

Defence and Security Public Contracts Regulations 2011

Chapter 8 - Procurement Procedures

Purpose

1. This guidance explains what procurement procedures procurers can use to award defence and security contracts under the Defence and Security Public Contracts Regulations (DSPCR) 2011.
2. Specifically, the guidance explains what the DSPCR procurement procedures are, how to select the most appropriate procedure, the main steps and time limits in those procedures, and considers specific compliant strategies for various circumstances, such as variations to advertised requirements.

What are procurement procedures?

3. Procurement procedures are the processes that procurers must follow when seeking offers in relation to a proposed contract for goods, services, work or works in the defence and security sector. The DSPCR sets out four main procurement procedures. These are:
 - a. the restricted procedure;
 - b. the negotiated procedure with prior publication of a contract notice (the “competitive negotiated procedure”);
 - c. the competitive dialogue procedure; and
 - d. the negotiated procedure without prior publication of a contract notice (the “non-competitive negotiated procedure”).
4. The restricted procedure and the competitive negotiated procedure are the default procedures in the DSPCR.

What is the legal framework?

5. Regulations 15 to 19 of the DSPCR set out the details of the procurement procedures that you must follow to award a contract unless where a treaty exemption or an exclusion applies or it is below the relevant thresholds.

Your choice of procurement procedure

6. In deciding the most suitable procedure, you need to follow the rules in Regulation 15 (Selection of contract award procedures).
7. You have a free choice between using the restricted procedure and the competitive negotiated procedure. These procedures should be sufficient for most competitive contracts. In exercising that choice, you should take into account, among other things, the complexity of the

- requirement and seek to minimise any administrative burden on the acquisition team and potential suppliers.
8. If the requirement is reasonably mature, i.e. it is possible to specify objectively the financial, technical and legal means of meeting the contract requirements and there is little or no need for discussion with the tenderers, the more structured restricted procedure will be more appropriate.
 9. You may use the competitive dialogue procedure where you wish to award a “particularly complex contract” and you consider the restricted or competitive negotiated procedures to be inadequate for the contract award. Procurers should not consider using the competitive negotiated procedure to the detriment of properly specifying and maturing their requirement before embarking on a procurement process.
 10. You can use the non-competitive negotiated procedure only in limited circumstances described in Regulation 16 (Use of the negotiated procedure without prior publication of a contract notice).
 11. Annex A sets out time limits for these procurement procedures. The time limits for the standard procedures are summarised at Appendix 1 to Annex A.

The restricted procedure

12. Regulation 17 (The restricted procedure) sets out details of the restricted procedure. Figure 1 below summarise the restricted procedure.

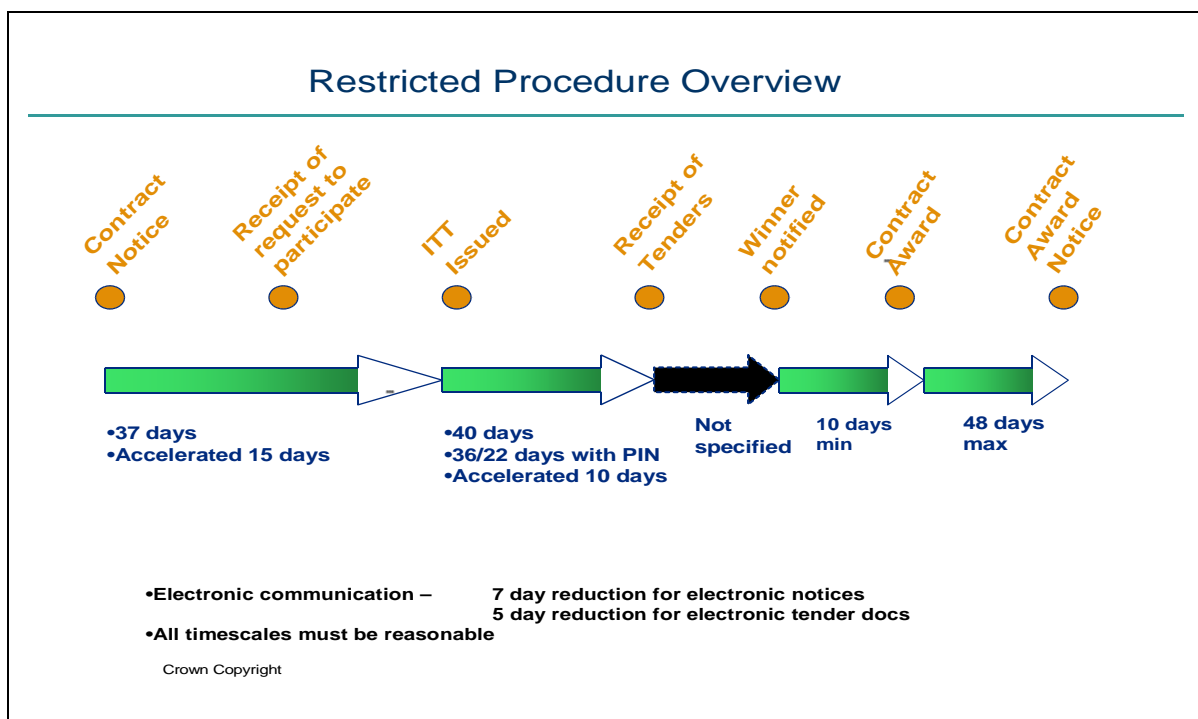


Figure 1: Summary of Restricted Procedure and associated time limits

13. The steps in the restricted procedure summarised above are:

- a. You publish a contract notice in the Official Journal of the European Union (OJEU) for 37 days asking for requests to participate from suppliers. You must specify your intention to invite a minimum of three tenderers in the contract notice.
- b. You issue the Invitation to Tender (ITT) to the best-qualified tenderers that meet the minimum pre-qualification standards. Tenderers have 40 days to return their tenders.
- c. You receive and evaluate tenders. The DSPCR does not specify the period for evaluating tenders.
- d. Following a standstill period to allow aggrieved parties to challenge the award decision, you award the contract to the supplier that best meets the advertised award criteria.
- e. You publish a contract award notice in the OJEU within 48 days of the contract award.

Publishing the contract notice

14. The first step in the restricted procedure is the publication of a [contract notice](#) in the OJEU inviting requests from potential suppliers who wish you to select them to tender for the contract.
15. You must specify the date for receipt of requests in the contract notice. You must take into account all the circumstances including the complexity of the requirement when setting this date. Ordinarily, you must allow a potential supplier at least 37 days from date of despatch of the notice to the OJEU although you can reduce this in certain circumstances (see Annex A).

Supplier Selection

16. After the closing date for receipt of requests, you should conduct an exercise to shortlist suppliers to determine their suitability to receive an ITT. You can best achieve this by using the responses to a Pre-Qualification Questionnaire (PQQ) exercise.
17. To ensure genuine competition, procurers must intend to invite a minimum of three tenderers (this differs from the minimum five under the Public Contracts Regulations (PCR 2006)) who meet the minimum pre-qualification standards. Statement to this effect must be set out in the contract notice and the PQQ.
18. You can find more guidance on Supplier Selection in Competitive Procurement in Chapter 14 – Supplier Selection.

Tendering

19. There is no minimum period for the time between receipt of requests for selection and issue of the ITT to short-listed tenderers.
20. You must specify the date for receipt of tenders in the ITT and you should take into account all the circumstances including the complexity of the requirement when setting this date. Ordinarily, however, you must allow a tenderer at least 40 days from date of despatch of the ITT

to submit a tender although you can reduce this in certain circumstances (see Annex A).

21. You must not negotiate or change the fundamental aspects of the contract with potential suppliers under the restricted procedure, in particular negotiations on price. The Commission has made its view clear on this in the context of the PCR 2006 and there is no reason to believe their position is any different under the DSPCR.
22. You must treat all tenderers equally and give them the same opportunities for discussion and response.
23. You should note that there are differing opinions about the extent to which you can introduce an additional tendering round for best and final offers. If you decide to ask for best and final offers, you must treat all tenderers equally and you must not alter the award criteria set out in the contract documents.
24. You can find more guidance on tendering in Chapter 15 – Conducting the Tendering Exercise.

Contract award

25. On receipt of tenders, the procurer will proceed to the contract award stage by application of the advertised award criteria.
26. You must exclude non-compliant tenders. However, you should only exclude a tenderer from a subsequent round of tendering where there is a sound case based on a material degree of non-compliance with the mandatory parts of the requirement issued in the contract documents. If all the tenders are non-compliant, you should cancel the procedure, and consider launching a new competitive procurement procedure or switching to the non-competitive negotiated procedure.
27. Acquisition teams may request further information from tenderers to clarify or supplement the content of tenders so long as this does not involve discrimination between tenderers. Anything more than clarification or supplementing tenders is susceptible to challenge as a potential breach of the DSPCR.
28. You can find more guidance on contract award and publishing a [contract award notice](#) in Chapter 16 – Standstill Period, Contract Award and Voluntary Transparency.

Accelerated restricted procedure

29. You may use an accelerated form of restricted procedure but only for reasons of urgency, for example, for urgent operational requirements where you cannot allow suppliers the periods normally required.
30. While the minimum time limits may suggest you can carry out this procedure in 20 days, experience shows that it allows you to complete the procurement in around six weeks. The reduced timescales for achieving this are set out in Annex A.

31. The Commission regards the use of the reduced timescales as an exception to following the standard restricted procedure as it has the effect of restricting competition.
32. You can only use the accelerated restricted procedure where it is strictly required, i.e. you must base your decision to use the reduced timescales on an objective need for urgency and a genuine impossibility of adhering to the normal periods for this procedure. In addition, you should not use the accelerated restricted procedure to recover administrative delays caused by the procurer.
33. If you use the accelerated procedure, you must show that the prospective contract is limited to the requirement (types and quantities) which is urgently required and in the context of services, be for a period no greater than is strictly necessary. You must procure any other related goods, works and services under a normal procedure.
34. You should clearly mark contract notices published in the OJEU for the accelerated procedure as “Accelerated Procedure” and include the justification for using this form of procedure. You should despatch contract notices by fax or e-mail.
35. Scrutiny and approval of any decision to use the accelerated restricted procedure should be done at the appropriate level. For the Ministry of Defence (MOD), this is at Band B level.

Use of the competitive negotiated procedure

36. Regulation 18 (The negotiated procedure) sets out details of the negotiated procedure with prior publication of a contract notice (which is referred to as the “competitive negotiated procedure” in the guidance). This procedure is freely available for you to use.
37. Unlike the restricted procedure, it expressly allows you to undertake negotiations and iterative tendering so long as you include this possibility in the contract notice and, depending on the circumstances, repeat it in the Invitation to Negotiate (ITN).
38. Figure 2 below summarises the competitive negotiated procedure.

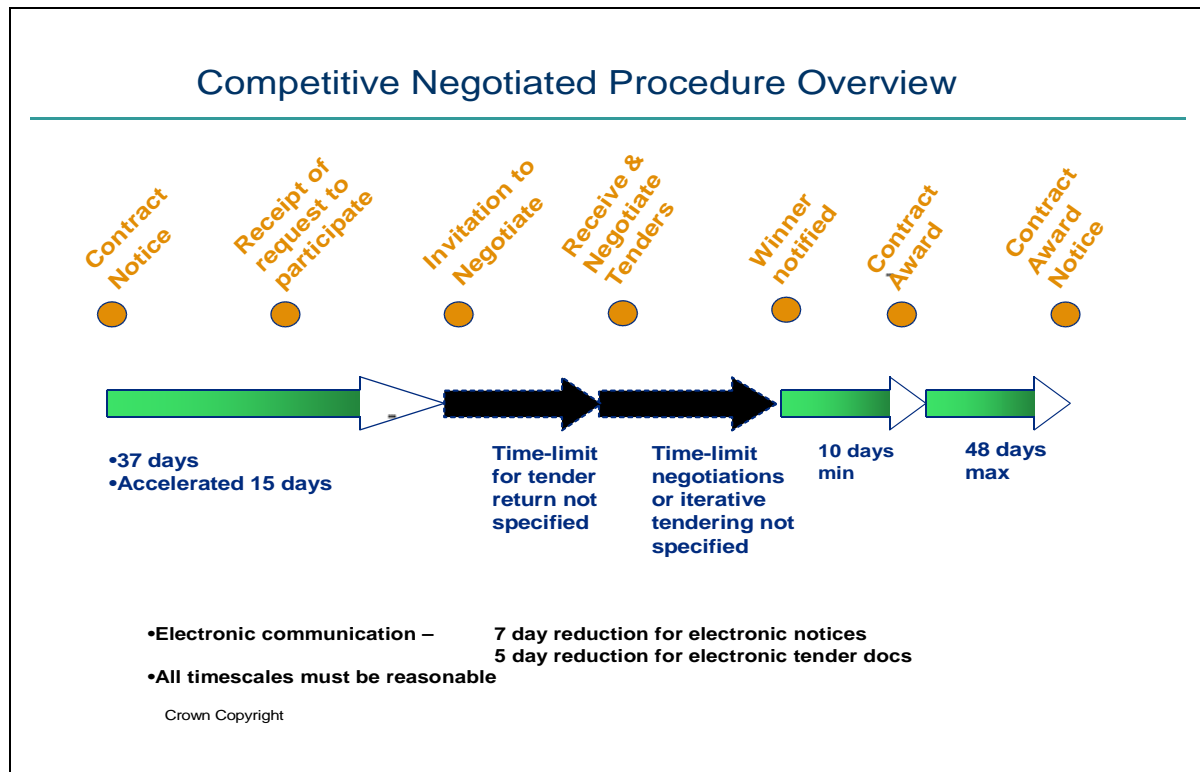


Figure 2: Summary of Competitive Negotiated Procedure and time limits.

39. The steps in the competitive negotiated procedure summarised above are:
- You publish a contract notice in the OJEU for 37 days that asks for requests to participate from suppliers. You should specify your intention to invite a minimum of three tenderers in the contract notice.
 - You issue the ITN to the best-qualified tenderers that meet the minimum pre-qualification standards. The DSPCR does not specify the period for returning tenders.
 - You receive and evaluate tenders received. You conduct negotiation on tenders received and, if required, hold iterative rounds of tendering to down-select solutions. The DSPCR does not specify the period for evaluating tenders or conducting iterative rounds of tendering.
 - Following a standstill period to allow aggrieved parties to challenge the award decision, you award the contract to the supplier that best meets the advertised award criteria.
 - You publish a contract award notice in the OJEU within 48 days of the contract award.

Publishing the contract notice

- The first step in the competitive negotiated procedure is the publication of a [contract notice](#) in the OJEU inviting requests from potential suppliers to take part in the negotiations for the contract requirement.
- You must specify the date for receipt of requests in the contract notice and should take into account all the circumstances, including the complexity of the requirement, when setting that date. Ordinarily, you

must allow a potential supplier at least 37 days from date of despatch of the notice to the OJEU although you can reduce this in certain circumstances (see Annex A).

Supplier Selection

42. On receipt of requests, you should conduct an exercise to shortlist suppliers to determine their suitability to receive an ITN. You can best achieve this by using the responses to a PQQ exercise.
43. To ensure genuine competition, procurers must intend to invite a minimum of three tenderers who meet minimum pre-qualification standards, which you must set out in the PQQ. You must state this intention in the contract notice.
44. You can find more guidance on Supplier Selection in Competitive Procurement at Chapter 14 – Supplier Selection.

Tendering and negotiation

45. There is no minimum period for the time between receipt of requests for selection and issue of the ITN to short-listed tenderers.
46. You must specify the date for receipt of tenders in the ITN and should take into account all the circumstances including the complexity of the requirement when deciding this date.
47. During the negotiation phase, procurers may negotiate with each pre-selected tenderer that has submitted a tender with the aim of developing the tenders to the requirements specified in the contract documents. Complex requirements are likely to require negotiations with all tenderers.
48. Upon receipt of tenders, the procurer may choose to evaluate the tenders by applying the advertised award criteria. If the tender evaluation shows that you can award the contract without the need to negotiate with all tenderers, you may proceed to contract award if:
 - a. the successful tenderer's bid is fully compliant with the requirement;
 - b. you can accept the successful tenderer's bid without negotiations that would result in material changes to the bid; and
 - c. you stated in the contract documents that:
 - (1) the procurer reserves the right to negotiate only with one tenderer who submits the best compliant tender in accordance with the published award criteria; and
 - (2) tenderers must submit their best tenders at the outset.
49. Due to the need to maintain equality of treatment among all the tenderers, if material changes are required, you must allow all the tenderers to improve or adapt their tenders.
50. The DSPCR expressly allows the negotiations to take place in successive stages so you may reduce the number of tenderers in the negotiations

by applying the pre-disclosed award criteria set out in the contract documents.

51. You should consider the amount of preparatory work needed beforehand and the practical and resource implications for both the procurer and tenderers of running the process. However, at the final stage of negotiations e.g. best and final offer, the procurer must ensure, if possible, that there are sufficient bidders to ensure genuine competition.
52. Throughout the negotiation phase the principles of equality, non-discrimination, transparency, etc. apply to ensure you give all bidders the same opportunities for discussion and response.
53. You can find more guidance on tendering and negotiation in the Chapter 15 – Conducting the Tendering Exercise.

Contract award

54. Upon receipt of tenders and after negotiations of the tenders, the procurer will evaluate the tenders by applying the advertised award criteria in order to award the contract.
55. You can find guidance on contract award and publishing a [contract award notice](#) in Chapter 16 – Standstill Period, Contract Award and Voluntary Transparency.

Accelerated negotiated procedure

56. Like the restricted procedure, you may use an accelerated form of the negotiated procedure for reasons of urgency. However, in contrast to the restricted procedure the DSPCR only stipulate the minimum period of 10 days for receipt of requests to participate. The minimum timeframe for receipt of tenders and for the negotiation phase will depend on the circumstances.
57. You must base the use of the accelerated procedure and the reduced timescales on an objective need for urgency and a genuine impossibility of adhering to the normal periods prescribed for this procedure. You will need to justify its use in the contract notice.

Use of the competitive dialogue procedure

58. The competitive dialogue procedure is set out at Regulation 19. You can only use it for the award of “particularly complex contracts” or projects where it is clear that the use of the restricted or competitive negotiated procedures will not allow the award of the contract. This will be the case, for example, where the procurer has not yet been able to establish its’ requirement with sufficient precision to be able to invite tenders under the restricted or competitive negotiated procedures.
59. The competitive dialogue procedure is a flexible procedure though you should consider the amount of preparatory work needed beforehand and the practical and resource implications for both the procurer and tenderers of running the process.

60. Competitive dialogue also provides the ability to have a “structured” dialogue or negotiation with bidders about all aspects of the contract. It gives the parties the opportunity to enter into dialogue or negotiate any aspect of a project after issue of the Invitation to Participate in Dialogue (ITPD) but before final tenders are submitted.
61. Figure 3 below summarises the competitive dialogue procedure.

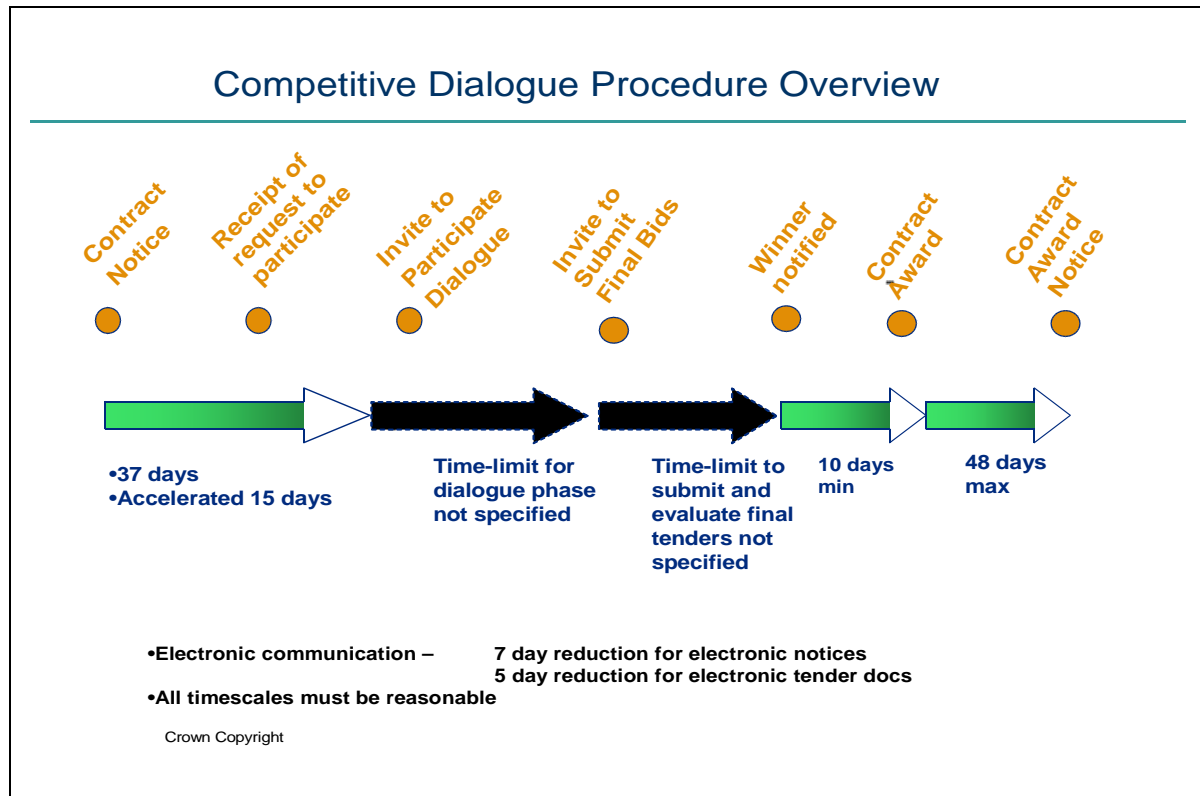


Figure 3: Summary of Competitive Dialogue Procedure and time limits

62. The steps in the competitive dialogue procedure summarised above are:
- You publish a contract notice in the OJEU for 37 days asking for requests to participate from suppliers. You should specify your intention to invite a minimum of three candidates to participate in dialogue in the contract notice.
 - You issue the ITPD in dialogue to the best-qualified candidates that meet the minimum pre-qualification standards. The DSPCR does not specify the period for returning proposed solutions.
 - You conduct dialogue on the proposed solutions and, if required, hold iterative rounds to down-select solutions. The DSPCR does not specify the period for doing this.
 - After the dialogue phase has identified solutions, procurers will receive and evaluate tenders. Following a standstill period to allow aggrieved parties to challenge the award decision, the procurer will award the contract to the supplier that best meets the advertised award criteria.
63. You can find detailed guidance on the competitive dialogue procedure at Annex B.

Non-competitive negotiated procedure

64. Regulations 16(2), (9) and (10) set out details of the negotiated procedure without prior publication of a contract notice (referred to as “the non-competitive negotiated procedure” in this guidance), which is summarised in Figure 4 below.

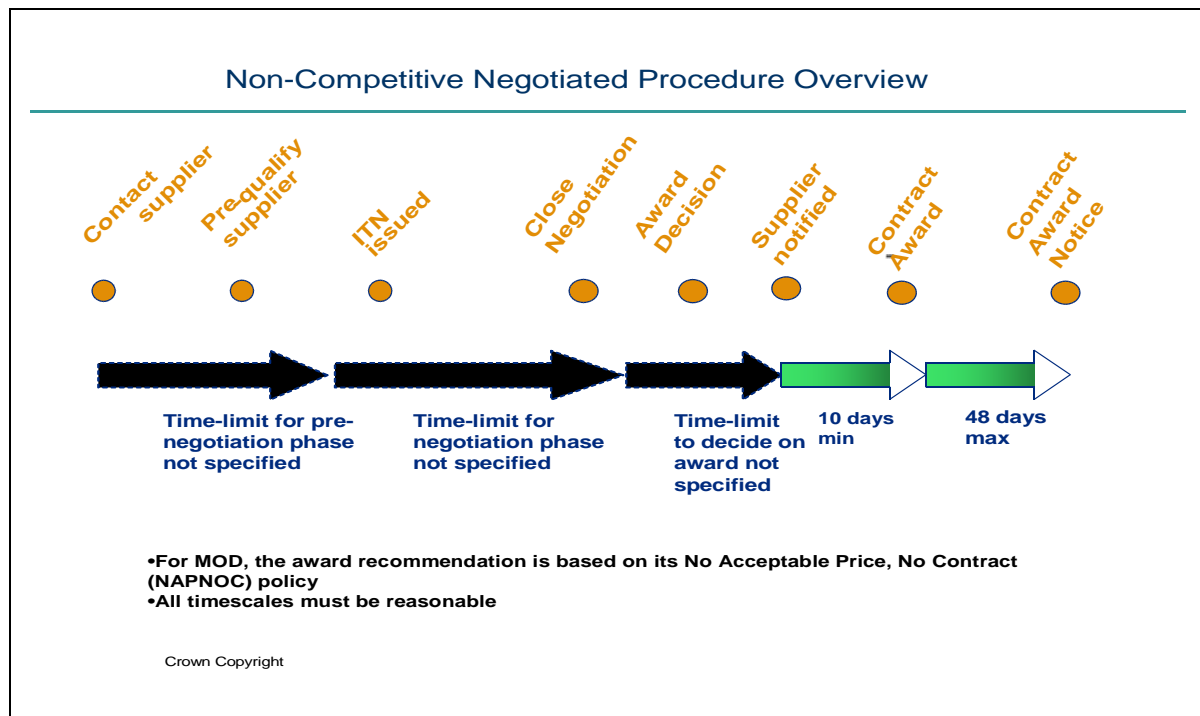


Figure 4: Summary of Non-Competitive Negotiated Procedure and time limits

65. The key steps in the non-competitive negotiated procedure are:
- You identify the proposed supplier(s), which you must justify in accordance with Regulation 16.
 - You pre-qualify the supplier(s) selected to negotiate in accordance with Regulations 23, 24, 25 and 26 (Supplementary information).
 - MOD procurers should issue their [Voluntary ex ante transparency notice](#) (VEAT) (also known in MOD as a Voluntary Transparency Notice (VTN)) at this stage.
 - You issue the ITN to the supplier(s).
 - You conduct negotiations, which, if there are two or more suppliers involved, may require them to tender against the requirement.
 - You evaluate whether the resulting contract delivers value for money for the requirement.
 - You publish a [contract award notice](#) in the OJEU.
66. You can find guidance on Supplier Selection in Non-Competitive Procurement in Chapter 14 – Supplier Selection.
67. This procedure is only available in the circumstances described in Regulation 16 and you should normally use it for single source

procurement. That said, where a limited competition is possible (although with no advertised call for competition), the procurer will select the suppliers to participate in the negotiations. This may occur, for example:

- a. in the absence of tenders or of suitable tenders or applications in response to a restricted, competitive negotiated or competitive dialogue procedure;
- b. in the case of urgency resulting from a crisis;
- c. in the case of extreme urgency; or
- d. in the case of contracts for research and development.

Justifying the non-competitive negotiated procedure

- 68. Detail about the specific cases and circumstances permitting the non-competitive negotiated procedure are in Regulation 16.
- 69. Its use is limited to exceptional circumstances and you must fully justify it as it allows procurers in most cases to dispense with competition and award a contract to a single supplier. That said, the treaty principles of equality of treatment, non-discrimination, transparency, etc. apply to any contract award procedure you chose. This may mean some form of limited competition depending on the circumstances and the grounds you invoke for justification.
- 70. Procurers should keep a record of the reasons for using Regulation 16, as you must report its use to the Efficiency and Reform Group (ERG) or the MOD under Regulation 46 (Statistical and other reports) (see Chapter 18 – Statistics and Reports).
- 71. Procurers may also wish to use these records to assist in the completion of a VEAT to avoid ineffectiveness under Regulation 60 (Grounds for ineffectiveness). You can find more guidance in Chapter 17 – Legal Review, Remedies and Ineffectiveness.

Absence of tenders or suitable tenders

- 72. You can use the non-competitive negotiated procedure if you receive no tenders or suitable tenders or applications (i.e. requests to participate) in response to a restricted, competitive negotiated or competitive dialogue procedure.
- 73. An unsuitable tender differs from an irregular or unacceptable tender (see below) by being compliant but unsuitable because of, for example, the price being unaffordable. It is clear though that under this particular ground the procurer is not obliged to negotiate with those who pre-qualified but did not then submit a compliant tender.
- 74. If you invoke this ground, the acquisition team must be prepared to submit a report to the ERG or the MOD, as appropriate, for onward transmission to the Commission if they request one.

Irregular or unacceptable tenders

75. You may apply this ground where, in response to a restricted, competitive negotiated or competitive dialogue procedure in which suppliers have pre-qualified, the procurer receives only tenders which:
- a. fail to meet any of the minimum requirements set out in the ITT, ITN ITPD; or
 - b. provide only unacceptable variations; or
 - c. are otherwise non-compliant.
76. In those circumstances you can only invoke the ground if:
- a. you do not substantially alter the original terms of the contract ; and
 - b. the procurer then negotiates with all of and only those bidders which submitted tenders who:
 - (1) satisfy the minimum requirements of technical and professional ability and financial standing and economic standing; and
 - (2) are not ineligible on the grounds specified in Regulation 23.

Urgency resulting from a crisis

77. This new ground is available when the periods that apply to the restricted or competitive negotiated procedures (including accelerated time-scales under each of these procedures) are incompatible with urgency resulting from a "crisis".
78. You will need to identify the "harmful event" which characterises a crisis in the contract award notice to justify the use of this process; delay by a procurer in procurement planning and processes will not amount to a crisis.
79. The DSPCR defines "crisis" at Regulation 3 (Interpretation) and includes where the relevant Secretary of State declares a "crisis situation" as impending through appropriate delegated authority. The aim is to ensure supply during a time of crisis on terms and conditions to be agreed. Depending on the circumstances, the procurer may negotiate with a single supplier or a limited pool of suppliers, chosen in accordance with treaty principles.

Extreme urgency

80. You can use the competitive negotiated procedure in cases of extreme urgency:
- a. brought about by events that the procurer could not foresee and are not attributable to the procurer; and
 - b. where you cannot meet the time limits under the restricted or competitive negotiated procedures, including accelerated timescales under each of these procedures.

81. The extreme urgency ground is distinct from urgency resulting from a crisis and you may only invoke it where strictly necessary. The urgency must not be attributable to the actions of, or failure to act by, the procurer.
82. You cannot use the extreme urgency ground for a requirement that continues for so long that it loses its “urgency” status, e.g. you may justify a requirement for urgent services for a month’s duration but not a year’s duration. In other words, the procurer must show that the prospective contract is limited to the subject matter (types and quantities) which is urgently required and be for a period no greater than is strictly necessary.

Technical reasons or exclusive rights

83. This ground is available where, for technical reasons or for reasons connected with the protection of exclusive rights, you can award the contract only to a particular supplier.
84. You must justify use of this ground on a case-by-case basis. You can use the ground, for example, in the following circumstances, the first three of which are set out in the Recital 52 to the Directive:
 - a. Strict technical impracticality for a supplier other than the chosen supplier to achieve the required goals.
 - b. Necessity to use specific know-how, tools or means which only one supplier has at its disposal. This may be the case, for example, for the modification, or retro-fitting of particularly complex equipment.
 - c. Specific interoperability or safety requirements that must be fulfilled in order to ensure the functioning of the armed forces or security forces.
 - d. Where strict reliance on the use of a supplier’s exclusive rights, which are unavailable to other suppliers (e.g. in technical data, copyright works, unpublished know-how, patented inventions, registered or unregistered designs), is necessary to perform the contract.
85. To rely on the exclusive rights ground you must show in each case that:
 - a. there is an exclusive right;
 - b. there is no available and lawful equivalent that another supplier could offer;
 - c. the right has not been licensed to other providers; and
 - d. the procurer does not have a licence to use the exclusive right which would enable it to procure the subject of the contract from another supplier.

Research and Development (R&D)

86. You can apply the use of the non-competitive negotiated procedure to:
 - a. R&D services not excluded from the DSPCR under the general exclusion at Regulation 7; and

- b. goods purchased or hired solely for the purpose of fundamental or applied research, or experimental development, but not with a view to quantity production to establish commercial viability or recovering R&D costs (see Chapter 9 – Research and Development).

Additional purchase or hire of goods

87. You can use the non-competitive negotiated procedure for additional purchase or hire of goods from the original supplier where they are intended either as:

- a. a partial replacement for existing goods or an installation; or
- b. in addition to existing goods or an installation;

and, in either case, where a change of supplier would oblige the procurer to acquire material having different technical characteristics resulting in either:

- c. incompatibility with the goods or the installation covered by the original contract; or
 - d. disproportionate technical difficulties in operation and maintenance of the existing goods or the installation.
88. Procurers may invoke this ground where, for example, the complexity of the goods and the associated requirements for interoperability of the new goods and the existing goods and the need for standardisation of equipment in the defence and security arena, requires supply by the same manufacturer. Therefore, under this ground you can obtain replacement components for existing systems from the original supplier (although you may equally be able to invoke the technical reasons or exclusive rights ground depending on the circumstances).
89. The length of any replacement or additional contracts and of recurrent contracts may not exceed five years unless there are “exceptional circumstances”. Recital 51 to the Directive describes how to judge whether there are exceptional circumstances for additional deliveries, which should take into account the expected service life of any delivered items, installations or systems, and the technical difficulties that a change of supplier may cause.

Repetition of works or services

90. You can use the non-competitive negotiated procedure where a procurer has awarded an earlier contract for works or services and seeks new works or services, which are similar works or services, from the original supplier, if the following five conditions are satisfied:
- a. The new works or services must conform to a basic project for which the procurer awarded the original contract.
 - b. When the procurer advertised the original contract, notice was given that the procurer might use the non-competitive negotiated procedure for the procurement of additional works or services.
 - c. You must have taken into consideration the total estimated cost of the subsequent works or services in estimating the value of the original

contract for the purposes of determining the applicability of the DSPCR to the original contract.

- d. The procurer awarded the original contract according to the restricted procedure, the competitive negotiated procedure or the competitive dialogue procedure; and
- e. Your recourse to the non-competitive negotiated procedure takes place within five years of the original contract unless there are exceptional circumstances in which case you may exceed this time limit. You must take into account the expected service life of any delivered items, installations or systems, and the technical difficulties that a change of services provider or contractor may cause when determining whether there are exceptional circumstances.

Additional works or services

- 91. You can use the non-competitive negotiated procedure for additional works or services not included in the project initially or in the contract once placed but which have, through unforeseen circumstances, become necessary. Under this ground you may award the contract for additional works or services to the original supplier(s) as long as:
 - a. the additional works or services:
 - (1) cannot be technically or economically separated from the original contract without great inconvenience to the procurer; or
 - (2) although separable from the performance of the original contract, are strictly necessary for its completion; and
 - b. the aggregate estimated value of contracts awarded for the additional works or services does not exceed 50% of the value of the original contract.

Purchase or hire of goods on commodity market

- 92. Where goods are quoted for and purchased or hired on a commodity market, procurers can purchase or hire direct from that market without competition.

Closing down sale or bankrupt stock

- 93. A procurer need not consider competition where it can benefit from particularly advantageous terms in a closing down sale or where a supplier is insolvent.

Air and maritime transport services

- 94. Use of the non-competitive negotiated procedure applies where a procurer has a need to charter aircraft or vessels for the armed forces or security forces for the transport of personnel deployed or about to deploy abroad. It applies only if you cannot comply with the time limits for the restricted or competitive negotiated procedures even with the accelerated time limits.

95. The use of any other procurement procedure is likely to be incompatible with the way the charter market operates. Providers will guarantee their tenders for very short periods in this market and therefore you cannot comply with the time limits set out in any of the normal procedures.

Re-advertising requirements due to changes during the award procedure

96. Running a contract award procedure under the DSPCR can be a lengthy process especially in the context of a complex procurement. During that time any number of internal or external factors may result in the need or desire for you to amend the procedure or content of any of the contract documents. However, this brings with it the risk of legal challenge.
97. A procurer who changes any procedural aspects of the award procedure or any of the contract documents during the award procedure needs to consider whether that will have any effect on the pool of bidders or potential bidders. This may result in discrimination against one or more bidders or potential bidders.
98. Where any change could result in either:
- a. a change at any stage of the process in the identity of the pool of bidders or potential bidders; or
 - b. potentially affecting the way in which a bidder or potential bidder may have responded at a particular stage in the process,

the procurer should revert to the stage in the contract award procedure where the risk of that discrimination or effect is eliminated.

99. Changes in the fundamental aspects of the procurer's requirements (in particular in quantity, scope or duration), in selection or evaluation criteria or in the mechanics of the procurement process may result in the procurer having to go back many stages in the procurement, ultimately resulting in the re-advertisement of the requirement. Any change, which could affect the potential pool of suppliers who expressed an interest to the original advertisement, will result in a need to re-advertise.
100. If you decide to abandon or re-start a contract award procedure for which you have already published a contract notice you must inform any tenderers or candidates as soon as possible. You should include the reasons for your decision, and put these in writing if requested by the supplier.

Amending contracts

101. Unless you can justify it under Regulation 16, amending an existing contract can require the award of a new contract. This may occur when the amendments are materially different in character from the original contract.

102. According to the Court of Justice of the European Union (EU) judgment in the [Pressetext](#) case, an amendment is materially different in character from the original contract if any of the following apply:
- a. the amendment introduces conditions which, had they been part of the initial award procedure, would have allowed you to admit tenderers other than those initially admitted or would have allowed you to accept a tender other than the one initially accepted;
 - b. the amendment extends the scope of the contract considerably to encompass services not initially covered; and
 - c. the amendment changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.
103. In order to avoid future problems, procurers should consider including more detailed variation provisions such as options in the original contract, for example, to cover potential additional services, as long as those services were included in the original OJEU contract notice.

What are the key points to remember?

1. Procurers have a free choice between using the restricted procedure and the negotiated procedure with prior publication of a contract notice. The competitive dialogue procedure is available if these two procedures are inadequate for the complexity of the requirement.
2. Each of these three competitive procedures requires the procurer to advertise a call for competition for the requirement and announce the contract award in the OJEU.
3. The negotiated procedure without prior publication of a contract notice is only available for non-competitive procurement under strictly defined circumstances. This procedure requires the procurer to place a contract award notice in the OJEU.
4. The details of these procedures are very similar to the corresponding procedures in the PCR 2006. You should note however, that, unlike the PCR, there is no open procedure in the DSPCR.
5. You must take great care during the procurement procedure to ensure you give the correct information and you follow the correct procedures. Otherwise, an affected party may challenge the decision to award the contract.
6. When required to advertise in the OJEU, procurements under the DSPCR must follow the time limits summarised at Annex A.

Annex A

Procurement Procedures Time Limits

Rules for time limits

1. You must conduct each procurement procedure in accordance with certain rules relating to time limits that apply across all Member States to give all prospective suppliers sufficient time and opportunity to bid before the closing date.
2. The DSPCR lays down the minimum periods allowed at the different stages of the procedure. Procurers may not set shorter deadlines but are free to allow longer periods and must do so in some instances.
3. The time limits for requests from suppliers to participate in the procedure and return their tenders must take into account the complexity of the contract and the time needed to prepare tenders. This must include sufficient time for suppliers to examine tender documents and forms, which may be unfamiliar to them, to undertake site visits, and to digest late information from procurers needed to produce tenders.
4. The Official Publications Office has to publish contract notices within 12 days from the date of dispatch by post or fax of the contract notice, or within 5 days from dispatch electronically of the contract notice, or within 5 days when you use the accelerated procedure.
5. You should receive a copy of the advertisement from the Publications Office to confirm its publication. If you do not receive this within 14 days, or 7 days in the case of the accelerated procedures, you should take hastening action.

Requests to participate

6. Under the restricted, competitive negotiated and competitive dialogue procedures, the minimum time limits for receipt of requests to participate are as follows:
 - a. 37 days from the date of dispatch of the contract notice for publication in the OJEU (see Regulations 17(3), 18(5) or 19(7));
 - b. if the contract notice is sent electronically, you may reduce the period by 7 days to 30 days (see Regulations 17(5), 18(7) or 19(9));
7. Under the accelerated restricted and accelerated competitive negotiated procedures the time limits are:
 - a. 15 days from the date of dispatch of the contract notice for publication in the OJEU (see Regulations 17(6)(a) or 18(8)(a)); or
 - b. if the contract notice is sent electronically, you may reduce the period by 5 days to 10 days. (see Regulations 17(6)(b) or 18(8)(b));

Receipt of tenders

8. There is no minimum time limit for receipt of tenders under the competitive negotiated or competitive dialogue procedures. However, there is a minimum time limit for receipt of tenders under the restricted procedure as follows:
 - a. 40 days from the date of dispatch of the ITT (see Regulations 17(18));
 - b. where the procurer has published a Prior Information Notice, in accordance with Regulation 14 and Regulation 17(20), you may reduce the period to 36 days in general (but not less than 22 days) from the date of dispatch of the ITT;
 - c. where the contract documents are available online, you may reduce the period by 5 days (see Regulation 17(21)).
9. In the case of the accelerated restricted procedure, the minimum time limit for receipt of tenders is 10 days from the date of dispatch of the ITT (see Regulation 17(19)).

Dispatch of additional information

10. The maximum time limit for dispatch of additional information relating to contract documents under the restricted procedure is 4 days before the final date fixed for receipt of tenders (see Regulations 17(22)).
11. Under the negotiated and competitive dialogue procedures the maximum time limit for the dispatch of additional information relating to the contract documents is 6 days before the final date fixed for receipt of tenders, provided such information was requested in good time (see Regulations 18(20)(a) or 19(21)).
12. For the accelerated restricted and competitive negotiated procedures, the maximum time limit for the dispatch of additional information to the contract documents is 4 days before the final date fixed for receipt of tenders, provided such information was requested in good time (see Regulations 17(22) or 18(20)(b)).

Procurement award decisions and de-briefs

13. Timescales for all procurement procedures are:
 - a. notification of decisions with regard to supplier and contract award – as soon as possible (see Regulation 33(1));
 - b. standstill period of a minimum of 10 days after announcement of the award decision (see Regulation 34(3));
 - c. if a supplier has not received an Award Decision Notice, debriefing on request – as soon as possible but within 15 days of request (see Regulation 33(7)).

Contract award notice

14. For all procurement procedures, you must publish a contract award notice in the OJEU not later than 48 days after the award of the contract or conclusion of the framework agreement (see Regulation 32(1)).

Calculation of time limits

15. Under the rules for calculating closing dates for the receipt of tenders and requests to participate, you must express time periods as a certain number of days from a particular event and:
 - a. run from the day following the day on which the event takes place; or
 - b. begin at 00h00 on the first day, as defined in a., and end at 24h00 on the last day of the period end, or if the last day of the period falls on a public holiday or a Saturday or Sunday, and you do not express the period in hours, at 24h00 on the following working day.
16. Periods include public holidays and weekends unless you expressly exclude these or you express the periods as a certain number of working days.
17. Appendix 1 to Annex A summarises the standard procurement time limits in the DSPCR.

Appendix 1 to Annex A

Summary of standard procurement time limits in the DSPCR

Procurement Procedure	Requests to participate after Contract Notice	Tendering	Contract Award
Restricted	37 days from dispatch of notice to OJEU, less: 7 days if sent electronically	At least 40 days for return of tenders after ITT, less 5 days if contract documents online Additional information - not less than 4 days before deadline	Award decision notice – as soon as possible, starting standstill period of 10 days Contract award notice to OJEU not later than 48 days after contract award
Competitive Negotiated	37 days from dispatch of notice to OJEU, less: 7 days if sent electronically	Tender return period not specified in DSPCR Additional information - not less than 6 days before deadline	Award decision notice – as soon as possible, starting standstill period of 10 days Contract award notice to OJEU not later than 48 days after contract award
Competitive Dialogue	37 days from dispatch of notice to OJEU, less: 7 days if sent electronically	Tender return period not specified in DSPCR Additional information - not less than 6 days before deadline	Award decision notice – as soon as possible, starting standstill period of 10 days Contract award notice to OJEU not later than 48 days after contract award
Non-Competitive Negotiated	Not applicable	Tender return period not specified in DSPCR	Voluntary Ex-Ante Transparency Notice - as soon as possible, starting standstill period of 10 days Contract award notice to OJEU not later than 48 days after contract award

Annex B

The Competitive Dialogue Procedure

1. The competitive dialogue procedure is set out at Regulation 19 (the competitive dialogue procedure). It is for use only in the award of “particularly complex contracts” or projects where it is clear that the use of the restricted procedure or negotiated procedure with prior publication will be inappropriate for the award of the contract.

What qualifies as a complex project?

2. To assist procurers to determine what qualifies as a complex project, the Cabinet Office and Her Majesty’s Treasury (HMT) have developed [competitive dialogue guidance](#). Essentially, a contract is considered complex where a procurer is unable to objectively:
 - a. define the best technical means capable of satisfying its needs or objectives. E.g. for complex Information Technology projects, a variety of solutions may be available but it might not be possible to define the best technical solution at the outset; or
 - b. specify the legal or financial make-up of a project. E.g. for Public Private Partnership / Private Finance Initiative (PPP / PFI) contracts where you cannot define the financial or legal make-up in advance because issues such as risk allocation, how the project will be undertaken and financed and who will be responsible for which services, will be the subject of discussion with potential providers; or
 - c. both a. and b. above.
3. Procurers should seek to specify the technical, legal or financial means of meeting its objectives before starting any procurement procedure. Also, the procurer must attempt to produce a technical requirement, which is as mature as possible. If you have matured the requirement as far as is reasonably possible and the restricted or competitive negotiated procedures will not enable the award of the contract then you may use the competitive dialogue procedure.
4. You can also use the competitive dialogue procedure on discrete aspects of the whole requirement or where you expect a straightforward dialogue phase with no down-selection of solutions before reaching the closing dialogue. In which case, it may be that you can invite a small number of candidates to participate in the process.
5. You must record the reasons for using the competitive dialogue procedure along with all the key decisions, and keep them in a registered file in the event of a challenge from the Commission or any affected person.

Publishing the contract notice

6. As stated above, at the pre-dialogue phase, the procurer should seek to specify and mature its requirement as far as possible and design the process for dialogue before publishing the contract notice.
7. The first formal step in the procedure is the publication of a [contract notice](#). It must specify among other things:
 - a. the requirement (which you can further define in the ITPD);
 - b. the minimum number of candidates the procurer intends to invite to participate in the dialogue;
 - c. the objective and non-discriminatory criteria which the procurer intends to use to limit the number to be invited to participate in the dialogue;
 - d. if there is an intention for the competitive dialogue procedure to take place in successive stages (best practice is to reserve the right to do so even if development of the requirement may result in this being unnecessary);
 - e. if you will permit variant bids; and
 - f. the procedural time limits for receipt of requests to participate which should be no less than 37 days although you can reduce this in certain circumstances (see Annex A). Any time limit that you set should take into account of all the circumstances and in particular the complexity of the contract.
8. You must specify the award criteria in either the contract notice or the ITPD or both.

Selecting candidates for dialogue

9. Like the restricted and negotiated with prior publication of a contract notice procedures, the DSPCR allows a pre-qualification process where you short list bidders, in this case, to receive an ITPD. You can find more guidance on Supplier Selection in Competitive Procurement in Chapter 14 – Supplier Selection.
10. To ensure genuine competition, the DSPCR specifies that there should be an intention to issue an ITPD to no less than three candidates provided they meet the pre-qualification criteria. What is an appropriate number will depend on the circumstances such as any or all of the following:
 - a. the nature and complexity of the project;
 - b. the number of bidders likely to be interested in participating; and
 - c. the length and scale of the dialogue phase which the acquisition team anticipates before identifying its preferred solution.
11. For relatively simple requirements that require a straightforward dialogue phase with no expected down-selection of solutions before the closing dialogue, it may be that you can invite a small number of candidates to participate in the process.

12. For more complex high value requirements where bidders are likely to form consortia, procurers should be aware of the potential for the structure of consortia themselves to change as the process unfolds and candidates decide to withdraw. This can cause problems; for example, when consortia change it is by no means certain that the new consortium would pre-qualify. You should bear the potential for this to occur in mind when selecting the number to participate in the project.

Dialogue phase

13. Unlike the restricted and the competitive negotiated procedure, the competitive dialogue procedure allows a formal, structured dialogue phase with selected participants. It usually involves a combination of discussion and tendering at meetings with individual candidates, which ends when the acquisition team can identify a solution or solutions capable of meeting the requirement. The dialogue commences after the issue of an ITPD to the selected participants.
14. In advance of issuing the ITPD, procurers must consider the resource requirements for producing the ITPD (and any subsequent Invitation to Continue Dialogue (ITCD)) and for conducting the dialogue phase, along with how and when you will take forward and resolve issues arising out of the dialogue.
15. The ITPD should include:
 - a. the acquisition team contact details;
 - b. how the dialogue will be run – the agenda, time, date and venue for each dialogue session, which each project will need to customise;
 - c. the draft project programme starting from dialogue to project close, which should be flexible enough to take account of unforeseen circumstances.
16. Regulation 19(18) calls for the ITPD to be accompanied by the contract documents. This may be difficult to comply with at this stage of the process as one of the justifications for using competitive dialogue is that the procurer is unable to specify the legal, financial or technical means of achieving its objectives. Procurers should therefore issue draft contract documents with as much detail as is available at the time.
17. For MOD procurers involved in Private Finance Initiative (PFI) projects using the competitive dialogue process, you should use the standard project agreement (PA v.1), which is based on the HMT's [standard project agreement](#) for use on PFI projects.

Contract award criteria

18. According to Regulation 19(29), you must award the contract based on the most economically advantageous tender. You should judge this against all the evaluation criteria that you must specify in the ITPD (if not published in the contract notice) in accordance with Regulation 19(20). You must give the criteria relative weightings, (giving a range with a minimum and maximum weighting where appropriate), or, where

this is not possible, the criteria must be set it out in descending order of importance.

19. This is an inherent challenge in using the competitive dialogue procedure that calls for early disclosure of evaluation criteria while the competitive dialogue process itself permits procurers to hold dialogue until they identify the solution(s) that meet their requirement. Recent case law has indicated a need for total transparency in respect of evaluation criteria.

How many rounds of dialogue do you need?

20. One of the benefits of competitive dialogue is that the DSPCR is not very prescriptive and so, to an extent, you can tailor the dialogue phase to suit the needs of the individual project.
21. Regulation 19(24) says that the procurer “may provide for the competitive dialogue procedure to take place in successive stages in order to reduce the number of solutions by applying the award criteria”. There is therefore no obligation to have numerous rounds of dialogue.
22. Therefore, it is important that procurers identify in advance those issues that they feel deserve detailed dialogue with candidates. Also, any additional issues that bidders identify are unlikely to change the process embarked on by the acquisition team. In certain circumstances, a single but detailed dialogue phase may enable the acquisition team to resolve all issues, close the dialogue and issue the final ITT.
23. Where you need more than one round of dialogue, particularly for very complex projects, procurers should consider issuing an ITCD with the aim of producing “initial bids” that specify the candidates’ proposals in writing, which you can further clarify during a subsequent dialogue phase.
24. Numerous rounds of dialogue are expensive and resource intensive for both procurers and candidates. Rather than plan for numerous rounds of dialogue, more focussed and detailed dialogue may ultimately achieve greater maturity of solutions over a shorter period.

Equality of treatment and confidentiality obligations during the dialogue process

25. Regulation 19(23) imposes specific obligations on procurers to ensure equality of treatment among all participants and not to reveal confidential information which you may receive during the dialogue process, particularly confidentiality of tenderer’s technical solutions, to avoid any unauthorised technical transfer between tenderers.
26. You need to strike a balance between treating candidates equally without revealing aspects of their solutions. One approach may be to require participants to specify, both in written submissions and during dialogue, which aspects of their solutions they consider confidential. It is not acceptable to say that all submissions and the entire dialogue process are confidential. Although the responsibility is on bidders to determine

- what is confidential, the acquisition team must exercise judgement in determining whether to accept or challenge such an assertion.
27. In general, it is reasonable to consider information provided by the candidate as confidential where it is unique or adds value to the candidate's tender. Trivial information cannot be confidential.
 28. Procurers should only release information received from other candidates where it is non-confidential and it is necessary to maintain equality of information between all the bidders, for example where the information relates to a clarification of the procurer's requirements.
 29. One way of achieving this is for procurers to produce notes of dialogue sessions covering generic details but excluding confidential information. The individual bidders should then approve these notes in writing before the notes are issued to the bidders. This ensures that, you can share issues raised by candidates holding their dialogue sessions later on in the process with those candidates who went first, when all the points would not necessarily have occurred to the procurer. Procurers may also retain a more complete, confidential record of the dialogue for internal purposes only.
 30. Where foreign contractors are involved in the competitive dialogue process, you will need to take care to ensure that you properly observe any restrictions imposed on the disclosure of information by export controls.

Down-selection of solutions

31. Regulation 19(24) permits the down-selection of solutions, not candidates, but only through applying the award criteria. You must stipulate the intention to carry out a down-selection process in the contract notice.
32. The process of down-selection during the dialogue phase in order to take forward the best solutions likely to meet the requirement comes with a number of practical and legal risks.
33. Procurers should not start procurements under competitive dialogue unless and until they have defined the requirement as clearly as possible. However, there is a legal risk that during the dialogue the bidders' solutions, and the requirement, may mature to the point that the acquisition team needs to develop, and even possibly change, its requirement.
34. You may mature the award criteria, as the requirement matures in the dialogue phase. There is a risk to the project where this leads to changes to the award criteria. Candidates are likely to object if they form their solutions on one set of criteria, which subsequently change, as this could have resulted in them taking a different approach. As mitigation, and depending on the complexity of the project, you should initially set award criteria at a high level. This allows for further maturity of the criteria and, as the solutions develop, you to identify lower level criteria. In any event, you must continue to base the award criteria on the most economically advantageous tender.

35. Procurers should be very wary of permitting candidates to submit more than one solution. Evaluation and selection of multiple solutions also brings practical and legal risks associated with a large number of solutions, for example, the increased administrative time involved in handling the dialogue process associated with numerous solutions.

De-briefing candidates at the down-selection phase

36. There is no requirement to de-brief bidders other than on contract award. However, procurers may receive requests or may choose to de-brief bidders at the down-selection phase.
37. If you undertake a de-brief at this stage, you should exercise care and maintain commercial confidentiality of other solutions especially where a bidder is no longer a part of the competition. If you exclude a solution from a bidder who has other solution(s) remaining in the process, you should not give information that will enable them to improve their remaining solution(s), as this would be unfair and discriminatory. You should consider delaying de-briefing of a bidder until you have down-selected all bidders' solutions.

Post dialogue and closure

38. The dialogue formally closes when you identify one or more fully matured solution(s) as meeting the requirement. You then issue a final tender document, the Invitation to Submit Final Bids (ITSFB), to the remaining bidder(s) enabling preparation of a final bid containing everything needed to define the contract requirements based on the solution(s) that they presented during dialogue, i.e. the technical proposal and commercial agreements from the last stage of the dialogue phase.
39. On receipt of the final bids, you cannot conduct further dialogue – the DSPCR allows procurers to clarify, specify and fine-tune the final tenders. You can find guidance on this in Chapter 15 – Conducting the Tendering Exercise. The DSPCR does not define what this precisely means; however, changes that could lead to a different outcome of the competition or result in discrimination against one or more bidders, will almost certainly fall foul of the DSPCR.
40. To mitigate against the risk of non-compliant tenderers arising in the final bid, you could ask bidders to submit a reasonably mature bid before the formal closing of the dialogue, but only if this is reasonable and proportionate. Bid time and costs will not be significantly increased and the assessment period after closure will be shortened as bidders can just confirm their previous bid subject to any changes which may have been discussed in the meantime.
41. Procurers will proceed to the contract award stage by application of the advertised and matured award criteria. You are required to publish a [contract award notice](#) in OJEU. You can find guidance in Chapter 15 – Conducting the Tendering Exercise guidance and Chapter 16 – Standstill Period and Contract Award and Voluntary Transparency.