

# **Defence and Security Public Contracts Regulations 2011**

## **Chapter 15 - Conducting the Tendering Exercise**

### **Purpose**

1. This guidance explains what procurers need to consider when inviting suppliers to tender, negotiate or participate in dialogue and when assessing tenders or awarding contracts under the Defence and Security Public Contracts Regulations (DSPCR) 2011.
2. Specifically, the guidance explains contract award criteria, the issuing of the Invitation to Tender (ITT), Invitation to Negotiate (ITN) or Invitation to Participate in Dialogue (ITPD) with other contract documents, how to assess tenders against the contract award criteria, the conduct of post-tender negotiations, and legally compliant methods to choose the winning tenderer.

### **What is conducting the tendering exercise?**

3. By conducting the tendering exercise, we mean the process where:
  - a. procurers prepare the contract documents, invite the selected suppliers to tender, negotiate or participate in dialogue (depending on the chosen procurement procedure);
  - b. suppliers make or submit a bid to undertake work or supply goods or perform services at a stated price; and
  - c. the procurer evaluates the tenders received against the contract award criteria to assess which supplier to award the contract to.
4. It is a common feature of the procurement procedures in the DSPCR. Mistakes or omissions by the procurer during tendering may result in a legal challenge from aggrieved tenderers or suppliers.

### **What is the legal framework?**

5. The DSPCR has the following Regulations on conducting the tendering exercise:
  - a. Regulation 21 (Electronic auctions) provides the rules for use of electronic auctions as part of the contract award procedure;
  - b. Regulation 31(1) (Criteria for the award of a contract) sets out the basis on which the award of a contract must be made:

- (i) “most economically advantageous tender”; or
- (ii) “lowest price”.

If the award is to be made on the basis of most economically advantageous tender the procurer must use criteria linked to the subject of the contract to work this out;

- c. Regulation 31 also deals with abnormally low tenders;
- d. Regulation 32 (Contract award notice) deals with the requirement to publish a contract award notice;
- e. Regulation 33 (Information about contract award procedures) details the information you must give at the contract award stage and the obligation on procurers to keep a record of the contract award;
- f. Regulation 49 (Means of communication) sets out the rules about the means of communication during the tender and contract award stage.

## **Tender Documents**

### **Preparing the tender documents**

- 6. The ITT, ITN or ITPD forms part of the contract documents you issue to suppliers you select to participate in the procurement following a pre-qualification exercise.
- 7. You must follow the contract award criteria and scoring method you chose and include in the contract documents so that you award the contract to the supplier that best meets the criteria.
- 8. Procurers will have their own specific guidance for preparing the contract documents along with their own set of ITT, ITN or ITPD documents and instructions for use. Ministry of Defence (MOD) procurers can find further information about preparing the ITT or ITN or ITPD in the Tender Preparation topic in the MOD Commercial Toolkit.

## **Contract award criteria**

### **Award criteria**

- 9. Regulation 31 of the DSPCR sets out the basis on which you may award contracts and the criterion that you may apply. The rules are very similar to Regulation 30 of the Public Contracts Regulations (PCR) 2006.
- 10. When setting the award criterion you must ensure that the Treaty for the Functioning of the European Union ([TFEU](#)) obligations of equal treatment, non-discrimination and transparency apply so as not to prejudice fair competition.
- 11. Regulation 31 (1) allows procurers to award a contract on the basis of the tenderer's offer which is either:

- a. the “most economically advantageous” from the point of view of the procurer; or
- b. offers the “lowest price”.

12. “Lowest price” means after you check the tenders you receive to ensure they are commercially compliant (generally speaking they meet the minimum specifications and accept all the contract conditions), you only take into consideration the prices offered by tenderers and award the contract to the tenderer who offers the lowest price.

13. “Most economically advantageous” tender means you assess the tenders you receive using a variety of objective and non-discriminatory criteria linked to the subject matter of the contract to identify the tender which is best value for money. You cannot use the criteria for any purpose other than identifying the most economically advantageous tender from the point of view of the procurer. It allows you to assess a number of factors including the technical aspects and price of a tender and to rank the tenders in the competition.

14. You must state the basis on which you will assess the tender and award the contract, i.e. “most economically advantageous” tender or “lowest price”, in the contract notice and contract documents.

### **Most economically advantageous tender**

15. Regulation 31 (2) gives examples of the detailed award criteria if you select the most economically advantageous tender as the overall contract award criterion. You must publish detailed objectively quantifiable award criteria linked to the subject matter of the contract together with their weighting (or ranking where weighting is not possible for demonstrable reasons) and the method by which you will evaluate them in the contract documents. They may include but are not limited to:

- a. quality;
- b. price;
- c. technical merit;
- d. functional characteristics;
- e. environmental characteristics;
- f. running costs;
- g. life cycle costs;
- h. cost effectiveness;
- i. after-sales service and technical assistance;
- j. delivery date and delivery period or period of completion;
- k. security of supply; and
- l. interoperability and operational characteristics.

16. The criteria of “life cycle costs”, “security of supply” and “interoperability and operational characteristics” are new and unique to the DSPCR although, where relevant, you may include them in a procurement under the PCR 2006 as well.

17. The criterion “aesthetic characteristics” which was listed in the PCR 2006 is not included in the DSPCR.

### **Life cycle costs criterion**

18. Regulation 3 of the DSPCR defines “Life cycle” as meaning “all the possible successive stages of a product, including research and development, industrial development, production, repair, modernisation, modification, maintenance, logistics, training, testing, withdrawal and disposal.”

19. This criterion may be particularly relevant where the stage of the life cycle is not one covered by the contract but may have future implications and costs, e.g. withdrawal or disposal may have a significant influence as to which supplier you award the contract to. This would be the case where, the estimated future costs associated with stages in the life cycle are not part of the contract requirements, and fall outside the definition of running costs. This may include withdrawal and disposal costs.

### **Security of supply criterion**

20. “Security of supply” criterion considerations could include technical capacity or ability to perform the contract, particularly in times of crisis, and during through-life maintenance, modernisation and adaption of the goods and services the contract covers.

21. You can find further details about establishing “security of supply” selection criteria in Chapter 12 – Security of Supply guidance.

### **Interoperability and operational characteristics criterion**

22. “Interoperability and operational characteristics” award criteria must be clearly related to the relevant technical specification. With regard to operational characteristics, this relates to the operational use of the product. It must relate to the effectiveness of a requirement’s functional characteristics in a given scenario. From a MOD perspective, this may be how a piece of equipment will perform in operational theatre, and might involve using, if appropriate, MOD Modelling and the Combined Operational Effectiveness Investment Appraisal.

### **Choosing the award criteria**

23. The Government’s procurement policy set out in [Managing Public Money](#) (MPM) is to buy the goods, works and services that it needs under a fair and open procurement process, guarding against corruption and seeking to secure value for public funds with due regard to propriety and regularity.

24. Value for money (VFM) is a key concept running through MPM. It means securing the best mix of effectiveness, efficiency and economy in the use of resources and impact on society as a whole over the period of use and disposal of the goods, works or services acquired. Based on the principles set out in MPM, the primary objective of procurers is to choose the compliant tender offering the best VFM solution.

25. The decision to use “most economically advantageous” tender or “lowest price” to secure VFM is dependent on the complexity and value of the requirement except that where you use the competitive dialogue procedure procurers must award on the basis of “most economically advantageous” tender only.

26. “Most economically advantageous” tender is a permitted award criterion under any procurement procedure. It is the standard award criteria for central government, as it is most suited to complex or high value contracts. For requirements valued below £5M, we advise procurers to limit the award criteria to those criteria you consider essential to the output from the contract. Keeping it simple reduces the opportunity for mistakes that could lead to a legal challenge.

27. “Lowest price” is likely to be most appropriate if procurers judge that the cost of the requirement is the only variable in the contract award decision. This may apply if the requirement is relatively simple, well-defined or low value. In all cases, you will need to describe comprehensively the requirement in the specification. If “lowest price” is the criterion for awarding the contract, procurers must still check that the tenders are commercially compliant and satisfy the requirement.

28. Using “lowest price” as the contract award criterion does not mean that you cannot take into account environmental or social factors if they are relevant and proportionate to the requirement. They will form part of the technical evaluation that establishes whether a tender will satisfy the requirement, for example, if the tender requires minimum standards for environmental and social impact standards to be met that are set out in the specification.

29. Whether you choose “most economically advantageous” or “lowest price” as contract award criteria to achieve best VFM the criteria must:

- a. be precise, non-discriminatory and not prejudicial to fair competition; and
- b. not be modified after they and the process for evaluating them have been specified and issued in the contract documents.

30. In the MOD, formulation of the award criteria should be an acquisition team activity. You can find more details about this in the Tender Preparation topic in MOD’s Commercial Toolkit.

## **Disclosing award criteria**

31. You should list the award criteria in the contract documents, i.e. in the ITT, ITN, ITPD or, if earlier, in the contract notice along with, among other things, the weightings given to each of the criteria, the evaluation process you will use, and the extent to which they are mandatory, desirable or optional parts of the requirements.

It is good practice to indicate in the contract documents those mandatory procedural requirements and formalities and those not mandatory.

32. Once you chose and publish the award criteria, you cannot change them unless there are exceptional circumstances and then only to the extent that you adhere to the procurer's obligations of equality of treatment, non-discrimination and transparency. Depending on the circumstances, this may mean notifying all bidders of the change and repeating certain steps in the process. In these circumstances, procurers will have to go back to that stage in the procedure where no supplier can argue it has been discriminated against.

33. You can express the weightings as a range where you consider it appropriate in view of the subject matter of the contract. If it is not possible to apply a weighting for demonstrable reasons, the procurer will indicate the criteria in descending order of importance in the contract documents.

34. You must disclose the methods you will use to assess tenders in conjunction with the evaluation criteria in order to comply with your obligation to act in a transparent way. If you intend to use specific tender assessment tools, you must publish this in the contract documents. MOD procurers can find further information about tender assessment tools in the Tender Assessment topic in MOD Commercial Toolkit.

## **Variations**

35. Regulation 13 (Variants) covers the rules on variations. If the award criterion is the most economically advantageous tender, you may authorise tenderers to submit variants.

36. You should indicate in the contract documents whether you will consider variant offers. If variants are acceptable then you must state the minimum requirements for tenders to meet. You should take into consideration a variant tender compliant with the minimum requirements even when it would lead to a service contract rather than a supply contract or vice versa.

## **Submission of tenders**

### **Information to tenderers**

37. The ITT or ITN in the contract documents must clearly set out how to submit a tender – you must prescribe the method, language, time and place (this also applies to the "invitation to submit a final tender" in the competitive dialogue procedure.)

38. The contract documents must contain all the provisions and information that tenderers need to submit their tenders, for example, the procedures to follow, contract award criteria, evaluation method, the documents they need to provide, contract terms and conditions to comply with and circumstances in which their tenders may be declared non-compliant.

39. For MOD procurers, the information required is clearly set out in the MOD's DEFFORM 47 (Invitation to Tender) which states that you must not consider tenders submitted in a different manner.

### **Tender Deadlines**

40. While the procedures provide deadlines for receipt of requests to participate and the receipt of tenders, the DPCR does not specify a minimum time period between receipt of requests to participate in the procurement and the issue of the contract documents to the tenderers (see Chapter 8 – Procurement Procedures). However, you must avoid any unnecessary delays to issuing of the contract documents, as delays will add to the costs for the tenderers and procurers.

41. The minimum time limits for the receipt of tenders in the restricted procedure are:

- a. 40 days from the date of dispatch of the ITT;
- b. where the procurer publishes a Prior Information Notice (PIN) on the Official Journal of the European Union (OJEU), you may reduce the period to 36 days in general (but not less than 22 days) from the date of dispatch of the ITT (this reduction is only available when there is a minimum of 52 days and a maximum of 12 months between the publication of the PIN and the contract notice on the OJEU);
- c. where contract documents are available online, you may reduce the 40 and 36 day period by 5 days;
- d. you must extend the above time limits in the circumstances outlined in paragraph 43 below.

42. In the case of the accelerated restricted procedure, the minimum deadline for the receipt of tenders is 10 days from the date of dispatch of the ITT subject to paragraph 43 below.

43. For all procurement procedures, you must calculate the deadlines for submission by counting complete calendar days and the deadline itself must fall on a working day in the country of the procurer. If the deadline does not fall on a working day, you must extend the period to the end of the next working day.

44. The period for tender return must also be sufficient to allow the tenderers to prepare their best bid and so permit effective competitive tendering. You must take into account all the circumstances and in particular the nature and complexity of the requirement when deciding on the deadline. Too short a period may cause tenderers to submit incomplete or ill-prepared tenders.

### **Tender Boards**

45. Procurers will have their own procedures on conducting tender boards. MOD procurers should refer to the Tender Boards topic in the MOD Commercial Toolkit for further information on tender board arrangements, including maintaining



confidentiality and dealing with late, incomplete or amended tenders. Tenderers do not need to submit single tenders, when there is no competition, via the Tender Board but direct to the MOD acquisition team.

## Electronic auctions

46. Regulation 21 sets out the arrangements for the holding of an electronic auction as part of the contract award procedure.

47. An “electronic auction” is described in the DSPCR as a repetitive on-line process for the electronic presentation of prices to be revised downwards where you will award the contract based on lowest price or of new and improved values of quantifiable elements of tenders, including price where you will award the contract on the basis of most economically advantageous tender.

48. An electronic auction will take place after the initial evaluation of tenders run in accordance with all the principles and requirements referred to above. This enables you subsequently to rank tenders using automatic evaluation methods.

49. The use of electronic auctions under the DSPCR is the same in all respects for the procurement procedures available under the rules of Regulation 21 of the PCR 2006 except that under DSPCR it is now available in all circumstances under the negotiated procedure with prior publication of a contract notice.

50. Except for certain service or works contracts that have as their subject matter “intellectual performance” e.g. the design of works, you may hold an electronic auction:

- a. under the restricted procedure;
- b. under the negotiated procedure with prior publication of a contract notice; and
- c. when running a mini-competition among the suppliers on a framework agreement

51. Procurers may only hold an electronic auction when they can establish the contract specification with precision.

52. You must specify an intention to use an electronic auction in the contract notice. The contract documents must contain certain technical and procedural aspects of how the electronic auction will take place; see Regulation 21(7).

53. Following the initial evaluation of tenders using the published contract award criteria, procurers simultaneously issue an invitation to participate in the electronic auction to all tenderers who submitted admissible bids. The invitation will include details of how to participate in the auction and how you will conduct the process; see Regulation 21(10).

54. During each phase of the auction procurers must communicate to the tenderers sufficient information to allow them to establish their relative ranking at any time.



55. Procurers may close the auction in a number of different ways, e.g. by stating the closure date and time in the invitation to participate, at a specified time after receiving the last bid or on completion of the planned number of phases.

56. There is a requirement set out in Regulation 33(13) for procurers to document the progress of contract award procedures they conduct by electronic means. This applies equally to e-auctions as it does to other types of e-procurement methods.

57. Procurers can find further guidance on electronic auctions in the [OGC Guidance on eAuctions](#).

## **Means of communication**

58. Regulation 49 sets out the rules on the means of communication governing a number of aspects under the DSPCR.

59. The communication rules relating to contract documents are virtually identical to those in Regulation 44 of the PCR 2006, where procurers must ensure communication methods, e.g. post, facsimile, e-mail, telephone, etc., are clearly set out in the contract documents.

60. The means of communication you specify must not restrict the access of tenderers to the tender process and the equipment you use for electronic communications must be non-discriminatory, generally available and interoperable with information and communication technology products in general.

61. If you require tenderers to transmit a tender electronically, all relevant information about the equipment and software you will use must be available to tenderers. The equipment you use must comply with the requirements of Regulation 49(6). For example, you must guarantee the integrity of the data communicated, and its safe storage, along with the confidentiality of tenders and requests to be selected to tender or to negotiate the contract, and only open tender responses after expiry of the deadline for submission.

## **Bidders conference**

62. You can use a Bidders Conference after sending out the contract documents to give suppliers the opportunity to ask questions about the tender and award process for complex or new requirements where you can clarify areas of doubt.

63. MOD procurers should refer to the Tender Preparation topic in the MOD Commercial Toolkit for further information to ensure the use of a Bidders Conference complies with the principles of transparency, non-discrimination and equality of treatment.

## **ITT queries**

64. Procurers will have their own procedures for responding to ITT queries from suppliers. MOD procurers can find further information in the Tender Preparation topic in the MOD Commercial Toolkit.

## **Tender assessment**

65. You must evaluate tenders in accordance with the TFEU obligations of transparency, equal opportunity and non-discrimination. The process must be confidential. You must evaluate and score tenders in a consistent manner. You must record each stage of the evaluation process. Procurers will have their own specific procedures for carrying out the assessment of tenders. In the MOD, a Tender Assessment comprising technical, financial, commercial and other relevant subject matter experts will usually assess tenders .

66. The technical and financial parts of the tender are assessed separately, and solely on the basis of the award criteria published in the contract documents. You will then combine the individual assessments to produce an overall assessment on which you base the contract award decision.

67. You must consider all tenders, reach decisions and place contracts in accordance with the tender validity period in the contract documents. Subject to your specific obligations under the DSPCR, you must consider the need to:

- a. safeguard the public purse and secure best VFM;
- b. preserve strict equity between all tenderers; and
- c. ensure commercial confidentiality.

68. After receipt of tenders, procurers can request further information from tenderers to clarify or supplement the content of tenders provided this does not distort the competition.

69. Throughout the tender assessment process, the award criteria must remain unchanged and you must adhere to the principles of transparency, equal treatment and non-discrimination.

70. Where any competition includes an in-house bid you must treat the in-house tenderer the same as all other tenderers and assess the bid in accordance with the published criteria.

## **Assessing Technical Standards**

71. Where you define the technical specifications in terms of technical standards, you cannot reject a tender solely on the basis that the tenderer's solution does not comply with those standards if the tenderer can prove by 'appropriate means' to your satisfaction that the solution satisfies the requirements of the standard in an equivalent manner.

72. 'Appropriate means' may be a technical dossier of the manufacturer or a test report from a recognised body. 'Recognised body' means a test and calibration laboratory or a certification and inspection body which complies with applicable European standards (see Chapter 7 – Technical Specifications).

## **How is a “lowest price” tender assessment carried out?**

73. The procurer must first check that the tenders comply with the essential requirements of the contract documents. Then award the contract to the tender that has the lowest price. You can find an example of how to carry out a “lowest price” tender assessment at Annex A. You must investigate tenders that appear to be abnormally low.

## **How is a “most economically advantageous tender” assessment carried out?**

74. The procurer must first check that the tenders comply with the essential requirements of the contract documents. The aim is to identify best VFM by applying a scoring method to the award criteria published in the ITT which covers both the price, and the technical and commercial aspects of the tender.

75. You must ensure that the scoring method you use is fair and reasonable, proportionate and does not discriminate in favour of any tenderer. Scores for price should be directly proportional to price difference.

76. It is good practice to test any proposed method or algorithms with a variety of dummy information to ensure that various permutations of bids (e.g. close bids, abnormally low bids) do not distort the result. You should keep the method or algorithms as simple as possible.

77. You can use a variety of scoring methods and Annex B provides some examples of methodologies. These examples are for guidance only and their use is not mandatory. Your tender assessment will start with a check for commercial compliance.

78. You can find further information and examples of how to carry out a “most economically advantageous tender” assessment at Annex B.

79. MOD procurers can find further information on the tender exercise in the Tender Assessment and Pricing Team Approach topics in the MOD Commercial Toolkit.

## **Abnormally low tenders**

80. One issue procurers need to look out for in the tender assessment is an offer that is “abnormally low”. You may reject an abnormally low offer in accordance with the rules set out in Regulations 31(6) to (9).

81. You to consider an offer abnormally low for a number of factors. In the MOD, an abnormally low tender price is an offer made in competition which, in the view of the acquisition team, taking account of their knowledge of the market place, their understanding of the requirement and their previous purchasing experience of similar goods or services:

- a. appears much lower compared to the prices of other tenders or their ‘should cost’ estimate;

- b. is unlikely, even with efficient working, to cover the tenderer's costs; or
- c. seriously calls into question the tenderer's ability to resource and perform the contract satisfactorily.

82. An abnormally low offer brings with it risks for procurers and you should not accept such an offer without detailed and careful consideration.

83. Before rejecting an abnormally low offer, however, the Regulations require procurers to seek an explanation in writing and to satisfy themselves, on the evidence, that the rejection is valid in accordance with Regulation 31.

84. A tender may be abnormally low because the tender includes State Aid (see State Aid [Article 107](#) of the TFEU). You may reject such a tender on that ground alone if, after consultation with the tenderer, the State Aid is granted in a way which is incompatible with the TFEU.

85. In accordance with Regulation 31(9), you must send a report justifying the rejection of any abnormally low offer in these circumstances to the European Commission ("the Commission"). Procurers must follow the procedures set out in Chapter 18 – Statistics and Reports for the submission of reports to the Commission.

## Post-tender clarifications and negotiations

86. After receipt of all tenders, you must treat tenderers equally and give them the same opportunities for clarification or negotiation in accordance with the procurement procedure selected.

87. You must not act in a manner that is likely to distort fair competition during post-tender negotiations or clarifications, as this would breach our TFEU obligation to maintain equality of treatment.

## Clarification of the tender

88. You may seek clarification of tenders after the receipt of tenders in the restricted and competitive dialogue procedures, and the receipt of final tenders in the competitive negotiated procedure.

89. You may need to request clarification if the tender:

- a. contains inconsistent or contradictory information on specific issues; or
- b. is not clear when describing what it is offering; or
- c. contains minor mistakes or omissions; or
- d. is not compliant with non-mandatory technical specifications.

90. Requesting clarification is not negotiation. Procurers must not seek or accept substantial alternations to tenders through a request for clarification, as this would breach our TFEU obligation to maintain equality of treatment. It would breach our TFEU obligation to, among other things:

- a. allow a non-compliant tender to be brought into compliance with the mandatory technical specifications;
- b. allow a change in the price quoted in the tender price (except for correction of any arithmetical errors discovered during the tender evaluation).

91. Any request for clarification, and the tenderer's reply, must be in writing.

92. The tender board (or if there is no tender board, the acquisition team) must agree the clarification request before it is sent to the tenderer. The chairperson of the tender board (or if there is no tender board, the commercial officer) will send the clarification request. Other individual members of the acquisition team must not contact the tenderers directly in order to seek clarification of tenders.

93. You must summarise the clarification request and the tenderer's reply in detail in the tender evaluation report, with a clear indication of whether the answers are satisfactory to the tender board, and if not why not. You should annex any exchanged correspondence to the tender evaluation report.

94. If a tenderer submits an unrequested clarification on its tender, you must not consider that clarification.

### **The restricted procedure**

95. After the receipt of tenders under the restricted procedure, you can seek clarification or supplementary information from tenderers on the content of tenders. You may also provide clarification on your requirements.

96. You cannot negotiate fundamental aspects of the contract (and especially price) under the restricted procedure, as it is likely to distort competition.

### **The competitive negotiated procedure**

97. Under the competitive negotiated procedure, you are expressly allowed to negotiate and conduct iterative tendering. You should invite tenderers to submit tenders that form the basis of post-tender negotiations, which will adapt the tenders to meet the procurers' requirements.

98. The aim of post-tender negotiations under the competitive negotiated procedure is to improve, in value for money terms, the tender submitted by the leading tenderer by adapting the tenders to the requirements specified in the contract documents. You should not award a contract until you have agreed a satisfactory price and acceptable terms and conditions.

99. You may also conduct the process in successive stages in order to reduce the number of tenders to negotiate by applying the award criteria in the contract documents.

100. As negotiations progress, you may ask tenderers to submit a Revise Or Confirm Offer (ROCO). You would issue ROCO invitations if there are many issues to resolve and all, or most, of the tenderers remain in the competition. ROCO invitations detail either or both of the following:

- a. the specific areas requiring attention (tailored to suit each tenderer if necessary);
- b. additional or amended information from the procurer that the tenderer needs to be aware of when re-submitting its offer.

101. You may also ask tenderers to submit a Best And Final Offer (BAFO). The aim of a BAFO is to obtain better VFM through a further round of tendering with all remaining tenderers. Normally, the emphasis will be on securing a price reduction, but this should not preclude seeking other improvements, e.g. delivery or performance.

102. Importantly, during the negotiations you should ensure equal treatment among all tenderers and should not provide information in a manner that may discriminate or give one or more tenderers advantage over others. In addition, you must put safeguards in place to prevent the disclosure by you among tenderers of their commercially sensitive and confidential information including technical solutions protected by patents or copyright as well as know-how or innovative ideas.

### **The competitive dialogue procedure**

103. The competitive dialogue procedure allows for a formal, structured dialogue phase with pre-qualified tenderers. You must specify the contract award criteria in the ITPD you issue to tenderers to give them and procurers the opportunity to dialogue or negotiate any aspect of the contract before tenderers submit final tenders.

104. Dialogue formally closes when you identify one or more fully matured solution(s) after down-selection. You then issue a final tender document, the Invitation to Submit Final Bids (ITSFB), to the remaining tenderers enabling them to prepare a final bid. On receipt of the final bids, you cannot conduct any further dialogue or negotiation though you may clarify and fine-tune the tenders.

105. The same obligations regarding distortion of competition, equality of treatment and confidentiality apply to the dialogue and negotiations you conduct under the competitive dialogue procedure as applied to all procurement processes.

### **Recording communications**

106. You must record all post-tender communications whether in the form of clarification or negotiation. This increases certainty in the process and reduces the risk of legal challenge to a contract award decision. Procurers must conduct proceedings in a manner that is not only fair, but which all tenderers see is fair.

### **Cancelling the procurement procedure**

107. Procurers may decide not to award a contract for a number of reasons, for example:

- a. no tenders are received;

- b. none of the tenders received are compliant;
- c. all compliant tenderers exceed the budget available;
- d. the circumstances of the procurement have fundamentally changed;
- e. irregularities occurred during tender evaluation.

108. The procurer must send written notification, as soon as possible to all tenderers and other suppliers who unsuccessfully requested to participate in the procurement procedure of its decision to abandon or restart the procedure, and the reason for its decision.

109. The procurer must also publish a [Notice for Additional Information, Information on Incomplete Procedure or Corrigendum](#) in the Official Journal of the European Union that announces the cancellation of the procedure.

110. You may withholding information under Regulation 33(11) from candidates and tenderers if, among other things, its disclosure might prejudice fair competition for the procurement that follows on from the cancelled procedure.

### **What are the key points to remember?**

1. You must conduct the award process by applying the published contract award criteria, which you cannot change once issued to the tenderers.
2. To comply with the government's procurement policy set out in Managing Public Money, the primary objective of procurers is to choose the compliant tender offering the best Value for Money solution.
3. During tender assessment, you must follow the principles of transparency, equal treatment and non-discrimination. Procurers must also comply with any obligations of confidentiality and protect commercially sensitive information from disclosure.
4. You must ensure that you disclose in advance any scoring method you will use during tender assessment and that it is fair and reasonable, proportionate and does not favour any tenderer.
5. To reduce the risk of legal challenge, you must carefully record all post-tender communications, clarifications or negotiations (where allowed under the DSPCR).
6. You should inform tenderers of the outcome of the tender assessment in writing by the fastest means possible.



## **Annex A**

# **Lowest Price Tender Assessment**

## **How is a “lowest price” assessment carried out?**

### **Commercial compliance test**

1. The procurer must check that the tender complies with the mandatory commercial requirements of the contract documents. You should not use a scoring method. It is a simple PASS / FAIL test for all elements specified as mandatory in the contract documents.
2. A tender is compliant if it satisfies all the conditions and specifications in the contract documents without substantially departing from, or attaching restrictions to, the conditions or specifications. The price is the only factor that you must take into consideration when choosing the best compliant tender. No cost analysis can come into play.
3. Substantial departures or restrictions that are sufficient to result in non-compliance are those which:
  - a. affect the scope, quality or performance of the proposed contract;
  - b. differ materially from the terms and conditions in the contract documents;
  - c. limit or change the risk allocation under the contract which must be equal for all tenderers; or
  - d. otherwise unfairly distort competition.
4. You should examine each tender for compliance with the contract documents, in particular that:
  - a. the documents are complete;
  - b. the tenderer has used the language required by the contract documents.

### **Technical compliance test**

5. The procurer must check that the tender complies with the mandatory technical requirements of the contract documents. You should not use a scoring method for these elements. It is a simple PASS / FAIL test for all elements specified as mandatory in the contract documents.
6. The technical evaluation of the tenders takes place after the commercial compliance check. The minimum technical standards to satisfy the requirement for compliance are those published in the contract documents. Under no circumstances

may the procurer change the minimum standards communicated to the tenderers in the contract documents. No quality considerations can come into play.

### Choosing the successful tender

7. The successful tenderer is the one submitting the least expensive tender classified as “commercially compliant” and “technically compliant” during the commercial and technical evaluation.

8. Table 1 below demonstrates the assessment of award of a contract based on “lowest price”.

**Table 1 – “Lowest Price” Tender Assessment**

	<b>Tender A</b>	<b>Tender B</b>	<b>Tender C</b>
<b>Commercial evaluation</b>	Pass	Pass	Pass
<b>Technical evaluation</b>	Pass	Fail	Pass
<b>Tender Price (£M)</b>	£50.000	£45.000	£52.500
<b>Result</b>	Successful bid, lowest priced, technically compliant tender	Unsuccessful bid, technically non-compliant	Unsuccessful bid, technically compliant but with higher price

## **Annex B**

# **Most Economically Advantageous Tender Assessment**

## **How is a “most economically advantageous tender” assessment carried out?**

1. The aim is to identify the best tender on a VFM basis by applying a scoring method to the award criteria published in the ITT which covers both price, and the technical and commercial aspects of the tender.
2. Procurers must take care to ensure that the scoring method they use is fair and reasonable, proportionate and does not unfairly discriminate in favour of any tenderer. Scores for price should be directly proportional to price difference.
3. It is good practice to test any proposed method or algorithms with a variety of dummy information to ensure that various permutations of bids (e.g. close bids, abnormally low bids) do not distort the result. You should keep the method or algorithms as simple as possible.
4. You can use a variety of scoring methods that and some examples of methodologies set out below for guidance only. We are not mandating that you use these methodologies. Your tender assessment will start with a check for commercial compliance.

## **Commercial compliance test**

5. The procurer must check that the tender complies with the mandatory commercial requirements of the contract documents. You should not use a scoring method for these elements. It is a simple PASS / FAIL test for all elements specified as mandatory in the contract documents.
6. A tender is compliant if it satisfies all the conditions and specifications in the contract documents without substantially departing from, or attaching restrictions to, the conditions or specifications.
7. Substantial departures or restrictions are those which:
  - a. affect the scope, quality or performance of the proposed contract;
  - b. differ materially from the terms and conditions in the contract documents;
  - c. limit or change the risk allocation under the contract which must be equal for all tenderers; or
  - d. otherwise unfairly distort competition.

8. You should examine each tender for compliance with the contract documents, in particular that:

- a. the documents are complete;
- b. the tenderer has used the language required by the contract documents.

9. In the examples below, all the tenderers were passed as commercially compliant.

### Example 1

10. In this example, you establish the “most economically advantageous tender” by weighing the technical evaluation score against the financial offer score on a 60 / 40 split. You allocate a mark out of 60 for the technical score and a mark out of 40 for the financial offer.

11. For a 60 / 40 split, marks out of 60 are allocated to the best technically compliant bid and marks out of 40 to the best price. The other marks are calculated using a percentage (%) difference method. This method ensures that you treat the technical and financial scoring in the same way and produces a consistent result.

12. This approach to the calculation method (which we have called the percentage (%) difference method) is illustrated in the Commission publication Practical Guide to Contract Procedures for EU External Actions, dated November 2010 (updated March 2011). See sections 3.3.10.3-5 and 4.3.9.5 for specimen scoring illustrations.

13. The results of the technical evaluation and the price of the bids for this example are set out in Tables 2-5 below with footnotes to explain the steps.

**Table 2 – MEAT: Technical Marks and Prices**

	Tender A	Tender B	Tender C
Technical Mark out of 60	50	40	38
Financial Offer (£M)	£197.815	£176.320	£153.839

14. The technical evaluation is scored as follows:

**Table 3 – MEAT: Technical Scoring**

	Tender A	Tender B	Tender C
<b>Technical Mark out of 60</b>	50	40	38
<b>% difference</b>	0	20 <sup>(2)</sup>	24
<b>Technical Score</b>	60 <sup>(1)</sup>	48 <sup>(3)</sup>	45.6

Notes:

- (1) The tender with the highest technical mark receives the full score of 60 points in line with the 60 / 40 split.
- (2) The other tenders are awarded points representing how far they fall short of the best mark, by means of the % difference. Here, the Tender B mark was 40 so the % difference =  $(50 - 40) / 50 \times 100 = 20\%$ .
- (3) The technical scores of the other tenders are calculated using the % difference against the best technical score. In this case, Tender B's technical score is 48, which is 20% less than Tender A's score of 60.

15. The price evaluation is scored as follows:

**Table 4 – MEAT: Price Evaluation**

	Tender A	Tender B	Tender C
<b>Price (£M)</b>	197.815	176.320	153.839
<b>% difference</b>	28.6 <sup>(5)</sup>	14.6	0
<b>Minus Mark</b>	11.4	5.8 <sup>(6)</sup>	0
<b>Financial Score</b>	28.6	34.2 <sup>(7)</sup>	40 <sup>(4)</sup>

Notes:

- (4) The lowest priced tender is given a full score of 40 in line with the 60 / 40 split
- (5) The other tenders are awarded points representing how far they fall short of the lowest price, by means of the % difference. First, the bids are calculated as a percentage difference against the lowest priced tender. Here, Tenderer A's price was 197.815 so the % difference =  $(197.815 - 153.839) / 153.839 \times 100 = 28.6\%$ .
- (6) The other bids are then converted into a % of 40, i.e. Tender B's price was 14.6% above the lowest price of Tender C, so 14.6% of 40 = 5.8. This is the minus mark.

(7) You calculate the financial score of all bids by taking the minus mark away from 40. Here Tender B's minus mark was 5.6, so the financial score =  $40 - 5.6 = 34.4$ .

16. The combined results of the technical and price evaluation is shown in Table 5 below:

**Table 5 – MEAT: Combined Technical & Price Evaluation**

	Tender A	Tender B	Tender C
Technical score	60	48	45.6
Financial score (£M)	28.6	34.2	40
Total Score	88.6 <sup>(8)</sup>	82.2	85.6

Notes:

(8) The technical and financial scores are then added together to give a total score that takes account of all award criteria. Here, the Tender A score is  $60 + 28.6 = 88.6$ , which makes it the winning bid.

## Example 2

17. Tables 6-9 give an example of the technical, financial and combined assessment of 3 tenders. You carry out the assessment is carried out on the basis of applying a 75 / 25 split (as published in the ITT) between the technical and financial elements of the tender. This is done by multiplying:

- the score awarded to the technical offers by 0.75; and
- the score awarded to the financial offers by 0.25.

18. Table 6 shows the technical assessment scores where each criterion is assessed and allotted a number of points out of 100 by each assessor.

**Table 6 – MEAT: Technical Assessment Scores**

	Maximum possible score	Tenderer 1	Tenderer 2	Tenderer 3
Assessor A	100	60	80	85
Assessor B	100	70	86	88
Assessor C	100	65	82	92

<b>Total</b>	300	195	248	265
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19. Table 7 illustrates how you work out the average technical assessment score. Any tender falling below the 75 point qualifying threshold is eliminated and does not proceed to the financial assessment.

**Table 7 – MEAT: Technical Scoring**

	<b>Tenderer 1</b>	<b>Tenderer 2</b>	<b>Tenderer 3</b>
<b>Average score (i.e. the mathematical average)</b>	$195 / 3 = 65.00$	$248 / 3 = 82.66$	$265 / 3 = 88.33$
<b>Technical score (i.e. [actual final score /highest final score] x 100)</b>	Eliminated	$82.66 / 88.33 \times 100 = 93.58$	100

20. Upon completion of the technical assessment, the financial offers are assessed. Table 8 is an example of the financial assessment scored by applying 100 points to the tender with the lowest total average score and using the following formula for the other tenders:

Technical score = (lowest total average score / total average score of the tender being considered) x 100

**Table 8 – Financial Assessment Scores**

	<b>Tenderer 1</b>	<b>Tenderer 2</b>	<b>Tenderer 3</b>
<b>Total price (£M)</b>	Eliminated	£100.000	£98.000
<b>Financial score (i.e. [lowest total price/actual price] x 100)</b>	Eliminated	$98,000 / 100,000 = 98$	100

21. You add the technical and financial scores are together as illustrated in Table 9 and you award the contract to the tenderer achieving the highest ranking. In this case, it is Tenderer 3.



**Table 9 – Combined Technical and Financial Assessment**

	<b>Tenderer 1</b>	<b>Tenderer 2</b>	<b>Tenderer 3</b>
<b>Technical score x 0.75</b>	Eliminated	$93.58 \times 0.75 = 70.185$	$100 \times 0.75 = 75$
<b>Financial score x 0.25</b>	Eliminated	$98 \times 0.25 = 24.5$	$100 \times 0.25 = 25$
<b>Overall Score</b>	Eliminated	$70.185 + 24.5 = 94.685$	$75 + 25 = 100$
<b>Final Ranking</b>	Eliminated	2	1