

# 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 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, what procedure is likely to produce best value for money, and the complexity of the requirement.

8. The competitive negotiated procedure has proved very useful in the MOD where the procurement process has involved trials of the goods to be purchased.
9. 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. 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.
11. 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.
12. 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). This is explained in more detail in paragraphs 65 – 98.
13. 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

14. Regulation 17 (The restricted procedure) sets out details of the restricted procedure. Figure 1 below summarises the restricted procedure and you can find a detailed process diagram at Annex C.

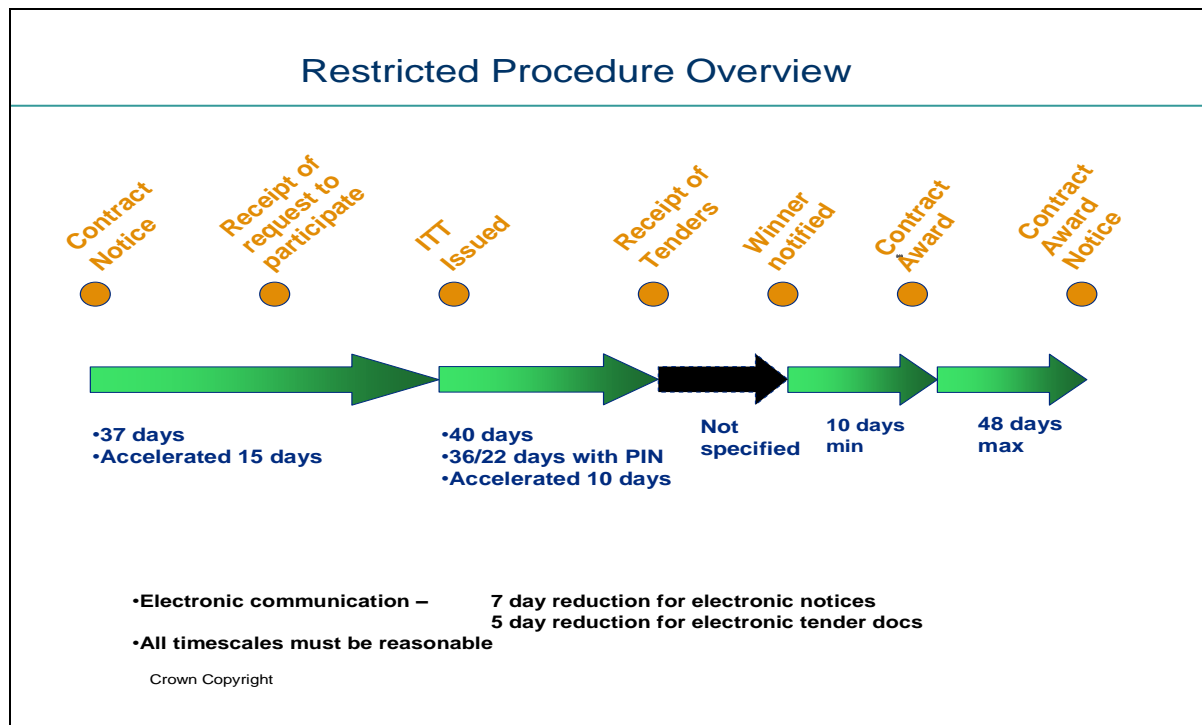


Figure 1: Summary of restricted procedure and associated time limits

15. The steps in the restricted procedure summarised above are:
- a. You publish a contract notice in the Official Journal of the European Union (OJEU) asking for requests to participate from suppliers. You must allow at least 37 days (this can be reduced in certain circumstances – see Annex A) from the date of despatch of the contract notice for receipt of requests to be selected to tender. If applicable, you must specify your intention to reduce the number of tenderers to a specified figure (which must be at least three), in circumstances where more than the specified figure are deemed suitable to be invited to tender, this figure must also be stated in the contract notice.
  - b. You issue the Invitation to Tender (ITT) to those tenderers selected in accordance with the criteria. The date by which the tenders must be received must be stated in the ITT and shall be no less than 40 days (this can be reduced in certain circumstances – see Annex A).
  - c. You receive and evaluate tenders. The DSPCR does not specify the period for evaluating tenders.
  - d. Following a standstill period of a minimum of 10 calendar days to allow aggrieved parties to challenge the award decision, you award the contract to the supplier that best meets the issued award criteria.
  - e. You publish a contract award notice in the OJEU within 48 days of the contract award.

## **Publishing the contract notice**

16. 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.

17. You must specify the date for receipt of requests in the contract notice. You must take into account all the circumstances in particular the complexity of the requirement and the time required for drawing up tenders 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**

18. On receipt of requests, you should conduct an exercise to shortlist suppliers to determine their suitability to receive an ITT. This must be carried out in accordance with the selection criteria set out in the DSPCR which are reflected in the PQQ to be completed by all prospective tenderers.

19. To ensure genuine competition and to meet the requirements of the DSPCR, 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 the minimum figure in the contract notice. If you wish to have a maximum number of tenderers, you must also state this figure in the contract notice. You must set out in the PQQ how the maximum number will be chosen.

20. You can find more guidance on supplier selection in competitive procurement in Chapter 15 – Supplier Selection.

## **Tendering**

21. There is no minimum period for the time between receipt of requests for selection and issue of the ITT to the selected tenderers.

22. You must specify the date for receipt of tenders in the ITT and, when setting this date, you should take into account all the circumstances including the complexity of the requirement and the time required for drawing up tenders. 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).

23. You must not negotiate any aspects under the restricted procedure.

24. You must treat all tenderers equally and give them the same opportunities. This includes sharing the details of any points of clarification with all tenderers.

25. You can find more guidance on tendering in Chapter 16 – Conducting the Tendering Exercise.

## **Contract award**

26. On receipt of tenders, the procurer will proceed to the contract award stage by application of the issued award criteria.

27. You must exclude non-compliant tenders. However, you should only exclude a tenderer where there is a sound case based on a material degree of non-compliance with the mandatory parts of the procurement documents. Any mandatory parts should be clearly marked within the procurement documents and the effect of non-compliance made evident. Procurers should seek project specific advice where there is a degree of uncertainty over the evidence the tenderer has presented. If all the tenders are non-compliant, you should cancel the procedure, and consider the reasons why, was the evaluation criteria set too high or the requirement too ambitious, before launching a new competitive procurement procedure or switching to the non-competitive negotiated procedure.

28. Following receipt of tenders, anything more than clarification or correction of minor errors / omissions will be susceptible to challenge as a potential breach of the DSPCR. If you are unsure as to the extent of permissible amendments, you must seek project specific legal advice.

29. You can find more guidance on contract award, publishing a [contract award notice](#) and the standstill period in Chapter 16 – Conducting the Tendering Exercise and Chapter 17 – Standstill Period, Contract Award and Voluntary Transparency.

## **Accelerated restricted procedure**

30. 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.

31. 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.

32. 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.

33. 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 that to follow the usual time limits would have a genuine adverse effect. In addition, you should not use the accelerated restricted procedure to recover administrative delays caused by the procurer.

34. If you use the accelerated procedure, you must do so proportionately. Where you can demonstrate value for money, you may use the procedure for the totality of the requirement. However, where you are unable to demonstrate value for money you must limit the prospective contract 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 and you must procure any other related goods, works and services under a normal procedure.

35. 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.

36. 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**

37. 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.

38. 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).

39. Figure 2 below summarises the competitive negotiated procedure, and you can find a detailed process diagram at Annex D.

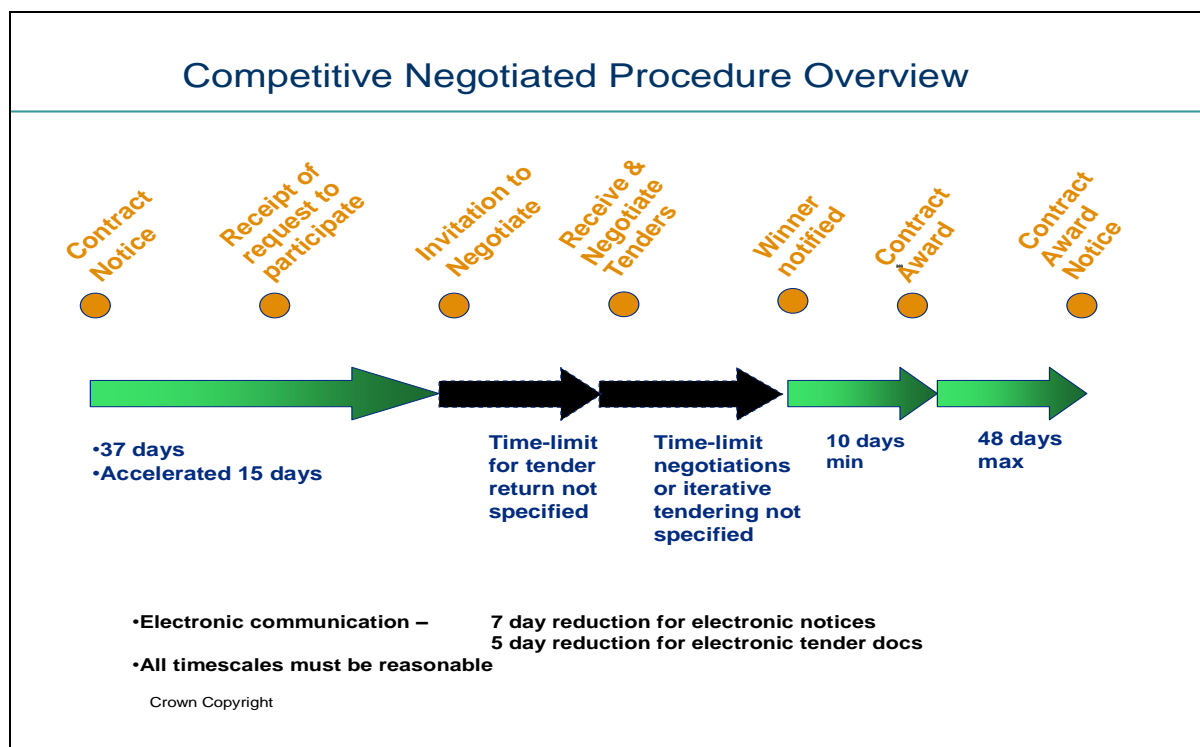


Figure 2: Summary of competitive negotiated procedure and time limits.

40. The steps in the competitive negotiated procedure summarised above are:
- a. You publish a contract notice in the OJEU asking for requests to participate from suppliers. You must allow at least 37 days (this can be reduced in certain circumstances - see Annex A) from the date of despatch of the contract notice for receipt of requests to be selected to tender. If applicable, you must specify your intention to reduce the number of tenderers to a specified figure (which must be at least three), in circumstances where more than the specified figure are deemed suitable to be invited to tender. Where you do not intend, in such circumstances, to invite more than a certain number of tenderers, this figure must also be stated in the contract notice.
  - b. You issue the ITN to the tenderers selected in accordance with the criteria. The DSPCR does not specify the period for returning tenders.
  - c. You receive and evaluate tenders received. You conduct negotiation on tenders received with the aim of adapting the tenders to the requirements set out in the contract documentation. If required, where it was included it in your contract notice, you may hold iterative rounds of tendering over successive stages in order to reduce the number of tenders to be negotiated, by applying the award criteria. The DSPCR does not specify the period for evaluating tenders or conducting iterative rounds of tendering, however you must ensure the timeframes are reasonable.
  - d. Following a standstill period, of a minimum of 10 calendar days, to allow aggrieved parties to challenge the award decision, you award the contract. You can find more guidance on the standstill period in Chapter 17 – Standstill Period, Contract Award and Voluntary Transparency.

- e. You publish a contract award notice in the OJEU within 48 days of the contract award.

## **Publishing the contract notice**

41. 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.
42. 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 contract, 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**

43. On receipt of requests, you should conduct an exercise to shortlist suppliers to determine their suitability to receive an ITN. This must be carried out in accordance with the selection criteria set out in the DSPCR which are reflected in the PQQ to be completed by all prospective tenderers.
44. To ensure genuine competition and to meet the requirements of the DSPCR, 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 the minimum figure in the contract notice. If you wish to have a maximum number of tenderers, you must also state this figure in the contract notice. You must set out in the PQQ how the maximum number will be chosen.
45. You can find more guidance on supplier selection in competitive procurement at Chapter 15 – Supplier Selection.

## **Tendering and negotiation**

46. There is no minimum period for the time between receipt of requests for selection and issue of the ITN to short-listed tenderers.
47. 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.
48. During the negotiation phase, procurers must 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.
49. Upon receipt of tenders, the procurer may choose to evaluate the tenders by applying the issued award criteria. If, having evaluated, you come to the conclusion 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 procurement documents that the procurer reserves the right to award the contract on the basis of initial tenders without negotiation to the tenderer who submits the best compliant tender in accordance with the published award criteria.

50. 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.

51. 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 procurement documents. You must however ensure that the number of tenderers be invited to negotiate the contract at the final stage is sufficient to ensure genuine competition, to the extent that there is a sufficient number to do so.

52. 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.

53. 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.

54. You can find more guidance on tendering and negotiation in the Chapter 16 – Conducting the Tendering Exercise.

### **Contract award**

55. Upon receipt of tenders and after negotiations of the tenders, the procurer will evaluate the tenders by applying the issued award criteria in order to award the contract.

56. You can find guidance on contract award and publishing a [contract award notice](#) in Chapter 17 – Standstill Period, Contract Award and Voluntary Transparency.

### **Accelerated negotiated procedure**

57. You may use an accelerated form of the negotiated procedure for reasons of urgency. Where it is impractical, for reasons of urgency to give a tenderer a minimum of 37 days within which to request to be selected to negotiate, that time limit may be reduced to 15 days (or to 10 days where the contract notice has been transmitted electronically). The minimum timeframe for receipt of tenders and for the negotiation phase will depend on the circumstances.

58. You must base the use of the accelerated procedure and the reduced timescales on an objective need for urgency and that to follow the usual time limits would have a genuine adverse effect. You will need to justify its use in the contract notice.

### **Use of the competitive dialogue procedure**

59. 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. The meaning of “particularly complex contracts” is set out in the DSCPR as being a contract where the procurer knows what its requirements or objectives are, but is not able to define the technical means of meeting them or where the procurer is unable to specify either or both of the technical or financial make-up of the project.

60. The competitive dialogue procedure is a flexible but arduous procedure. 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.

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

62. Figure 3 below summarises the competitive dialogue procedure and you can find a detailed process diagram at Annex E.

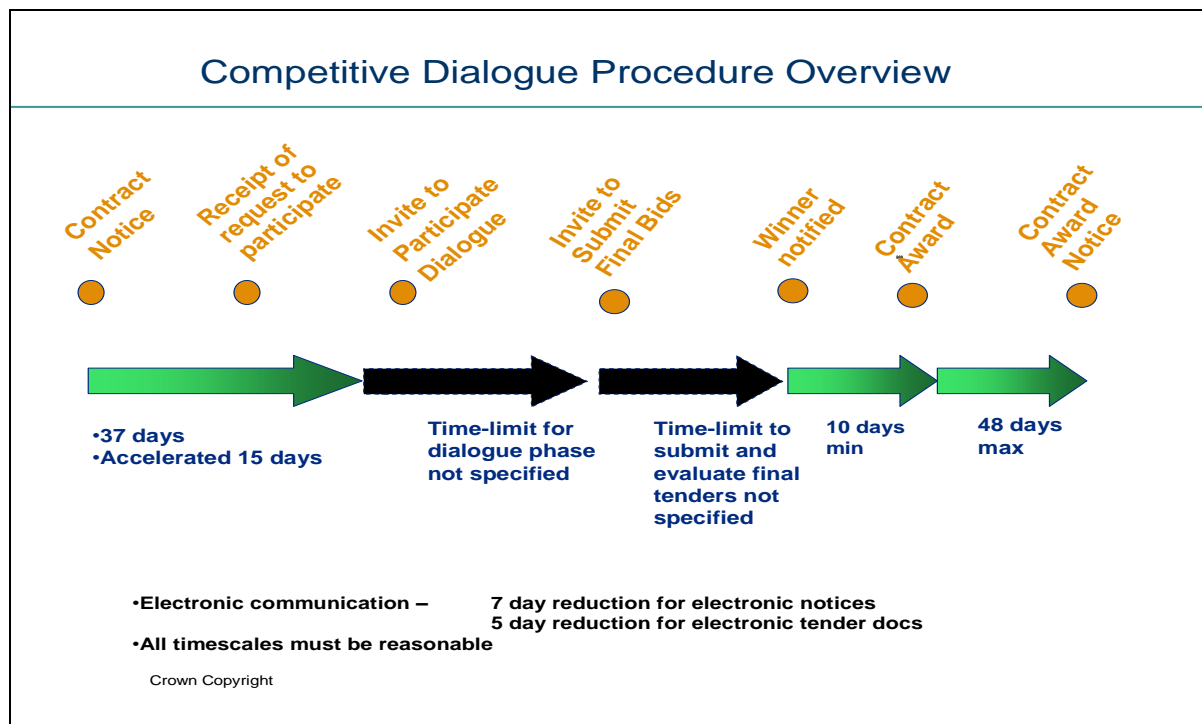


Figure 3: Summary of competitive dialogue procedure and time limits

63. The steps in the competitive dialogue procedure summarised above are:
- You must specify the date for receipt of requests to participate in the contract notice and should take into account all the circumstances, including the complexity of the contract, 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).

- b. To ensure genuine competition and to meet the requirements of the DSPCR, 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 the minimum figure in the contract notice. If you wish to have a maximum number of tenderers, you must also state this figure in the contract notice. You must set out in the PQQ how the maximum number will be chosen.
- c. You issue the ITPD to the tenderers who meet the minimum pre-qualification standards. The DSPCR does not specify the period for returning proposed solutions.
- d. 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.
- e. After the dialogue phase has identified solutions, procurers will receive and evaluate tenders. Following a standstill period of a minimum of 10 calendar days to allow aggrieved parties to challenge the award decision, the procurer will award the contract to the supplier that best meets the issued award criteria.

64. You can find detailed guidance on the competitive dialogue procedure at Annex B.

**Non-competitive negotiated procedure (Regulation 16)**

65. 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.

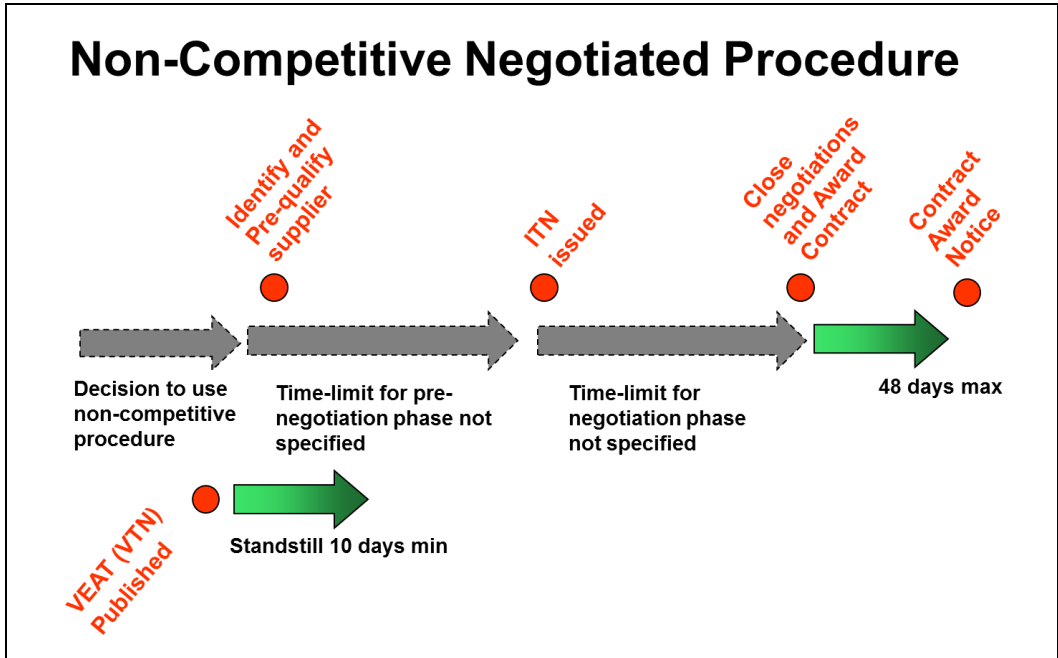


Figure 4: Summary of non-competitive negotiated procedure and time limits

66. The key steps in the non-competitive negotiated procedure are:
- a. You identify the proposed supplier(s), which you must justify in accordance with Regulation 16.
  - b. You pre-qualify the supplier(s) selected to negotiate in accordance with Regulations 23, 24, 25 and 26.
  - c. MOD procurers are required to publish their [Voluntary ex ante transparency notice](#) (VEAT) (also known in MOD as a Voluntary Transparency Notice (VTN)) once the procurement strategy decision has been taken to award a single source contract under the non-competitive negotiated procedure. There should not however be any unreasonable delay prior to commencing any further procurement activity.
  - d. You issue the ITN to the supplier(s).
  - e. You conduct negotiations, which, if there are two or more suppliers involved, may require them to tender against the requirement.
  - f. You evaluate whether the resulting contract delivers value for money for the requirement.
  - g. You must ensure there is a minimum of 10 calendar days between the publication of a VEAT and contract award.
  - h. You publish a [contract award notice](#) in the OJEU.
67. You can find guidance on Supplier Selection in Non-Competitive Procurement in Chapter 15 – Supplier Selection.
68. This procedure is only available in the circumstances described in Regulation 16 and you should normally use it where there is only one suitable supplier.<sup>1</sup> 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 to which the Regulations apply (should not have been excluded under Regulation 7).

## **Justifying the non-competitive negotiated procedure**

69. Details about the specific cases and circumstances permitting the non-competitive negotiated procedure are in Regulation 16. Procurers must also comply with Regulations 18(9) and (10) which state that you must pre-qualify the supplier(s) selected to negotiate in accordance with Regulations 23, 24, 25

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

and 26 and that the contract must be awarded in accordance with Regulation 31 (award criteria).

70. 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.<sup>2</sup> 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.

71. 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 19 – Statistics and Reports).

72. Procurers may also wish to use these records to assist in the completion of a VEAT (VTN) to avoid ineffectiveness under Regulation 60 (Grounds for ineffectiveness). MOD procurers must gain approval from [CLS-CL](#) for the wording of the VTN. You can find more guidance in Chapter 18 – Legal Review, Remedies and Ineffectiveness.

### **Absence of tenders or suitable tenders (Regulation 16(1)(a)(i))**

73. You can use the non-competitive negotiated procedure (under Regulation 16) if you receive no tenders, suitable tenders or requests to participate in response to a restricted, competitive negotiated or competitive dialogue procedure, but only if the terms of the proposed contract have not been substantially altered from the terms offered in the discontinued procedure.

74. An unsuitable tender differs from an irregular or unacceptable tender (see Regulation 16(1)(f) below). A tender is unsuitable where:

- a. the tender is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents;
- b. the price in the tender exceeds the contracting authority's budget. However, in order to safeguard against abuse, the price must be determined and documented by the contracting authority prior to the commencement of the procedure.

75. 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 (Regulation 16(1)(f))**

76. You may use the non-competitive negotiated procedure where you are forced to discontinue a restricted, competitive negotiated or competitive dialogue

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

procedure because of irregular tenders or unacceptable tenders. 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 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.

### **What is an irregular tender?**

77. For the purposes of this Regulation 16(1)(f), the concept of irregular tenders includes those tenders that do not comply with the specifications (see Case [C-250/07, Commission v Greece](#)).

78. You can also consider a tender to be irregular if the tender:

- a. does not comply with other formal requirements stated in the procurement documents;
- b. was received late; or
- c. was a product of bid rigging or other corruption.

### **What is an unacceptable tender?**

79. Regulation 16(1)(f) of the DSPCR states that unacceptable tenders are tenders that are rejected in accordance with Regulations 23 to 26 on suitability of tenders, e.g. the tenderer lacks the good standing, economic or technical capacity or capability to perform the contract.

80. You will normally reject a tenderer under Regulations 23 to 26 during the supplier selection process. However, a tenderer's good standing, capacity and capability may change during a lengthy procurement procedure, which may result in the tenderer failing any mandatory selection criteria you have set under Regulations 23 to 26. In such circumstances, you will reject its tender as unacceptable.

81. The concept of an unacceptable tender in Regulation 16(1)(f) in the DSPCR has been expanded by other laws. In particular, Directive 2009/81/EC means you will consider tenders to be unacceptable if they are incompatible with the requirements or instructions to tenderers made under:

- a. Regulation 5, where the economic operator fails to conform with the definition of a contractor, supplier or services provider in Regulation 3;
- b. Regulation 13, where the tender is a variant bid that fails to meet the minimum requirements stated in the procurement documents;
- c. Regulation 21, where the tender fails to meet the minimum requirements to be invited to participate in an electronic auction;
- d. Regulation 27, where the tenderer is registered on an Official List of another Member State, and fails to provide the certificate of registration or other certificate you require;

- e. Regulation 31, where you find a tender to be an abnormally low offer;
- f. Regulation 35, where the tenderer fails to comply with any conditions on obligations relating to taxes, environmental protection, employment and working conditions;
- g. Regulation 37, where the tenderer fails to comply with any conditions on subcontracting;
- h. Regulation 38, where the tenderer fails to comply with any conditions security of information; or
- i. Regulation 39 where the tenderer fails to comply with any conditions security of supply.

### **Urgency resulting from a crisis (Regulation 16(1)(a)(iii))**

82. This 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”.

83. 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.

84. 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 (Regulation 16(1)(a)(iv))**

85. You can use the non-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.

86. 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.

87. 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 (Regulation 16(1)(a)(ii))**

88. 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.

89. 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.

90. 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.

91. MOD procurers can find further guidance on exclusive rights in the [Justifying Single Source Procurement due to Exclusive Rights Commercial Policy Statement](#).

## **Research and Development (R&D) (Regulation 16(1)(c))**

92. 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 10 – Research and Development).

## **Additional purchase or hire of goods (Regulation 16(1)(b)(i))**

93. 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 goods having different technical characteristics resulting in either:

- a. incompatibility with the goods or the installation covered by the original contract; or
- b. disproportionate technical difficulties in operation and maintenance of the existing goods or the installation.

94. 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).

95. 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 (Regulation 16(1)(d)(ii))**

96. You can use the non-competitive negotiated procedure where a procurer has awarded an earlier contract for works or services and wishes the same contractor to carry out further works or provide further services, which are a repeat of the original works or services. To rely on this ground, the following five conditions must be satisfied:

- a. The new works or services must conform to the 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 the additional repetitive works or services now required.
- 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 (Regulation 16(1)(d)(i))**

97. 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 major 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 (Regulation 16(1)(b)(ii))**

98. 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 (Regulation 16(1)(b)(iii))**

99. A procurer need not consider competition where it can benefit from particularly advantageous terms in a closing down sale or where a supplier is the subject of insolvency procedures as set out in Regulation 24(4)(a), (b) or (c)..

### **Air and maritime transport services (Regulation 16(1)(e))**

100. A procurer can use the non-competitive negotiated procedure where the procurer has a need to charter aircraft or vessels for the transport of its armed forces or security forces 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.

101. It must also be the case, as is typical in this market, that the procurer has to procure such services from suppliers who will only guarantee their tenders for very short periods such that is not possible to comply with the time limits set out in any of the other procedures (including accelerated).

## **Re-advertising requirements due to changes during the award procedure**

102. 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.

103. 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.

104. 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 rewind to the stage in the contract award procedure where the risk of that discrimination or effect is eliminated.

105. Fundamental changes in the procurer's requirements (particularly in quantity, scope or duration), in selection or award criteria or in 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.

106. 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**

107. Where the amendment of an existing contract would result in that contract being materially different from the original contract, then unless an exemption applies, a new procurement procedure is required.

108. According to the Court of Justice of the European Union (EU) judgment in the *Presstetext* case C-454/06, 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; or

- 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.

109. Where the amendment(s) would result in a contract being materially different but there are grounds for relying on Regulation 16, you can use the non-competitive negotiated procedure to amend the contract. You must publish a VEAT (VTN) in these circumstances. MOD procurers must gain approval from [CLS-CL](#) for the wording of the VTN.

110. The exercising of a priced option or an option which has mechanisms for determining price will not require a new procurement procedure, provided that the scope and nature of the option as well as the conditions under which it may be used were set out within the contract. In exercising the option the overall nature of the contract must not be altered.

111. This however is a complex area and procurers are advised to seek legal advice as appropriate. MOD procurers should contact [CLS-CL](#).

### **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 2015. You should note however, that, unlike the PCR 2015, there is no open or innovative partnerships 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. There should not however be any unreasonable delay.
3. Notwithstanding any minimum time limits stipulated in the Regulations, the time limits for requests from suppliers to participate in the procedure and return their tenders must take also 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 despatch of the ITT (see Regulation 17(19)).

## Dispatch of additional information

10. The procurer must supply such further reasonable information relating to the contract documents as is requested by a tenderer provided that the request is received in enough time for the procurer to supply that information. The request must be received no less than:
- a. 4 days before the final date fixed for receipt of tenders in the restricted procedure (see Regulations 17(22)); or
  - b. 6 days before the final date fixed for receipt of tenders in the competitive negotiated or competitive dialogue procedures (Regulations 18(20)(a) or 19(21)).
11. 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 reasons for decisions

12. 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 (when the notice is sent by fax or electronically) after announcement of the award decision (see Regulation 34(2));
  - c. except to the extent that the information was supplied in the Award Decision Notice (the standstill letter) the economic operator is entitled to receive the information set out in Regulation 33(7) as soon as possible but in any event within 15 days of the procurer receiving the request. You can

find the details of the required contents of the standstill letter in Chapter 17 – Standstill Contract Award and Voluntary Transparency.

### **Contract award notice**

13. 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**

14. 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.

15. Periods include public holidays and weekends unless you expressly exclude these or you express the periods as a certain number of working days. In all circumstances, the period must include at least 2 working days.

16. 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	At least 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 – request to supply it must be received in sufficient time to allow reply to be sent 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	At least 37 days from dispatch of notice to OJEU, less: 7 days if sent electronically	Tender return period not specified in DSPCR Additional information – request to supply it must be received in sufficient time to allow reply to be sent 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	At least 37 days from dispatch of notice to OJEU, less: 7 days if sent electronically	Tender return period not specified in DSPCR Additional information - request to supply it must be received in sufficient time to allow reply to be sent 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

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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
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## 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” 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](#). The guidance enhances the definition in the DSPCR, where 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.

4. There may be aspects of your requirement which are not necessary to discuss and therefore not to be dialogued. If this is the case, you must set out in your procurement documents the distinction between the elements of the requirement which will and will not be dialogued.

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 (not less than 3) of candidates the procurer intends to invite to participate in the dialogue and if you wish to have a maximum number of tenderers, you must also state this figure in the contract notice;
  - 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 all of 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 15 – 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 in

mind the potential for this to occur 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 or phases with the selected participants. It involves discussion during meetings with individual candidates, which ends when the acquisition team can identify a solution or solutions capable of meeting the requirement. At that point, the dialogue stage is formally concluded and tenders are called for. The dialogue commences after the issue of an ITPD to the selected participants.

## **Invitation to Participate in Dialogue**

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 must 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;
- d. a reference to the contract notice;
- e. the relative weighting of criteria for the award of the contract, or where appropriate, the descending order of importance for such criteria, if this information was not specified in the contract notice.

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.2), 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 out in descending order of importance.

19. There is an inherent tension in the competitive dialogue procedure, which 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. 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. There is no obligation to have numerous rounds of dialogue.

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”.

22. 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 (unless you have prior agreement) to reveal rival solutions or confidential information which you may receive during the dialogue process. This aims 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 and the responsibility is on bidders to determine what is confidential.

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. You must not make any changes to the requirement during the dialogue phase, you may however refine it and add further detail for example. 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 but only so far as to add more layers of detail. You must not change the criteria set out in the contract notice and ITPD. There is a risk to the project where this leads to changes to the award criteria. As mitigation, and depending on the complexity of the project, you should initially set award criteria at an optimum 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 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. 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**

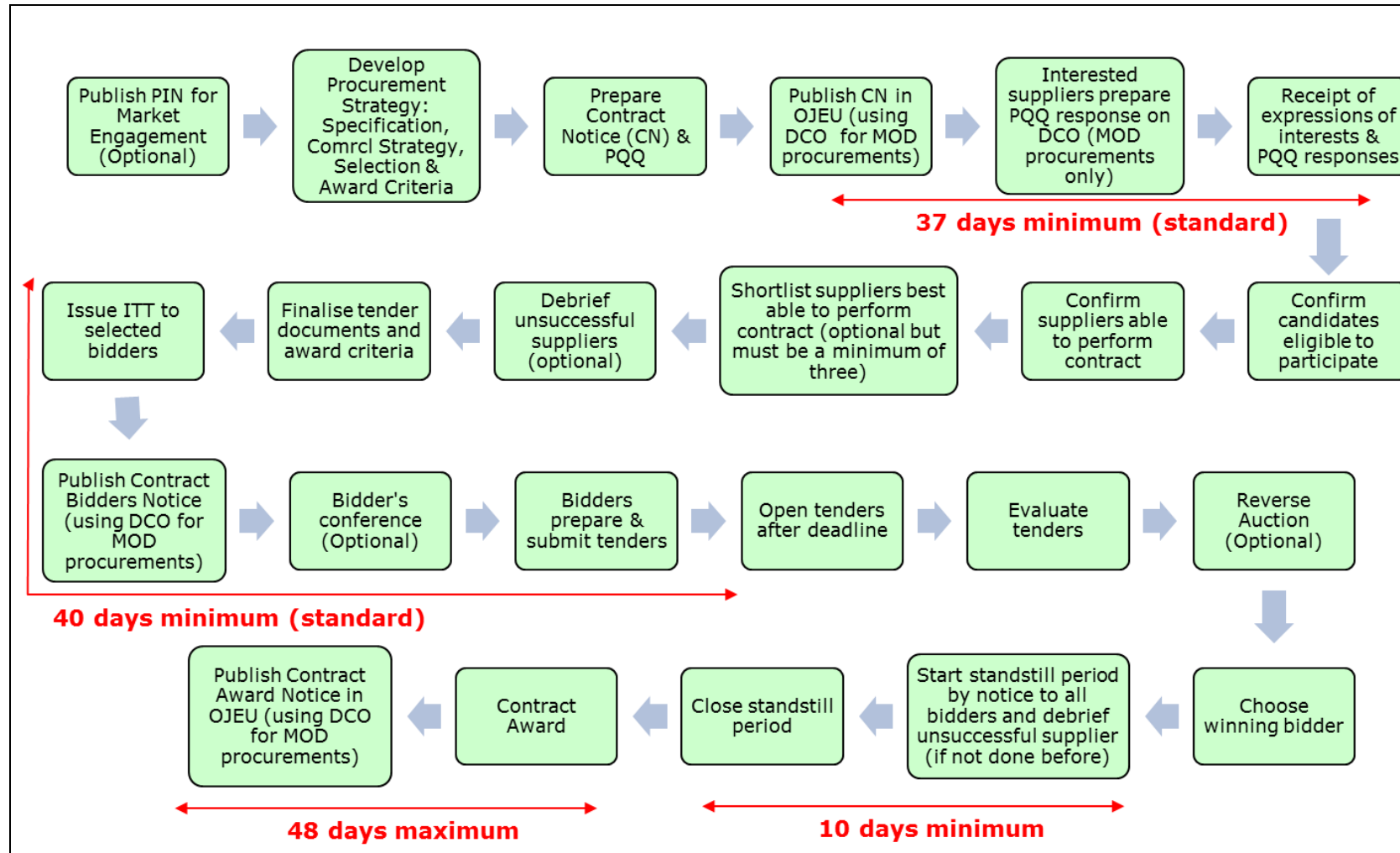
38. The dialogue formally closes when you identify one or more fully matured solution(s) as meeting the requirement. You then issue a final tender document, the Invitation to Submit Final Bids (ITSFB), to the remaining bidder(s) enabling preparation of a final bid containing everything needed to define 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, which are to be received within the date specified in the ITSFB, 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 16 – 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.

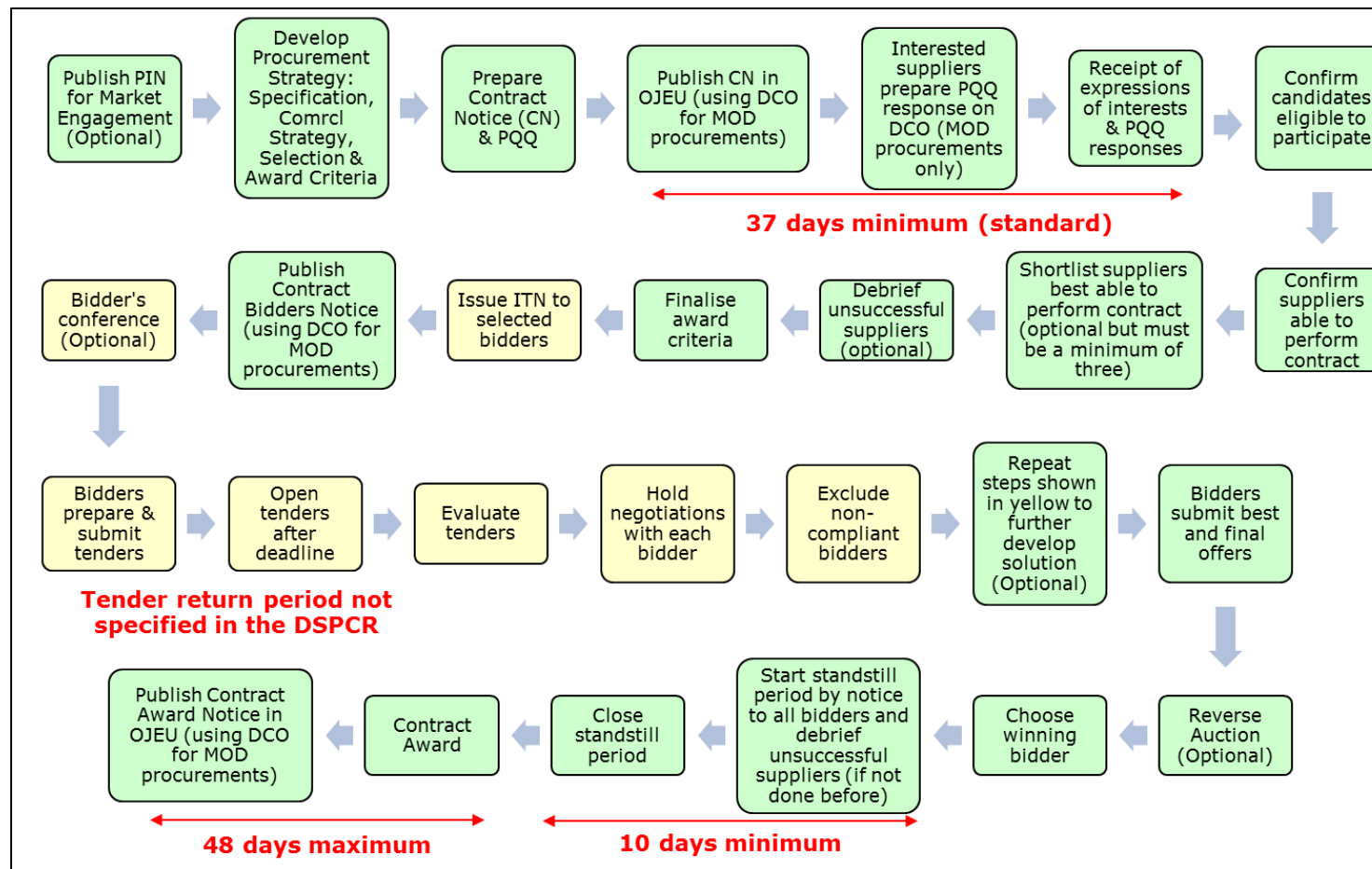
40. To mitigate against the risk of non-compliant tenders arising in the final bid, you could design the competition to include submission of a detailed tender (after detailed dialogue) and follow this up with a final round of dialogue to clear up any remaining issues, before formally closing the dialogue stage and calling for final tenders, 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 issued and matured award criteria. You are required to publish a [contract award notice](#) in OJEU. You can find guidance in Chapter 16 – Conducting the Tendering Exercise guidance and Chapter 17 – Standstill Period and Contract Award and Voluntary Transparency.

## Annex C – Summary of the Restricted Procedure Process



## Annex D – Summary of the Competitive Procedure with Negotiation Process





## Annex E – Summary of Competitive Dialogue Procedure Process

