

# Defence and Security Public Contracts Regulations 2011

## Chapter 9 – Procuring Urgent Operational Requirements

### Purpose

1. This guidance explains how to use the Defence and Security Public Contracts Regulations (DSPCR) 2011 when procuring Urgent Operational Requirements (UORs). MOD procurers should read this guidance in conjunction with the [MOD's UOR Commercial Policy Statement](#) and the associated guidance on the Acquisition System Guidance (ASG).
2. Specifically, the guidance describes the legal framework, the procurement options for UORs, typical length of each procedure for planning purposes, benefits of using competition, justifying single procurement, best practice for delivering a quick procurement and dealing with the possibility of legal challenge.

### What are Urgent Operational Requirements?

3. By "UORs", we mean requirements for military or sensitive security goods arising from:
  - a. the identification of previously un-provisioned and emerging capability gaps because of current or imminent operations; or
  - b. where deliveries under existing contracts for equipment or services require accelerating due to an increased urgency to bring the capability they provided into service.
4. These capability shortfalls are addressed by the urgent procurement of either new or additional equipment, enhancing existing capability, within a timescale that cannot be met by the normal acquisition cycle. Value for money considerations still apply to UORs although the weighting given to time, performance and cost dynamics may not be equal.

### 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 a treaty exemption or general exclusion applies or it is below the relevant thresholds.

### Procurement options for UORs

#### Exemptions

6. There is no automatic exemption for UORs from the DSPCR. The DSPCR therefore apply to UORs for defence and sensitive security requirements.

7. The two main grounds that require acquisition teams to examine the need for an exemption are where the nature of the UOR unavoidably requires us to:
- a. discriminate on the grounds of nationality, for example:
    - (1) the contractor needs access to classified information bearing a national caveat (for example, UK Eyes Only) which restricts the nationality of those who can access the information or to technical information that is subject to export control legislation which restricts the nationality of those who can access the information; and / or
    - (2) the urgent requirement is so strategically important that any dependence on authorisation from another EU Member State is a risk to the UK's essential security interests.
  - b. not publish an OJEU contract notice, for example, if you cannot write a meaningful unclassified notice as the very existence of the UOR is too sensitive to be placed in the public domain.
8. Acquisition teams must follow the guidance in Chapter 4 (Treaty Exemptions) and Chapter 5 (General Exclusion from the DSPCR) of the DSPCR guidance if they wish to apply an exemption.

### **Procurement Procedures in the DSPCR**

9. You should not presume that you can dispense with competition for UORs. You must consider competition in accordance with the DSPCR as the starting position. Experience suggests that competition may be the quickest route to delivering the UOR.
10. To comply with our treaty obligations, your choice of contracting method for the UOR under the DSPCR must:
- a. be suitable to deliver the UOR to the agreed in-service date bearing in mind the time needed for the delivery and integration, and in-service stages of the UOR process; and
  - b. not divert from normal commercial practice any more than necessary to achieve the agreed in-service date for the UOR.
11. The DSPCR allow a range of contracting methods suitable for UORs that are summarised in Table 1 below. The Table also summarises MOD commercial governance. Other Departments may issue their own commercial governance instructions.

<b>Procurement Procedure</b>	<b>Contracting Method</b>	<b>MOD Commercial Governance</b>
Restricted procedure Competitive negotiated procedure	Open competition using standard time limits	Normal policy and guidance applies

Restricted procedure Competitive negotiated procedure	Open competition using accelerated time limits	Senior Commercial Officer sign-off required for MOD approved UORs Commercial Band B2 sign-off required for other urgent requirements
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Table 1: Contracting methods for UORs

12. The flowchart at Annex A summarises how to choose the correct method and should be read in conjunction with the guidance below.

### **Open competition using standard time limits**

13. The restricted procedure and the competitive negotiated procedure are fully described at [Chapter 8 \(Procurement Procedures\)](#) of the DSPCR guidance.

14. European Commission statistics show that the average time for the standard restricted procedure is 200 calendar days and standard competitive negotiated procedure is 167 calendar days.

15. You should plan to execute a standard procurement procedure within 120 to 200 calendar days depending on the complexity of the requirement. You should only assume 120 calendar days for very straightforward requirements.

16. If you cannot meet the in-service date for the UOR using a standard procedure, you should then look at using accelerated procurement procedures.

### **Open competition using accelerated time limits**

17. The DSPCR allow a procurer to use an accelerated restricted and competitive negotiated procedure where it is impractical for them to comply with the normal minimum timescales for reasons of urgency.

18. You should view the use of such accelerated procedures as exceptional, as it may restrict competition, and should be reserved for cases where the normal timescales for the procedure cannot deliver the UOR to the agreed in-service date.

19. In the MOD, the approval of a UOR in accordance with departmental instructions is normally sufficient justification for the need for quicker procurement. Senior Commercial Officers may sign-off the use of either the accelerated restricted procedure or the accelerated competitive negotiated procedure, where necessary to achieve the agreed in-service date for the UOR.

20. In the MOD, any decision to use the accelerated restricted procedure or accelerated competitive negotiated procedure for requirements that are not approved UORs requires approval by a Senior Commercial Officer at Band B2 (or above).

### **Conducting an accelerated procedure**

21. An accelerated restricted procedure or accelerated competitive negotiated

procedure has the same steps as the standard procedures but with shorter timescales.

22. You must exercise judgement in choosing suitable timescales for accelerated procedures. Complex UORs may require longer as you must allow suppliers adequate time to prepare their request to participate or submit a proper tender.

23. European Commission statistics show that the average time for the accelerated restricted procedure is 88 calendar days and accelerated competitive negotiated procedure is 75 calendar days.

24. Experience shows that UORs can be placed within these average times, so acquisition teams should plan to execute an accelerated procedure within 60 to 85 calendar days, depending on the complexity of the requirement.

### **Importance of good project management**

25. The majority of the time taken for procurement is not due to the time limits in the DSPCR. Internal actions take most time, for example, setting the requirement, business case approval, selecting tenderers and tender assessment. Good project management is therefore the key factor in terms of delivering a quick, efficient and effective contract award.

26. In MOD acquisition teams, project management staff must engage commercial staff at the earliest opportunity to ensure successful implementation of these procurement procedures, particularly when considering using accelerated procedures.

27. Acquisition teams must ensure that the project plan identifies the tasks and resources required to conduct the contract award procedure and that those resources are available to deliver the UOR. All acquisition team members involved need to know what is required from them and by when.

### **Saving time during an accelerated procedure**

28. Commercial officers must seek opportunities to compress timescales for the contract award, for example, by including the pre-qualification questions in the OJEU advert, suppliers requesting to participate would complete the pre-qualification questions within the same timeframe. For MOD staff using Defence Contracts Online, this process is already streamlined as suppliers will signify their desire to be involved in the tender process by completing the dynamic pre-qualification questionnaire in response to the Contract Notice.

29. Commercial officers must try to avoid wasting time and resources, as a result of too many suppliers in the contract award procedure, by:

- a. providing sufficient information in the OJEU advert on the requirement and the capabilities required to discourage unrealistic requests to participate from suppliers; and
- b. intending to invite tenders from the minimum number of tenderers allowed by the DSPCR, i.e. three tenderers for both the restricted and negotiated procedures.

30. Acquisition teams must try to simplify the tender evaluation stage by using concise and focused award criteria and sub-criteria (but not to the extent where you risk jeopardising your ability to analyse tenders and chose the best value for money option). As with all procedures, you must disclose these to all tenderers in advance and no later than in the Invitation to Tender (ITT) or Invitation to Negotiate (ITN).

31. Commercial officers (and other team members involved) must try to start the procurement with most of the contract documents in place. Work on your procurement documents must be underway when the requirement is approved as a UOR, in accordance with department instructions on UORs. When the business case is approved, you should be:

- a. ready with the OJEU advert, pre-qualification questions and selection criteria and marking scheme to select tenderers; and
- b. well advanced on the ITT or ITN, the draft contract, and the criteria and marking scheme for contract award.

## **Tendering and negotiations**

32. The accelerated restricted procedure is a straightforward tendering exercise after a down selection of tenderers. The competitive negotiated procedure allows you to request tenderers to submit a full tender or an outline solution depending on what is best to meet the requirement.

33. In the accelerated competitive negotiated procedure, as is the case in the normal competitive negotiated procedure, you do not have to negotiate every single aspect of the work to be carried out. You should plan the negotiations to concentrate on areas where you can improve value for money or where you need confidence in the technical aspects of the solution.

## **Grounds for non-competitive procurement procedure**

34. Closed competition or single source procurement<sup>1</sup>, are only permitted under the grounds set out in Regulation 16 of the DSPCR. We refer to these as the “non-competitive negotiated procedure”.

35. The grounds for using non-competitive negotiated procedure are fully described at paragraphs 68 to 95 of [Chapter 8 \(Procurement Procedures\)](#) in the DSPCR guidance.

36. In the MOD, CLS-CL scrutinise the grounds for using this procedure, through the scrutiny of all proposed Voluntary Ex Ante Transparency Notices (VEATs), also known in the MOD as a Voluntary Transparency Notice (VTN) (see paragraph 43 below), as misuse of Regulation 16 is one of the most serious breaches of the DSPCR. This scrutiny considerably reduces the risk of a successful legal challenge for wrongful use of the procedure.

37. Two grounds for using the non-competitive negotiated procedure are

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<sup>1</sup> MOD commercial officers must refer to the guidance on the Single Source Contract Regulations and in particular [Chapter 2 Qualifying Defence Contracts](#) to assess if your single source contract falls within the scope of the [Deform Reform Act 2014](#) and [Single Source Contract Regulations 2014](#).

particularly relevant to UORs, where the procedure is allowed for reasons of:

- a. Regulation 16(1)(a)(iii) for urgency resulting from a “crisis”, including armed conflict; or
- b. Regulation 16(1)(a)(iv) for extreme urgency brought about by events that could not be foreseen by, and are not attributable to, the procurer. This ground has been successfully challenged in Court because the “urgency” claimed was foreseeable.

38. Procurers may not use these grounds when they could award the contract in time using the standard or accelerated versions of the restricted procedure or competitive negotiated procedure.

39. In assessing whether there is an urgency to justify departing from the standard or accelerated procedures the Courts will first consider the nature and extent of the interest to which the contract relates and, secondly, the likelihood of prejudice to that interest if delay occurs. Presumably, the Court will give highest priority to health and safety and national security interests. For MOD procurers, where it is considered that the MOD has contributed through its own actions and / or should have foreseen the urgency, you must contact [CLS-CL](#).

## **Closed competition among chosen tenderers**

40. A closed competition is where, for reasons of urgency, we have to limit competition to suppliers that we can readily identify as being able to meet the requirement (that is, without the use of an advert in the OJEU).

41. A closed competition must be justified on the grounds for the non-competitive negotiated procedure set out in Regulation 16, as there is no OJEU advert asking for requests to participate. The most suitable grounds are either Regulation 16(1)(a)(iii) or Regulation 16(1)(a)(iv), see paragraph 37 above.

42. The advantage of a closed competitive procedure is the time saved by not having to publish an OJEU contract notice and wait for requests to participate from suppliers. It also introduces an element of competition to drive down costs. The disadvantage is that we do not fully test the market so we may not achieve best value for money.

43. Commercial officers (and other team members involved) must try to start the procurement with most of the contract documents in place. Work should be underway when the requirement is endorsed. When the business case is approved, you should be:

- a. ready with the justification for using the non-competitive negotiated procedure, and MOD commercial officers should have the justification approved by [CLS-CL](#);
- b. ready with the draft VEAT (VTN), also approved by [CLS-CL](#), and pre-qualification questions; and
- c. well advanced on the ITT / ITN, the draft contract, and the criteria / marking scheme for contract award.

44. Acquisition teams must choose tenderers on objective and non-

discriminatory grounds. You should aim to invite three tenderers to submit bids, and allow them sufficient time to prepare a proper tender, paying due consideration to the in-service date of the UOR.

45. Acquisition teams should also ensure that any such procurement, whether competed or not, should only satisfy the UOR. For example, where a requirement for services may be on-going and can be competed using the restricted procedure or the competitive negotiated procedure in accordance with normal timescales, such a procurement process should be commenced in parallel. The UOR should therefore only fill the gap between the initial urgency and the time when the competed requirement can be successfully let.

## **Single source procurement including contract amendments**

### **Justifying single source procurement**

46. You may use single source procurement on the grounds of urgency resulting from a crisis under Regulation 16(1)(a)(iii) or other extreme urgency under Regulation 16(1)(a)(iv) where open or closed competition will not meet the agreed in-service date for the UOR.<sup>2</sup> You should not, however, presume that single source procurement is necessarily quicker than competition.

47. If you require urgent supplies or services on a regular basis, you can only use single source procurement on the grounds of urgency for those supplies or services needed until you can run the competition for the full requirement.

48. You should ensure that any requirement you contract for as single source, does not restrict your ability to compete the on-going requirement. That may be difficult when you need to buy something urgently and then when you require more, you need the same material, for compatibility reasons. The timely delivery of the UOR should always be the priority, although the ability to compete any on-going requirement and achieve value for money will potentially be achieved through obtaining appropriate IPR.

49. Single source procurement may also be the only realistic contracting method due to exclusive rights or technical reasons or for additional deliveries of materiel subject to Regulation 16.

50. The MOD acquisition team must demonstrate to CLS-CL as early as possible that these grounds are justified. It is important that the justification presented to CLS-CL is robust so their review can be carried out quickly.

### **Conducting a single source procurement**

51. European Commission statistics show that the average time for the competitive negotiated procedure is 167 calendar days, which compares to an average time for the non-competitive negotiated procedure of 164 calendar days.

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<sup>2</sup> MOD procurers must refer to the guidance on the Single Source Contract Regulations and in particular [Chapter 2 Qualifying Defence Contracts](#) to assess if your single source contract falls within the scope of the [Deform Reform Act 2014](#) and [Single Source Contract Regulations 2014](#).

52. You can place single source contracts for very simple requirements quickly (e.g. 15 to 20 calendar days), particularly if you only need to amend an existing contract. However, you must recognise that placing a single source contract for a complex requirement will take longer. Two examples of single source procurements for UORs took 115 calendar days and 273 calendar days respectively.

53. Your estimate for the duration of single source procurement is very much a matter of judgement. It depends on the complexity of the requirement and the resulting contract. The lack of competitive pressure may encourage the supplier to seek a more favourable arrangement or attempt to re-negotiate our standard terms and conditions, which will cause delays and erode any justification for single source procurement based on urgency.

54. In order to identify and deal with any issues that may result in a legal challenge as early as possible, you must publish the VEAT (VTN) as soon as you know the:

- a. contract title;
- b. type of contract;
- c. place of performance;
- d. short description of the contract;
- e. common procurement vocabulary;
- f. name and address of the proposed supplier; and
- g. the justification for the single source procurement.

55. Please note the mandatory period of 10 calendar days between publication of the VEAT (VTN) and contract award, delays contract award but does not prevent you working on pre-qualifying the proposed supplier or entering into contract negotiations.

56. Commercial officers (and other team members involved) must endeavour to start the procurement with most of the contract documents in place. Work should be underway when the requirement is endorsed. When the business case is approved, you should be:

- a. ready with the justification for using the non-competitive negotiated procedure and the draft VEAT (VTN), for MOD procurers for submission to CLS-CL;
- b. ready with the Statement of Good Standing for pre-qualification; and
- c. well advanced on the ITN and the draft contract.

## **Legal Challenges**

57. The DSPCR contain provisions that allow aggrieved parties to challenge award decisions if they believe that you have not followed the rules. You must therefore keep a record of the evidence to justify your procurement decision. This is particularly important if you are using Regulation 16 to justify non-competitive procurement, as a challenge from a supplier not invited to

participate can immediately stop your procurement.

58. A challenge during the standstill period, or following the publication of a VEAT (VTN) will stop the award decision. Where such delay results in a material risk to the safety and security of national interests, including the Armed Forces, acquisition teams should consult their legal advisers about the way forward and in particular about seeking an order from the Court lifting the automatic stay. Where the procurer's legitimate defence and security interests are likely to be harmed the Court may be persuaded to lift the automatic stay but it will also take into account the legitimate expectations of the challenger.

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

1. You must be aware that the DSPCR are likely to apply to most UORs for defence and sensitive security requirements.
2. Your contracting method for the UOR under the DSPCR must be both:
  - a. suitable to deliver the UOR to the agreed in-service date; and
  - b. not divert from normal commercial practice any more than necessary to achieve the agreed in-service date for the UOR.
3. You must consider competition in accordance with the DSPCR as the starting position albeit using accelerated timescales as necessary.
4. Remember internal actions will take the most time, e.g. setting the requirement, business case approval, tender assessment. Good project management is the key to delivering quick and effective contract awards.
5. The DSPCR allow aggrieved parties to challenge award decisions if they believe we have not followed the rules. You must therefore keep the evidence to justify your procurement decision.

## UOR Procurement Flowchart

