

Defence and Security Public Contracts Regulations 2011

Chapter 14 – Supplier Selection

Purpose

1. This guidance explains what is meant by the term “supplier selection”, identifies the applicable legal framework, sets out the regulatory obligations that procurers must adhere to when selecting suppliers and identifies the key issues for procurers when undertaking supplier selection in the procurement process under the Defence and Security Public Contracts Regulations (DSPCR) 2011.
2. Specifically this guidance explains the use of selection criteria (and the difference between selection and award criteria); the mandatory and discretionary criteria that apply to the exclusion of suppliers; the use of Pre-Qualification Questionnaires (PQOs); and the supplier selection process in competitive and non-competitive procurement.

What is supplier selection?

3. Supplier selection is the process in which a procurer:
 - a. selects from potential suppliers, that have requested to participate in response to a contract notice published in the Official Journal of the European Union (OJEU), those it will invite to proceed to the next stage of the procurement, e.g. tendering or negotiation;
 - b. checks the eligibility of the supplier(s) it has chosen in accordance with Regulation 16 to participate in the non-competitive negotiated procedure.

What is the legal framework?

4. Regulation 23(1) sets out the grounds under which you must exclude a supplier. Confirmation that a supplier has a conviction for any of the offences listed in Regulation 23(1) means automatic ineligibility of a supplier, unless the procurer disregards the supplier's exclusion under the general interest test at Regulation 23(2).
5. Regulation 23(4) details the discretionary grounds for exclusion or ineligibility of a supplier.
6. Regulation 24 (Information as to economic and financial standing) sets out what evidence a procurer can take into account in assessing whether a supplier meets the minimum standards of economic and financial standing.
7. Regulation 25 (Information as to technical or professional ability) sets out what evidence a procurer can take into account in assessing whether a supplier meets the minimum standards of technical or professional ability.

Selection criteria

8. Regulations 23 to 26 set out the selection criteria that you can use in the procurement procedures under the DSPCR. You may decide to require part of the selection criteria used for supplier selection to apply in the selection of some subcontractors in the supply network by the successful tenderer, subject to the rules on sub-contracting in the DSPCR (see Chapter 13 – Subcontracting Under the DSPCR).
9. Supplier selection and contract award are two different steps in the procurement procedure and are unlikely to take place at the same time in a procurement procedure subject to the DSPCR. There is a clear distinction between the processes of:
- a. checking the suitability of and selecting a tenderer to be able to meet the requirement, (Regulations 23 to 26 set out the evidence that you may consider when deciding which suppliers should be invited to tender); and
 - b. assessing the relative merits of the tenders received at the award stage to identify the most economically advantageous tender for award of contract, (Regulation 31 (Criteria for the award of a contract) sets out the rules for contract award criteria (see Chapter 15 – Conducting the Tendering Exercise)).
10. Procurers must not use the criteria used at the supplier selection stage at the contract award stage and vice versa.

Mandatory exclusion of suppliers

11. Regulation 23(1) of the DSPCR requires that procurers exclude any supplier from the supplier selection process if the procurer has actual knowledge that the supplier or its directors or any other person who has powers of representation, decision or control of the supplier has a conviction for any of the following offences:
- a. conspiracy relating to participation in a criminal organisation;
 - b. corruption;
 - c. bribery;
 - d. fraud (where the offence relates to fraud affecting the financial interests of the European Communities);
 - e. terrorist offences or offences linked to terrorist activities;
 - f. money laundering or terrorist financing; or
 - g. any other offence within the meaning of Article 39(1) of the Directive.
12. If a procurer has actual knowledge that a supplier has a conviction for any of the offences listed in Regulation 23(1), it must reject that supplier, subject to Regulation 23(2).
13. This requirement to reject a supplier extends to offences committed by the “controlling mind” of the supplier. This could include the directors of a company, partners of a firm or those in equivalent positions such as other senior

management who have powers of representation, decision or control, including potentially the parent company of the supplier. You should seek legal advice on these issues where they are relevant to any specific procurement. For Ministry of Defence (MOD) staff, this means consulting Central Legal Services - Commercial Law (CLS-CL).

14. The DSPCR do not dictate the steps you should take to establish whether suppliers have a conviction for any of the offences listed above. However, as a minimum, you must ask suppliers to confirm whether they have a conviction for any of these offences. For MOD staff, you do this through the Pre-Qualification Questionnaire or Statement Relating to Good Standing.

15. The procurer may require further information from the supplier to clarify the information that the supplier has provided. Where the procurer is unsatisfied with the information provided or wishes to verify the information provided, the procurer can apply to the 'competent authority' to obtain further information under Regulation 23(3).

16. The competent authorities for suppliers based within the United Kingdom (UK) are the MOD's Defence Vetting Authority, Disclosure Scotland or the Criminal Records Bureau. For non UK-based suppliers then a procurer must apply to the competent authority of the relevant European Union (EU) Member State. Procurers should seek legal advice on these issues, where they are relevant to any specific procurement.

17. Procurers must accept the evidence listed at Regulation 23(5) as conclusive.

Disregarding the exclusion of a supplier

18. Regulation 23(2) provides a derogation that you can disregard the exclusion of a supplier against Regulation 23(1) where there are "overriding requirements in the general interest" which justify doing so.

19. Procurers must only use this derogation in the most serious of circumstances (such as a 'crisis' as defined in Regulation 3 (Interpretation)). In such cases, you should get the approval of the appropriate Minister or Permanent Under Secretary of State (PUS), as the accounting officer, to apply the derogation to the procurement concerned.

20. Your submission to the Minister or PUS must demonstrate the justification for using the derogation and the different factors for and against using it, which will vary depending on the circumstances of each individual case.

21. Procurers should take into account all the circumstances of the case in considering if there are overriding requirements in the general interest, including but not limited to:

- a. the harm to the national security of the United Kingdom (UK) and its Allies; for example, excluding the supplier would prejudice:
 - (1) conduct of military or security operations;
 - (2) operational sovereignty or our Armed Forces or security agencies;or

- (3) key industrial or technical capabilities regarded as essential for national security reasons;
 - b. the economic or financial harm caused if excluding the supplier would damage an important part of the private sector or be detrimental to public finances;
 - c. the full circumstances surrounding the conviction for the offence including:
 - (1) the nature and seriousness of the offence;
 - (2) the severity of the punishment for the offence;
 - (3) whether the offence was related to the subject matter of the contract;
 - (4) the action taken, or underway, to monitor and prevent a recurrence of the offence; and
 - (5) the length of time that has elapsed since the conviction;
 - d. the legal entity that will perform the contract (e.g. are we proposing to contract with the part of the company that committed the offence?);
 - e. the nature of the contract, including the size and importance; and
 - f. the scope, cost and timing implications of placing the contract with another supplier.
22. You should be aware that use of the derogation might be subject to a legal challenge if there is a feasible alternative to the supplier.

Discretionary Exclusion of Suppliers

23. Procurers have discretion not to select a supplier in the circumstances listed at Regulation 23(4). These are very similar to those listed in the Public Contracts Regulations (PCR) 2006 but include aspects that are specific to the defence and security sectors. These include:

- a. Grave professional misconduct - acts of grave professional misconduct which are similar to PCR 2006 but also include, by way of example, breaches of security of supply or security of information obligations during a previous contract (whether with the procurer or any other procurer) regardless of the Member State in which it is situated.

Although the ability to apply this ground does not require a conviction by a final Court judgment, the procurer must be able to rely on objective and verifiable evidence in order to invoke this, which must be a proportionate course of action. The breach would need to be deliberate or negligent and, if related to breaches of security of supply or security of information obligations, have a material detrimental effect on security of supply or security of information to be classifiable as grave professional misconduct.

- b. Criminal offences - this includes convictions for criminal offences linked to its business or profession as in the PCR 2006 but including by way of example infringements of existing legislation on the export of defence and / or security equipment.

c. Risks to national security - this means where the supplier is found, based on any evidence (including evidence provided by protected data sources), not to possess the reliability necessary to exclude risks to security of the UK. Given the sensitive nature of defence and security procurements, the reliability of suppliers is vital. This reliability is particularly important in the context of protecting the procurer's security of information and security of supply requirements. A concern about the reliability of a supplier may come from investigation of a number of factors such as:

- (1) the shareholding structure of the supplier; or
- (2) where certain features of previously supplied products have given cause for concern, such as hidden software to track use of a system.

24. Procurers must make the decision to exclude a supplier on discretionary grounds on objective evidence, which they must interpret proportionately and reasonably in the context of the requirement.

25. For MOD procurers, you must obtain approval to exclude a supplier under Regulation 23(4) from a 1-Star Commercial Officer (or, if they choose, a nominated Band B Commercial Officer on their staff), prior to the issue of any Invitation to Tender (ITT). You must record the decision for audit purposes and in the event of legal challenge. Other Government Departments should consider drawing up their own processes.

26. The procurer must be prepared to demonstrate and justify, ultimately to a court, the reasons for, and plausibility of, its decision to exclude or not exclude a supplier. This guidance is not a substitute for project specific legal advice, which you should always seek where required.

Economic and Financial Standing

27. Regulation 24 of the DSPCR is similar to Regulation 24 of the PCR 2006. It sets out what a procurer can consider when assessing whether a supplier meets any minimum standards of economic or financial standing and so establish whether they are suitable to participate in the procurement. The information you can take into account includes:

- a. bankers statements or, where appropriate, relevant professional risk indemnity insurance;
- b. statements of accounts or extracts of those accounts relating to the supplier's business where publication of these accounts is required under the law of the country the supplier is established in; or
- c. where appropriate, a statement covering the three previous financial years of the supplier's overall business turnover; and, where appropriate, the turnover in respect of a similar type of contract subject matter to that specified in the contract.

28. Where the above information is not appropriate to a particular procurement, you may ask a supplier to provide other information to demonstrate their economic and financial standing. In other words, this list is not exhaustive and

you can supplement it by other information relevant and proportionate to the ability of the supplier to perform the contract.

29. However, where a supplier is unable for a valid reason to provide the information you require, procurers must accept other information provided by the supplier that the supplier considers appropriate. These circumstances may occur when suppliers, particularly small businesses, form a consortium; consortia are eligible to tender for contract awards under Regulation 28.

30. You must set out in the relevant contract notice any minimal levels of economic or financial standing, and any applicable minimum technical capacity, and the information and evidence you require from the suppliers to prove that they satisfy the set selection criteria.

Technical or Professional Ability

31. Regulation 25 sets out what a procurer can consider when assessing whether a supplier meets any minimum standards of technical or professional ability to determine whether they are suitable for the next stage of the procurement procedure. Regulation 25 has been adapted from Regulation 25 of the PCR 2006, the principal differences being in terms of the evidence required.

32. Regulation 25 sets out an exhaustive list of technical or professional information that procurers can assess so long as the information is related and proportionate to the subject matter of the contract. You must set out in the relevant contract notice any minimal levels of technical or professional ability, and any applicable minimum capacity, and the information and evidence you require from the suppliers to prove that they satisfy the set selection criteria. Where relevant and proportionate to the subject of the contract, the information and evidence can include:

- a. in the case of a contract for goods, a supplier's technical ability taking into account the supplier's skills, efficiency, experience and reliability;
- b. in the case of a works contract, details of works carried out over the past five years, with certificates of satisfactory completion where appropriate (procurers may specify that the person providing the certification should provide this directly to them). In each case it must include the contract value, when and where the works were carried out and that the works were completed in accordance with the rules of any relevant trade or profession and were properly completed;
- c. a list of principal goods sold or services provided by the supplier in the past five years, or during a shorter period if necessary. This must include the date the goods were sold or services provided, the payment received, details of the customer receiving the goods or services and certification from them confirming the contract details. Where this certification is not available from the customer the supplier should provide that confirmation by an appropriate declaration;
- d. a statement of the technical services or technicians available for the supplier to use to meet the requirements of the contract particularly those responsible for quality control;

- e. a statement on the supplier's technical, study and research facilities, quality management system and internal rules for handling Intellectual Property Rights (IPR). The latter is to inform the procurer if the supplier's internal rules require the transfer of IPR to another party, e.g. a parent or sister company located in another Member State or outside the European Union (EU) – this may have an impact on a supplier's capability to meet security of supply requirements;
- f. procurers carrying out a check on the technical capability of the supplier and, if relevant, on their study and research facilities and quality control measures. For foreign suppliers, a competent official body may carry out this check on the procurer's behalf. You must take care to ensure that the checks are proportionate and apply objective standards to those checks;
- g. where the supplier is an individual, and in the case of works, services or supply contracts also covering siting and installation operations and services, the supplier's educational and professional qualifications, those of his managerial staff and those of the people responsible for carrying out the work or providing the services under the contract;
- h. evidence of any environmental management measures where this is necessary to undertake the requirements of a work or services contract. This can be a certificate from an appropriately qualified body attesting conformity to environmental standards based on the [EU Eco-Management and Audit Scheme](#) or relevant European or international standards, and any other evidence of environmental management measures equivalent to these;
- i. a statement of the supplier's average annual numbers of staff and managerial staff over the previous three years;
- j. a description of the resources available to the supplier to perform the contract to cope with any additional needs of the procurer that may arise as the result of a crisis, or to carry out the maintenance, modernisation or adaptation of the supplies covered by the contract;
- k. any samples, descriptions or photographs of goods to be purchased or hired under the contract and certification of their authenticity and, if appropriate, certification of compliance of those goods with the standards and technical specifications the procurer identifies in the contract;
- l. where required by the contract, evidence of the supplier's ability to process, store and transmit classified information at the level specified. This may include evidence that the supplier holds the appropriate UK security clearance or a clearance recognised by the UK as equivalent. Procurers may grant additional time to a supplier to obtain the necessary clearance if they do not already hold this. If this is the case procurers must make this clear in the contract notice and state the time limit which will apply; and
- m. evidence of conformity of a supplier's quality management system. This can be a certificate from an independent and suitably accredited body attesting conformity to quality management system standards based on the

relevant European standard or equivalent; and from an independent and suitably accredited body.

33. You may also request supplementary information from the supplier for the purposes of clarification, however this must relate to the areas covered in a. to m. above. However, where a supplier is unable for a valid reason to provide any of the evidence or information you require, you must accept other evidence and information provided by the supplier that you consider appropriate.

34. Having said that, in contrast to the evidence that you can take into account for economic or financial ability, the information in Regulation 25 (as supplemented) is an exhaustive list and you can take only that evidence into account when assessing whether suppliers meet the procurers stated minimum standards of technical or professional ability.

Pre-Qualification Questionnaire (PQQ)

35. Procurers will normally conduct supplier selection by use of a PQQ, although the DSPCR does not explicitly refer to the use of a PQQ. The PQQ provides a structured means of capturing the information. For goods and services contracts, MOD procurers must use the standard template and guidance at Annex A. Other procurers are free to adapt this form for their own use. When procuring works under the DSPCR, procurers must use the [PAS91 PQQ template](#) instead but will have to adopt this template for the different selection criteria in the DSPCR.

36. Procurers should issue the PQQ under cover of a letter, which should provide, for example:

- a. any necessary background information on the requirement;
- b. why the requirement arose;
- c. any relevant military or security strategic factors; and
- d. links to policy initiatives and wider programmes.

37. If MOD procurers use a PQQ, they do not have to obtain a Statement Relating to Good Standing (SRGS) from potential suppliers to obtain information on grounds for exclusion under Regulation 23. MOD procurers only need to use the SRGS:

- a. for works contracts where the PAS 91 PQQ template is used; or
- b. for goods and services contracts, for example, in non-competitive procurement where a PQQ is not used.

38. Procurers are reminded that, as part of the Government's wider transparency commitments, you are required to publish the PQQ (including the scoring methodology) when publishing your tender documents for procurements over the value of £10,000. You should publish it on the Government's Contracts Finder portal, after you issue the Invitation to Tender (ITT) or Invitation to Negotiate (ITN).

Supplier selection in competitive procurement

39. Supplier selection under the restricted, competitive negotiated and competitive dialogue procedures should follow the broad steps below.

Advertising the requirement in OJEU

40. Procurers should publish a contract notice inviting requests to participate in the procurement procedure in the:

- a. Official Journal of the European Union (OJEU);
- b. Defence Contracts Online (DCO), where appropriate; and
- c. Her Majesty's Government's (HMG's) Contracts Finder, where appropriate.

41. You must include in the contract notice the cut-off date by which potential suppliers must express their interest in participating in the procurement procedure. Procurers should also be careful not to put any information in the DCO or HMG's Contracts Finder advertisements, which is not in the contract notice you publish in the OJEU.

Using the PQQ to select those invited to participate

42. The PQQ should first ask for information relating to the eligibility of the supplier, in accordance with Regulation 23. It should request information about convictions for offences under Regulation 23(1), and whether the supplier meets any of the grounds for exclusion under Regulation 23(4). This allows the procurer to consider whether the supplier is eligible to proceed to the next stage.

43. Assuming you do not exclude any potential suppliers under regulation 23, you will then assess them against any minimum standards of economic and financial standing and technical or professional capability that you have set. These standards must relate and be proportionate to the subject of the contract, i.e. they relate to the ability of the supplier to perform the proposed contract and you must be able to evaluate them by the information, evidence, and means set out in regulations 24 to 26.

44. You must state these minimum standards in the contract notice in order to comply with the DSPCR. The contract notice will contain a link to the PQQ (or otherwise explain how to obtain the PQQ) where you will set out those minimum standards in full. This may be as part of a scoring methodology that links the responses to certain requirements for which you will give a pass / fail mark or where a score below a certain mark will result in a failure to meet those minimum standards. Or, it is possible a score below a certain overall mark may result in a failure to proceed.

45. You must declare the scoring and weighting rules you will use to choose the potential suppliers to take forward to the tendering exercise to all potential suppliers in the instructions for using the PQQ.

46. The PQQ will also set out the information, evidence or means that potential suppliers must provide to establish the minimum standards referred to above. The information, evidence or means permitted for consideration is set out in

Regulations 24 to 26. The DSPCR allows procurers to set out in the contract notice what evidence they require although again in reality the PQQ will fully provide this.

47. The DSPCR states that you can limit the number of suitable suppliers (i.e. those which are not ineligible under Regulation 22 and which have passed the procurer's minimum standards of economic and financial standing and technical and professional ability) by applying objective and non-discriminatory criteria. The minimum number of suppliers you limit must not be less than three under any of the procedures in the DSPCR and you can make them subject to a maximum number as well.

48. You must indicate in the contract notice both the objective and non-discriminatory criteria and the minimum and where appropriate maximum number. In the absence of such indication, you must invite all suppliers who are eligible under Regulation 23 and who meet the minimum standards to tender or to negotiate.

49. You will assess the objective and non-discriminatory criteria using the scoring methodology and weightings referred to above. Again though, such criteria must relate and be proportionate to the subject matter of the contract. In this way, procurers should be able to rank qualified suppliers in order of capability.

50. You may not select suppliers if they fail to comply with certain minimum standards or key legal requirements, or if they fail to provide the information you request. If any questions are sufficiently important that an unsatisfactory answer could result in you excluding a supplier, regardless of its total score, you must make this clear at the outset.

51. Your scoring should be consistent and allow for clear identification of reasons for rejecting a supplier. You must maintain a clear audit trail for the selection process that can stand up to scrutiny if required.

What to do if there are insufficient tenderers

52. If, following this process, the number of pre-qualified suppliers is less than the minimum you stated in the contract notice you may continue with the award procedure with those selected as long as their number is sufficient to ensure genuine competition.

53. The number of pre-qualified suppliers to demonstrate genuine competition will depend upon the complexity of the requirement and availability of suppliers in a particular market.

54. Where the selection process results in there being too few suppliers to ensure genuine competition, you may:

- a. cancel the procedure and launch a different procedure; or
- b. suspend the procedure and re-publish the original OJEU notice with a new deadline for requests to participate.

55. You will then add any further suppliers you select under this repeat procedure to the list those suppliers who pre-qualified under the original procedure and issue them an ITT or ITN.

Supplier selection in non-competitive procurement

56. The circumstances in which you may use the non-competitive negotiated procedure are set out in Regulation 16 (Use of the negotiated procedure without prior publication of a contract notice) (see Chapter 8 – Procurement Procedures).

57. Supplier selection in the context of non-competitive negotiated procedure has the following steps:

- a. The procurer identifies (in accordance with Regulation 16) the supplier(s) to participate in the negotiations under Regulation 18.
- b. The procurer confirms that the supplier(s) are eligible to participate in the procurement under Regulation 23 (Criteria for rejection of economic operators).
- c. The procurer assesses the supplier(s) selected to negotiate against any pre-disclosed minimum capability levels, in accordance with Regulations 24 to 26.
- d. Following this pre-qualification process, the procurer enters into negotiation with the qualified supplier(s).

Official lists of approved suppliers

58. Regulation 27 (Official lists of approved operators) applies where a supplier:

- a. is registered on an official list of approved suppliers in a relevant State which maintains a list and in which the supplier is established; or
- b. is certified by a certification body complying with European certification standards in a relevant State which maintains that certification and in which the supplier is established.

59. While the UK does not maintain official lists of approved suppliers or certification of suppliers, they are in use within other Member States. Therefore, Regulation 27 may be applicable to some UK procurements which include suppliers registered or certified in the EU.

60. Further requirements for procurers on the acceptance of certificates supporting supplier registration or certification on an official list of approved suppliers are set out in Regulation 27(4), (5) and (6). These provisions limit the information that you can require from suppliers for qualitative selection where suppliers provide these certificates, unless the procurer can justify the grounds for additional information.

Consortia

61. Where the supplier represents a consortium, that is two or more persons at least one of whom is a supplier and acting jointly for the purpose of being awarded a contract, the supplier may rely upon the capabilities of other consortium members to perform the contract. However, the supplier is required to prove that the consortium has the necessary resources to meet the procurer's requirement and the procurer may request an undertaking to that effect.

62. The consortium need not have formed a legal entity for the purposes of tendering for or negotiation of a contract and you must not exclude the consortium based on this circumstance. However, the procurer may, if justified for the satisfactory performance of the contract, require the consortium to form a legal entity before entering into, or as a term of, the contract. Consortia can be contract based or equity based as a contracting entity. You may encounter different forms of equity-based corporations and you need to treat them on an equal basis, e.g. Small or Medium Enterprises (SMEs) may form a corporation based on the European Economic Interest Grouping in some circumstances.

Corporations

63. The procurer must not exclude a supplier from the supplier selection process on the grounds that under UK law the supplier is required to be an individual, a corporation or other type of body if the supplier is authorised within their own country to provide those services.

64. In the case of a services or works contract or a supply contract which includes services or siting and installation operations, where the supplier is not an individual the procurer may request the supplier to disclose in the PQQ the names and relevant professional qualifications of the staff responsible for the performance of the contract.

Notifying suppliers of procurement decisions

65. If, at any stage prior to the procurer making a contract award decision, the procurer decides to exclude a supplier, the procurer must notify the supplier of their exclusion. It is advisable to notify the supplier of all the reasons why it was unsuccessful. If the procurer does this then it does not need to send an award decision notice to that supplier at the end of the procurement procedure, in accordance with Regulations 33(15)(a) (Information about contract award procedures).

What are the key points to remember?

1. You should be aware of the grounds for mandatory and discretionary exclusion of suppliers under Regulation 23 of the DSPCR.
2. The DSPCR includes new grounds for exclusion, i.e. where a supplier has a conviction for terrorist offences this is mandatory grounds for exclusion; and a breach of obligations regarding security of information or security of supply is discretionary grounds for exclusion.
3. You should be aware of changes in the DSPCR from the PCR in terms of the evidence of technical and professional ability for the tenderer to provide. These include:
 - a. changes to the requirements to provide a list of principal deliveries or services provided;
 - b. the ability to carry out checks on technical capacity and, if relevant, study and research facilities;
 - c. evidence of the resources available to cope with additional needs resulting from a crisis; and
 - d. an ability to handle classified information at the level required.
4. You may only assess suppliers against the selection criteria stated in the contract notice, and that criteria must be relevant and proportionate to the subject matter of the contract.
5. If using a PQQ in the supplier selection process you should use the PQQ at Annex A for goods and services or the PAS91 PQQ for works (see paragraph 35).