence score and whole life cost, together with the residual costs and risk adjustments; and an Annex titled “Solution Confidence Evaluation” which provided a commentary on strengths and weaknesses of the proposal. Its receipt by Serco did not prevent, and may have prompted, the issue of the pre-action protocol letter by their solicitors on 22 June.
106. The pre-action protocol letter attested that the losing bidder was not satisfied a clear explanation had been provided and that the documentation in relation to some evaluation criteria did not support the final scores. There was a particular focus in the letter on the cost evaluation and a request for an explanation as to “how [MOD] has calculated the residual cost sums and evaluated price during the procurement”.
107. In addition to the pre-action protocol letter, GLD’s Commercial Litigation Team received a letter from Serco dated 27 June requesting the provision of a wide range of further information. They responded by supplying copies of the AWARD records of the individual and consensus scores for the bidders for the evaluation criteria identified in the pre-action protocol letter for each stage of the procurement process; and a summary of the MOD’s clarification questions sent to the winning bidder since the date of submission of its final tender. Further information was not supplied by MOD, who stated that the request was too wide ranging, that it would be disproportionate to conduct such a search (much of the information requested was stored on a number of different IT systems some of which were no longer easily accessible or in use, making recovery difficult and costly), and that some of the information was confidential to the winning bidder.
108. The response and additional information supplied by GLD did not satisfy Serco and nor did the feedback meeting held by MOD on 16 July to explain the reasons for the award decision. Consequently, Serco continued to pursue its claim against the MOD.
109. In our view, while there may have been grounds for not releasing some material, the information made available did not provide an explanation of the award decision which could be expected to satisfy a losing bidder. It is notable that Mr Justice Fraser in February 2019, in response to a court application by Serco for disclosure, held that “the MOD should have voluntarily provided this documentation months ago”.<sup>23</sup>
110. Our conclusion is that MOD faced the continuation of the litigation partly because:
  - a. The CADN letter to Serco had not given them an adequate explanation of why they had not won the bid;
  - b. The record-keeping and absence of a summary evaluation report made it difficult for MOD to assemble the information needed to articulate the reasons convincingly;
  - c. Examination of the evaluation records themselves showed deficiencies in recording how final evaluation decisions were reached; and
  - d. MOD’s responses to Serco’s requests for fuller disclosure were inadequate.

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<sup>23</sup> Serco Limited v Secretary for State for Defence [2019] EWHC 515 (TCC)



# Annex A

## Terms of Reference - Summary

### Programme Review objectives & scope

The Permanent Secretary and accounting officer would like an independent review to:

- Assess the contributing factors to the procurement process being open to challenge and the lessons to be learnt from the programme delivery - covering specifically, legal, commercial and financial advice and process, governance and assurance.
- Identify and recommend the most important actions that could be taken on other programmes across Defence and potentially wider Government including identification of those that need to be taken urgently.

The review will not look at the whole of the procurement process since 2014 or be an in-depth review of the programme. It will focus on the final phase of the competitive dialogue from Sept 2017 and the evaluation of bids and the management of the procurement from that point onwards. Though not restricted to looking at any areas of the programme during that period if others appear important to the review team, we would expect the review to look into the following areas as a minimum:

- The overall evaluation process, how it was developed, prepared and assured, whether it was fit for purpose and how the final dialogue phase was planned and managed
- The process for selecting, training and managing evaluators and the recording of scores
- The design, development, management, assurance and use of the financial model
- The issuing of award and non-successful award letters to bidders and the information provided
- Governance and assurance of the procurement
- Use of external legal and financial advisors

## Out of Scope

Action to be taken in regard to settlement or finalisation of contract award and mobilisation.

## Review Panel

A small independent review panel will be led by a non-executive director with relevant experience and skills from another relevant Government department - Tony Poulter. Tony will be supported by an independent team consisting of a legal, procurement and IPA specialist with dedicated administrative support to conduct the review.

The review panel will report directly to the Permanent Secretary, with advice and day to day support from the Director General Finance.

The review panel will have full access to the people and evidence needed to quickly and effectively get to the facts which will include Government Legal Department, the Cabinet Office and Deloitte and Legal Counsel as external advisers.

## Reporting and timescales

The output from the review will be a report consisting of no more than a dozen core pages covering:

- Background and pertinent facts
- The lessons learnt and key findings
- Recommendations and most important actions including identification of those that need to be taken urgently.

The Report should be delivered directly to the Permanent Secretary, ideally no later than the end of July. This assumes a start date of 3 June.



