

5.6 EVALUATION OF TENDERS

INTRODUCTION

- 1 This chapter applies to all evaluation activities for Complex and Strategic Procurements undertaken in Defence and the Defence Materiel Organisation (DMO).
- 2 This chapter may also apply when evaluating larger or more complex Contract Change Proposals. Evaluation of tenders in Simple Procurement is addressed in the Simple Procurement Chapter. For general information on evaluation of Contract Change Proposals, refer to chapter 6.7.
- 3 For Defence and the DMO to deliver on their commitments to Government they must evaluate tenders ethically and in a way that ensures the best value for money outcome. The tender evaluation and source selection process is therefore an important activity and one that must be conducted in the appropriate manner. The objective of this process is the selection of an offer that best meets the Government's requirements as defined in the request documentation such as the Request for Tender (RFT).
- 4 For the purposes of this chapter, the term tenderer should be interpreted as meaning any potential supplier responding to request documentation issued by Defence or DMO, and is not limited to a supplier actually responding to a RFT. Similarly, a reference to a RFT should be interpreted as meaning any type of request/solicitation documentation.

MANDATORY POLICY

- **Officials conducting tender evaluations must comply with the *Commonwealth Procurement Guidelines (CPGs)* including the principle of value for money.**
- **All tenders must be evaluated in accordance with the evaluation criteria and methodology contained in the request documentation and the Tender Evaluation Plan (TEP).**
- **TEP must be completed and approved before the opening of tenders following the tender closing time.**
- **For covered procurements, tender evaluation activities must be compliant with the Mandatory Procurement Procedures in Division 2 of the CPGs.**
- **Where minimum content and/or format requirements are specified in request documentation for a covered procurement, a tender not meeting those minimum requirements must be excluded from further consideration, unless the procurement officer considers that there has been an unintentional error of form.**
- **Where a tenderer fails to meet a condition for participation in a covered procurement, the tenderer must be excluded from the procurement process and their tender not given any further consideration.**
- **Where essential requirements are specified in request documentation for a covered procurement, a tender not meeting those requirements must be excluded from further consideration.**
- **The evaluation criteria advised to Industry in request documentation must not be altered during the evaluation process without a formal request documentation amendment process.**
- **The evaluation criteria advertised in the request documentation must be used to evaluate the tenders and must be related to the tender response requirements.**

- **The evaluation criteria identified in the Tender Evaluation Plan must be identical to the evaluation criteria contained in the request documentation.**
- **DMO has specific procedures contained within DMI (PROC) 13-0-001 - *Mandatory Procurement Policy Requirements for all DMO Acquisitions (including Sustainment Procurements) to Contract Signature* that must be complied with when evaluating tender documentation.**

OPERATIONAL GUIDANCE

- 5 The nature and complexity of a tender evaluation should be determined in accordance with the complexity and risk profile of the procurement and detailed in a Tender Evaluation Plan (TEP) (see Chapter 5.4). Subsequent evaluation activities must be undertaken in accordance with the TEP.
- 6 Officials conducting tender evaluations must be familiar with, and must comply with, the *Commonwealth Procurement Guidelines* (CPGs).
- 7 The operational guidance provided in this chapter is considered to be best practice across Defence. However, it is noted that Defence Groups and separate divisions may have processes, terminology and local businesses rules that differ from those described in this chapter. For example, Infrastructure Division should refer to the guidance at www.defence.gov.au/im for additional guidance on the evaluation process and executive review and approval procedures.

CHECKLIST OF ACTIVITIES OCCURRING PRIOR TO EVALUATION

- 8 Prior to conducting an evaluation the following activities should have occurred:
 - Proposal Approval obtained;
 - FMAR 10 Approval obtained (if required);
 - Procurement Approval obtained (Procurement Method Approver for the DMO);
 - TEP approved by Procurement Approver;
 - Request for Tender (RFT) documentation approved by Procurement Approver;
 - RFT advertised on AusTender, released, and open for sufficient period of time (see chapter 5.5);
 - All tenders received were correctly receipted and late tenders dealt with in accordance with Defence late tender policy (see chapter 5.5).
- 9 If any of the above activities have not occurred, specialist contracting advice should be obtained from the relevant DMO or Group contracting area.

RESOURCES REQUIRED FOR EVALUATION

- 10 Team members conducting evaluations should have the technical/subject matter skills to assess the substance of the tendered solutions. The availability of appropriate resources should be determined and identified in the TEP prior to releasing a RFT. Resources that need to be considered are:
 - availability of subject matter experts;
 - facilities for conducting evaluation; and
 - a booking for the tender room to receipt tenders (if required in your region).

- 11 Specialist advisors such as Financial Investigation Services (FIS), contracting officers, and technical experts should be given advance warning for workforce planning purposes, as tender evaluation may require intensive or exclusive allocation of personnel during the evaluation period. In the DMO, procurement offers involved in a sole source or direct source procurements must comply with the FIS consultation process outlined in DMI (PROC) 13-0-001.
- 12 For particularly high risk or commercially sensitive evaluations, consideration should be given to the appointment of an independent legal process or probity advisor. A probity plan commensurate with the risk of the proposed procurement may be required (see chapter 5.4).
- 13 Tender responses should be treated as commercial-in-confidence and should be secured accordingly. Where possible, it is recommended that secure lockable premises are booked and reserved exclusively for tender evaluation purposes. Dedicated facilities assist in maintaining the confidentiality of documents received and minimise the likelihood that tenders will be discussed in an open work environment shared by staff members who are not involved in the tender evaluation. Removing members of the evaluation team from their usual work environment also promotes greater emphasis on the task and facilitates the efficient conduct of tender evaluation activities.

EVALUATION OBJECTIVES AND PRINCIPLES

Evaluation principles

- 14 Evaluation principles such as value for money, probity, confidentiality, ethics and fair dealing, and accountability should all be addressed in the planning stages, and the TEP should contain references to current policy requirements (see chapter 5.4).

Compliance with Request for Tender and Tender Evaluation Plan

- 15 Standard request documentation sets out the conditions under which a tender process will be conducted and the evaluation criteria to be applied (see Chapter 5.4). When using the ASDEFCON templates, the evaluation criteria are found in the Conditions of Tender. All tenders must be evaluated in accordance with the evaluation criteria and methodology advised in the tender documentation.
- 16 Tender evaluations must comply with the TEP, and the TEP must be completed and approved before the opening of tenders following the tender closing time. It is best practice to have the TEP completed and approved prior to RFT release. The evaluation criteria stated in the tender documentation must be identical to the evaluation criteria included in the Tender Evaluation Plan.
- 17 The TEP should have been written so that it does not conflict with the request documentation. Where there is a conflict between the TEP, or any proposed evaluation activities, and the request documentation released to industry, officials must seek contracting or legal advice for the following reasons:
 - A change to the evaluation criteria or methodology after RFT release has the potential to jeopardise the tender process. The standard terms of ASDEFCON require that tenderers are allowed a chance to respond to any additional evaluation criteria; and
 - The TEP should not be altered (except for minor administrative updates) after the release of the request documentation, unless the request documentation has been formally amended.

Value for money

- 18 The CPGs provide that ‘value for money’ is the core principle underpinning Australian Government Procurement and the application of this principle requires a comparative analysis

of *all* relevant costs and benefits of each proposal throughout the whole procurement cycle (whole-of-life costing).

- 19 Value for money is not limited to a consideration of capability versus price, or ‘cheapest price wins.’ Value for money requires consideration of Government policy, specifically values such as open competition, efficiency, ethics and accountability. The CPGs outline these policies in further detail. Officials conducting procurement should be aware that the overall goal of the procurement process is to provide a value for money recommendation to the delegate. For further information on value for money refer to Chapter 1.2.
- 20 A value for money assessment requires that the level of risk associated with each tender, or performance under each evaluation criteria, is evaluated. For further information on risk assessment refer to paragraph 69 and chapter 3.2. Further guidance on value for money is contained in chapter 1.2 and Annex 1A.

Assessable Information

- 21 Tenders comprise everything provided by a tenderer in response to a RFT, including the executive summary, tender response requirements and supplementary information. All tender documentation should include a clause which specifically allows the Commonwealth to:
 - consider additional information related to any evaluation criteria;
 - use material tendered in response to one evaluation criterion in the evaluation of other criteria; and
 - use material tendered by the tenderer in other RFT processes conducted by the Commonwealth for purposes consistent with the Commonwealth’s procurement objectives (subject to the Commonwealth’s IP and commercial in confidence obligations).
- 22 The ASDEFCON suite of tendering and contracting templates contains clauses that reflect the requirements detailed in paragraph 21.
- 23 The use of the DMO Company Scorecard (see chapter 3.8) and reports from credit rating agencies such as Dunn and Bradstreet (usually sought via FIS) are two examples of where additional information will typically be used to evaluate criteria relating to a tenderer’s ability to supply.
- 24 When assessing additional information in any tender evaluation, officials should consider each of the following issues:
 - is the information relevant to one or more of the evaluation criteria?;
 - is the information provided from a reliable source and sufficiently specific to the tender itself?;
 - would the use of the additional information cause any probity concerns?;
 - are there any conditions found in the request documentation which would prevent the use of the additional information?; and
 - are there conditions under which the additional information was supplied that would prevent the use of the additional information?

Assessment of the Tenderer

- 25 The evaluation criteria used in the RFT should include criteria which address **both** the products or services offered by the tenderer, and the ability of the tenderer to supply the required products and services.
- 26 When assessing the tenderer against the evaluation criteria, it will generally be necessary to:

- determine the capability of the tenderer to meet the specified requirement, including technical competence, available capacity, relevant experience, availability of key personnel, financial stability and management competence;
 - identify potential risks to the achievement of the primary procurement objectives;
 - acquire satisfactory evidence of overall performance and reliability of the tenderer in undertaking similar projects in either the private or public sector;
 - evaluate the relative strengths and weaknesses of different tenderers;
 - identify and assess for individual tenderers, the key issues and priorities which must be addressed in negotiating the contract.
- 27 If the complexity or nature of the procurement requires it, a member of the FIS should be requested to assess the financial viability of each tenderer (see chapter 3.3) by lodging a webforms AD553 Professional Services Request form.

Maintaining an audit trail

- 28 Records of all stages of the procurement, including the evaluation process, must be collected and retained in accordance with departmental archiving requirements and the *Archive Act 1983* (Cth) to ensure that an adequate audit trail is retained and accountability requirements are met. Records of the evaluation process should include significant developments and all reasons for decisions made. Any evaluation may be challenged or audited through internal and external bodies and well maintained records will assist with clarifying and/or defending any challenge to the process.

Communication with tenderers

- 29 During evaluation it is essential to maintain probity, ethics and accountability. The clarification process applies in circumstances where Defence requires further information from tenderers in order to properly evaluate their tenders. Therefore, any communication between Defence and a tenderer between release of the tender and award of a contract should only be for clarification of the issues that would assist in the evaluation process. Clarification should be sought and received in writing. All communications between Defence and tenderers should go through one point of contact within Defence nominated in the request documentation. This will assist Defence in maintaining probity, ethics, fairness and accountability of the evaluation process.
- 30 Maintaining the integrity of the process by not allowing clarification to be used as an opportunity for tenderers or Defence to revise, modify the scope of, or change a tender (including the tendered price) is essential. For example, tenderers may seek to submit material after the tender closing time to correct mistakes in their tenders. This could be material to replace incorrect information in their tender or material that has been accidentally omitted from their tender. Such material should be considered a 'late tender' and should not be accepted to ensure that all tenderers are treated equally. The only exception to this is where Defence provides all participating tenderers with the same opportunity to correct unintentional errors of form. Refer to chapter 5.4, paragraph 25 for further guidance on unintentional errors of form. For further information on late tenders refer to chapter 5.5.

Site visits to tenderer's premises and product demonstrations

- 31 The RFT and the TEP may allow for tenderer's premises to be visited as part of the evaluation process. This will usually only be necessary for higher value Complex and Strategic procurements. The purpose of the site visit should be for clarification purposes, to confirm information provided within the tender or to otherwise inform the tender evaluation. The underlying principles of probity, ethics and fair dealing must be maintained. All discussions with tenderers should be fully documented and at least two Commonwealth officials with an in-depth understanding of the RFT must be present.

- 32 The RFT and the TEP may also allow for, or request, a tenderer to demonstrate the product being offered as part of the evaluation process. The product demonstration will usually occur at the tenderer's premises or an agreed location. The requirements for probity, ethics and fair dealing required when attended tenderer's premises should also be complied with when attending a product demonstration.

EVALUATION PROCESS

- 33 Tender evaluation, guided by the TEP, is generally a sequential process and will usually contain the following activities:
- conduct screening;
 - develop shortlist;
 - conduct evaluation;
 - develop and seek approval of Preliminary Source Evaluation Report (SER) and Negotiation Directive (if necessary);
 - conduct negotiations (if necessary);
 - develop and seek approval of the SER by Contract Approval delegate and any additional signatory required under the TEP.

CONDUCT OF A MORE COMPLEX EVALUATION

- 34 A typical evaluation for higher risk Complex or Strategic procurement may involve all or some of the following stages.

Initial screening stage

- 35 The aim of the initial screening is to exclude tenders from further consideration where they are incomplete or do not meet minimum content and format requirements, conditions of participation, or essential requirements specified in the request documentation. For covered procurements, failure to satisfy a condition for participation must result in a tender being declined at the initial screening stage. The conditions for participation and essential requirements must be clear and unambiguous and therefore there should not be any confusion as to whether a tenderer has met them. Further information on conditions for participation can be found in chapter 5.4.
- 36 In assessing whether a potential supplier satisfies the conditions for participation, a procurement officer must base a determination solely on the conditions for participation that the purchasing area has specified in the request documentation.
- 37 A potential supplier may be excluded on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior contract.
- 38 The screening process must be conducted in accordance with the TEP. Where it is proposed that one or more tenders will be declined as a result of the screening stage, a screening report should be developed and approved by the Contract Approval delegate. A decision to decline a tender at any point in the evaluation process must be justified and defensible and should be documented in the screening report.
- 39 Tenderers should be advised as soon as possible that their tenders have been declined.

Shortlisting stage

- 40 After an initial screening, tenders may be shortlisted. The shortlisting stage is used to decline tenders which are clearly non-competitive and have no reasonable prospect of exhibiting the

best value for money compared to other tenders. The shortlisting process should be conducted in accordance with the TEP.

- 41 The degree of analysis applied to shortlisting must be of sufficient rigour to ensure that excluded tenderers, under more detailed evaluation, stand no reasonable chance of providing the best value for money and being selected for negotiation.
- 42 Where tenders will be declined as a result of the shortlisting stage, a shortlisting report should be developed and approved by the Contract approval delegate.

Comparative evaluation stage

- 43 The comparative evaluation stage should be conducted in accordance with the TEP. The comparative evaluation stage involves the comparative assessment of shortlisted tenders. Comparative assessment involves the ranking of tenderers in relative order of merit against each evaluation criteria (but ranking against subcategories may also be required), and the overall relative merit of tenders against all criteria, including risk. This provides the basis for determining value for money and for recommending the preferred tenderer (if any) to the delegate.
- 44 If it becomes evident during the comparative evaluation stage that a tender is clearly not competitive, a decision may be made to set aside the tender from further evaluation. The SER should justify any decision to set aside a tender. Setting aside does not require separate approval, as these tenders are not formally declined.
- 45 In setting aside tenders, procurement officers need to be confident that:
 - remaining tenders may prove more suitable and provide better value for money; and
 - there are no serious impediments to the achievement of an executable contract with one of the remaining tenderers.
- 46 Where tenders are set aside, tenderers would not necessarily be advised that their offers have been declined. This may be done when further evaluation of offers has confirmed that offers remaining are viable.

EVALUATION METHODOLOGIES

- 47 Evaluation methodologies are the mechanisms used to determine the value for money nature of an offer in accordance with the evaluation criteria. Commonwealth policy should inform any selection of a preferred methodology with an emphasis on fairness and appropriateness to the capability that is being evaluated. It is impracticable to use a single methodology for all procurements due to the unique nature of each requirement and the many differences in the range of goods and services purchased by Defence. The choice of methodology should be set out in the TEP and all members of the evaluation team should be fully briefed on and confident of applying the selected methodology.
- 48 Some procurement areas prefer a highly quantitative, systematic ‘value tree’ approach or the use of proprietary software evaluation packages. Quantitative methods may be used for any or all of the evaluation criteria; however these should be in the context of a broader qualitative approach.
- 49 The tender request documentation may have weighted the evaluation criteria. For further information refer to paragraphs 60 to 66 below.
- 50 It is best practice to seek specialist contracting advice to validate methodologies and to assist in choosing the appropriate methodology for higher risk Complex and Strategic procurements.
- 51 Whichever methodology is chosen, it is important to remember that it is a tool to assist in evaluation only, since the final decision must be made on the basis of value for money. The experience, training and professional judgement of the officials conducting evaluation remains integral to the evaluation process.

Qualitative assessments

52 A qualitative evaluation is a written descriptive and analytical assessment that addresses the relative merits of tenders in order to make a value for money judgment. This form of evaluation is a suitable methodology for all Simple, Complex and Strategic procurements and should form the basis of all source recommendations.

Comparative Assessment and Ranking Method

53 Comparative assessment involves ranking tenders in their relative order of merit against the requirements of the request documentation and evaluating each criterion and the risks associated with each criterion, to arrive at a recommendation of the overall merit of the tender against all requirements.

54 The TEP should define the ratings to be used during the comparative assessment to assist in differentiating between tenders. In particular, specific guidance should be provided on the interpretations that are to apply in rating the tenders and on any other aspects to be considered in the determination of value for money. Ratings that are commonly used include:

- **exceeds:** the tendered solution exceeds the requirement specified in the request documentation in a manner which offers significant additional benefits to Defence;
- **compliant:** the tendered solution meets the requirement specified in the request documentation or, where it exceeds the requirement, there is no significant additional benefits to Defence; and
- **deficient:** the tendered solution does not meet the requirement specified in the request documentation.

55 Deficiencies are often further classified as:

- **critical:** a deficiency that cannot be readily remedied and which is of such significance that it may seriously prevent the principal project objectives from being achieved or does not comply with Defence or DMO Mandatory Policy;
- **significant:** a deficiency that has the potential to prevent an element of the principal project objectives from being achieved; and
- **minor:** a deficiency that has no substantial implications for the project objectives and, subject to discussion with the tenderer, may be acceptable without remedial action.

56 Following the assignment of ratings and risk assessments to each evaluation criteria, tenderers should be ranked in relation to each evaluation criterion (see Table 1: Comparative information table) and a supportive qualitative assessment developed for inclusion in the SER.

Criteria	Tenderer A	Tenderer B	Tenderer C
1.	First	Second	Third
2.	Second	Third	First
3.	Second	Third	First
4.	First	Second	Third
Overall Ranking*	Second	Third	First

***Note:** This table is an example, and provides a summary of recommendations only. To understand why Tenderer C is ranked above Tenderer A, it would be necessary to refer to the supportive qualitative assessment. In this example the qualitative assessment would have to address the importance given to criteria 2 and 3.

Quantitative assessments

- 57 Quantitative assessments involve the assignment of numerical values to the level of compliance and/or associated risk with the requirements set out in the RFT. Especially for technical analysis, it can be very effective to assign relevant numerical values to requirements of the SOW or specification.
- 58 The TEP should set out the numerical values that apply to the different levels of compliance and risk. The numerical values are then aggregated to produce a final numerical value for each tender.
- 59 Advantages of using quantitative assessment include:
- degrees of difference between tenders are easy to demonstrate;
 - rigour is added to arguments for source selection;
 - subjectivity in the evaluation may be reduced; and
 - ranking of tenderers is easier.
- 60 A quantitative assessment must be used in conjunction with the qualitative comparative assessment and ranking method described above. A supportive qualitative assessment should be developed for inclusion in the SER and a qualitative assessment must be used to provide a high level summary describing each tenderer's performance against the evaluation criteria.

USE OF WEIGHTINGS IN TENDER EVALUATIONS

- 61 The tender request documentation may have weighted the evaluation criteria. For further guidance on the weighting of evaluation criteria refer to Chapter 5.4.
- 62 A weighted quantitative evaluation methodology may be used to determine the relative merits of each tender against an individual criterion, or within individual Tender Evaluation Working Groups (TEWG) or with regard to a particular subject matter, e.g. technical compliance or integrated logistics support.
- 63 Weighting methods used in evaluations must take into account any prioritisation of requirements that has been used for individual elements of the SOW or specification. For example, elements of the SOW or specification may be identified in the RFT documentation as either:
- Essential;
 - Important; or
 - Desirable.
- 64 All care must be taken to ensure that terms used in the request documentation to indicate requirements prioritisation are removed when preparing the draft contract (after the evaluation period and prior to negotiation).
- 65 In general, weightings should not be used to attribute levels of importance to various and disparate components of the tender, for example assigning a numerical value against contractual compliance, integrated logistics support or price.
- 66 Weightings should not be used in TEWGs to determine the overall assessment for that TEWG. It is recognised, however, that each case will need to be examined on its merits, taking into account the particular circumstances and the standard practices of the relevant procurement area.
- 67 Weightings may be applied across several TEWGs or evaluation components where the evaluation methodology being used is well established and the source selection is not based solely on a quantitative assessment. Where a commercially available e-procurement evaluation tool is used which incorporates a weighted quantitative evaluation methodology, the findings of

the evaluation must be supported by a qualitative assessment that addresses the relative merits of each tender.

NORMALISING

- 68 Where tenderers have submitted their offers inconsistently it may be necessary to ‘normalise’ the competing offers so that there is a common basis for comparison. Normalising may be required for reasons including the following:
- firm and variable prices are offered;
 - offers submitted have different price components or indices in the price variation provisions;
 - different delivery arrangements are offered;
 - offers are submitted with different maintenance/training etc requirements incorporated;
 - differing warranty periods are offered;
 - differing settlement discount arrangements are offered; or
 - different payment arrangements are offered.
- 69 Specialist contracting advice should be sought before attempting to ‘normalise’ offers. Chapter 3.3 provides further guidance on normalising the financial aspects of offers.

ASSESSING RISK

- 70 Risk should be factored into the value for money assessment of tenders. Procurement officers need to make an assessment of the level of risk associated with a tenderer’s offer. This is done by assessing the risks associated with the tenderer’s ability to perform and deliver against the offer (e.g. are the tenderer’s financial and human resources adequate) rather than just the risk of the tenderer not meeting the request documentation requirements (e.g. the tenderer not furnishing all the requested documents). The compliance assessment will identify any difference between the request documentation and the offer.
- 71 The risk assessment should take into account not only the risk associated with the tenderer but also the risk associated with key players in the tenderer’s team, including subcontractors. The risk assessment should involve:
- identification of risks that could impact on the tenderer’s ability to deliver what it has offered;
 - an estimation of the likelihood of each identified risk occurring;
 - an estimation of the consequence of the occurrence of each risk on the overall project outcome; and
 - the combination of the likelihood and consequence to determine the level of risk both individually and across the entire tenderer’s risk profile.
- 72 Further guidance on assessing risk is contained in chapter 3.2.

DETERMINING VALUE FOR MONEY

- 73 The value for money assessment must take a holistic view of the tenderer and its offer against the evaluation criteria. The value for money assessment should include:
- compliance and risk assessments for all tenderers against the conditions of participation and evaluation criteria, including relative ranking of tenderers against each criterion;

- an explanation of the key areas for discrimination between the tenderers;
- a presentation of tendered prices and an explanation of cost risk attributable to each tenderer;
- any implications relating to through life support;
- an overall assessment of the risks associated with each tender and an indication of the risk management strategies that are considered necessary;
- an explanation of the actions that would be necessary to enter into a contract i.e. negotiation required in relation to contractual non-compliance, in the form of a draft Negotiation Directive; and
- a ranking of shortlisted tenderers.

74 Further guidance on assessing value for money is contained in chapter 1.2 and Annex 1A.

EVALUATION OF WHOLE OF LIFE COSTS

75 Evaluation of whole of life costs, sometimes referred to as life cycle costs, is a critical aspect of any evaluation. Whole of life costs are the total of the direct/indirect, recurring/non-recurring, fixed/variable costs arising from a decision to purchase, and are incurred in respect of the purchased item over its life cycle from proposal to disposal.

Use of Whole of Life costing

76 For any Defence procurement, price is seldom the only relevant cost of a purchase. A minimum consideration for all procurement is a prediction of useful life. This is relevant even for the Simple Procurement of consumable items. It is, however, not worthwhile to undertake a detailed whole of life cost evaluation for short-life and low-cost items when the comparison is with other equally simple options.

77 In making a value for money judgement, a comparison of the relevant benefits and costs on a whole of life basis should be undertaken. This requires that whole of life costing principles be used in the evaluation of offers. In many cases, this will be a simple process as the total costs and benefits of ownership will be readily apparent. A formal evaluation should be undertaken when comparing options with noticeably different initial prices, life expectancy, ongoing costs and disposal costs/residual values. In these circumstances professional advice should be sought from financial advisers. For further information refer to chapter 3.3.

Costs to be considered in Whole of Life costing

78 Costs to be included in whole of life costing calculations should include only factors that can be assigned a monetary value for evaluation purposes. If a financial value cannot be given to a factor with certainty or confidence, then that factor must be evaluated separately. Costs that cannot be quantified with certainty, although they will have financial consequences, will include factors such as ease of purchase, delivery time, supplier and equipment reliability, equipment down time and availability of spares. Trade-in offers should also be considered in the whole of life analysis.

79 There is no simple formula for whole of life costing. Assessing whole of life costs will require some professional judgements about options and future events. The incorporation of the whole of life costed items, factors with uncertain costings and factors with no costings will comprise the value for money equation.

80 The implementation of the whole of life costing process will result in significant benefits in the form of awareness of and planning for future opportunities and risks, and increase the probability of a successful procurement.

81 Advice on financial evaluation methods can be obtained by contacting the Financial Investigation Service by lodging a webforms AD553 Professional Services Request form.

CARTELS AND TENDERER COLLUSION

82 Regardless of the evaluation methodology adopted in connection with a procurement exercise, procurement officers need to be aware of the possibility of tenderer collusion.

What is a Cartel?

83 A cartel exists when businesses, instead of competing, agree to act together in a way that defeats competition. This is designed to drive up the profits of cartel members while maintaining the illusion of competition.

Collusion and the Law

84 Anti-competitive conduct is prohibited under Australian law. There are four types of conduct that are defined as cartel behaviour. It is common for cartels to employ more than one strategy at any given time. These are:

- bid rigging;
- price fixing;
- market sharing; and
- output restrictions.

85 Collusion between tenderers can take a number of forms in the procurement process. All are unethical and most are illegal. Examples include attempts by suppliers at market sharing or collusive tendering. The most common form of tenderer collusion involves leaking or sharing one party's tender information (usually about price) with another tendering party. The result is usually that the Commonwealth fails to achieve value for money. Conduct between tenderers that is designed to 'share the work' may be contrary to Trade Practices legislation. 'Covering' quotes – where one party deliberately submits an uncompetitive quote to make another party's quote look competitive - may also be contrary to Trade Practices legislation.

Reporting and inquiries

86 Where tenderer collusion is suspected, procurement officers should contact their relevant contracting specialist or the Office of the Special Counsel. More information on cartels can be found in the Australian Competition and Consumer Commission (ACCC) publication "*Cartels: deterrence and detection - a guide for government procurement officers*" available on the ACCC website at: www.accc.gov.au.

OFFER DEFINITION

87 Offer Definition (OD) can be defined as a stage within the tender evaluation process in which shortlisted tenderers further define specific aspects of their tenders before Defence completes its source selection activity and selects the preferred tenderer. OD generally involves the shortlisted tenderers refining a number of key plans and may, in certain circumstances, include the conduct of risk reduction workshops.

88 Defence uses OD to assist it in making a source selection decision. OD aims to reduce risk by optimising the level of detail that is agreed between the Commonwealth and the shortlisted tenderer(s) prior to contract signature.

89 In some circumstances, OD activities allow Defence to reduce uncertainty and provide greater clarity on the level of detail that tenderers are required to provide in response to the RFT which may assist in reducing the cost of tendering. However in most circumstances OD is likely to increase the cost of tendering for those shortlisted to participate in the OD activity.

90 Where Defence plans to undertake OD activities, appropriate clauses should be included within the RFT documentation. Appropriate clauses are included within ASDEFCON (*Strategic*

Materiel). Where the Commonwealth requires that OD is undertaken after the release of an RFT, legal and probity advice should be sought. Refer to chapter 3.13 for further information.

- 91 An OD contract (or deed) between the Commonwealth and shortlisted tenderers maybe required prior to entering into OD activities. This deed should have legal sign-off to ensure that it does not jeopardize the process set out in the RFT.

When should it be used?

- 92 OD should be used in two scenarios:

- where Defence intends to adopt a ‘minimal’ RFT approach in which tenderers are asked to provide limited amounts of information and Defence develops a shortlist on the basis of that information (see chapter 5.4); or
- where a full RFT has been released and Defence wishes to ensure that all critical plans are agreed prior to contract signature.

- 93 Use of OD activities enables Defence to better assess the extent to which shortlisted tenderers are able to meet Defence requirements for the particular acquisition. Based upon this information, Defence should be able to finalise its evaluation and selection of the preferred tenderer or tenderers prior to entering into negotiations. OD has the added advantage of allowing plans finalised during OD activities to be included within any resultant contract without the need for further negotiation. Use of the OD approach may also assist Defence to achieve a common understanding with the shortlisted tenderer that may in turn considerably shorten any contract negotiation phase.

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- 95 Where the shortlisting process has led to development of a ranked order of merit and it is assessed that the outcomes of the OD activities will not change this order, then OD activities should not normally be undertaken. In these circumstances, Defence should move directly to contract negotiations unless contract negotiations are unlikely to be successful without OD.

- 96 OD should only be used where there is a legitimate requirement for further clarification and risk reduction and should not be used merely to maintain competitive tension between tenderers.

Selection of the Offer Definition process

- 97 The types of OD activities that can be conducted during an OD stage will depend upon the process that is selected and the activities notified to tenderers as possible OD activities in the RFT. ASDEFCON (*Strategic Materiel*) contains several OD clause options.

Offer Definition activities

- 98 Typical activities that may be undertaken in the OD stage include:

- the review and agreement of key contract plans, e.g. the Intellectual Property Plan and the System Safety Program;
- facilitation of risk-reduction activities; and
- other activities that will assist Defence to rank the shortlisted tenderer.

Probity issues for the Offer Definition process

- 99 Probity advice may be required when conducting OD activities. Careful consideration should be given to the selected OD activities to ensure that they result in a fair tender process, i.e. do not unfairly disadvantage or advantage a tenderer. In most circumstances, Defence will only be able to request shortlisted tenderers to participate in OD activities that have been identified in the RFT or draft OD contract (or deed).

- 100 Specific probity issues that may need to be addressed include:

- the evaluation and OD process should be carefully designed to ensure that a tenderer who was not shortlisted to participate in the OD activities cannot subsequently argue that it could have provided a better value for money tender than the other shortlisted tenderer;
- the OD process should be conducted in a manner that ensures an unsuccessful shortlisted tenderer cannot argue that Defence unfairly assisted a tenderer during the OD activities while not providing the same assistance to the other shortlisted tenderer/s;
- Defence will need to clearly advise the shortlisted tenderers about how OD activities are to be undertaken (e.g. information requirements, deliverables, duration, etc), and Defence's role in the OD phase (e.g. whether this is simply to provide information and to answer questions, or whether it is intended that Defence will actively participate in the development of the documentation by the tenderers). In the latter case, there would be an increased risk of allegations that Defence provided greater assistance to one shortlisted tenderer over another; and
- the OD activities should be carefully selected and not altered during the OD stage. Where additional activities are required, Defence should write to each of the shortlisted tenderers to seek their approval to include the additional OD activities and ensure that the inclusion of these activities does not impact upon the ability of a non-shortlisted tender to represent better value for money.

Revision of tendered pricing during the Offer Definition stage

101 Tenderers may revise their tendered pricing based on the outcomes of the OD activities, however for competitive tenders:

- OD should not be used by tenderers to change the fundamental basis on which their pricing has been calculated; and
- revised pricing should not be considered where the revision is considered to change the underlying basis of the tendered price or where such consideration would contravene Defence's obligations to treat all tenderers fairly.

SOURCE SELECTION RECOMMENDATION

102 A source selection recommendation should be made to the Contract Approver identified in the TEP. The source selection recommendation to enter into negotiations requires an evaluation of tenders and a submission of findings. DMO has specific procedures contained within DMI (PROC) 13-0-001 that must be followed when developing a SER.

Source Evaluation Report

103 For high value Complex and Strategic procurements a more structured evaluation report referred to as the SER must be used to make the source selection recommendation. A typical SER could take the form of:

- Part 1: **Executive Summary**. The executive summary provides an overview of the evaluation, findings reached and recommendations.
- Part 2: **Body of Report**. The body of the report should contain:
 - a) an introduction;
 - b) reference to the approved TEP;
 - c) details of the evaluation process and methodology used;

- d) results of the comparative assessment of the tenders against each other, drawing on information contained in the individual evaluation reports contained in Part 3; and
 - e) value for money considerations, ranking of offers and recommendations etc.
- Part 3: **Enclosures** (individual tender evaluations). Enclosures contain the documentation from the detailed evaluation, the individual evaluation of each tender against the evaluation criteria and the original of all request documentation. The associated papers consist of original copies of request documentation and the evaluation plan. This documentation supports the audit trail.
 - Part 4: **Associated Papers**. By the end of the evaluation process for high value Complex and Strategic procurements, there should be:
 - a) clarified and ranked tenders;
 - b) a value for money target;
 - c) identified areas for negotiation;
 - d) identified necessary contract terms;
 - e) developed strategies for managing contract negotiations; and
 - f) a comprehensive record of the evaluation.
- 104 Recommendations in the SER may include that:
- a particular tender be accepted;
 - negotiations commence with one or more tenderer/s; or
 - none of the tenders be accepted.

EARLY NOTIFICATION OF TENDER OUTCOME

- 105 For Complex and Strategic acquisitions Defence may provide early notification to tenderers who have been declined for failing to meet a mandatory requirement so that they can channel their efforts and resources toward other business opportunities. For less Complex acquisitions, where the selection is made in a single evaluation process, the unsuccessful tenderers' offers should be declined within 48 hours after the award of the contract. For further guidance on Defence policy on the public announcement of preferred tenderers refer to Chapter 5.7A.
- 106 In a staged evaluation suggested decline/acceptance letters are included in the Process Template section of the Procurement and Contracting Branch website:
- **Unsuccessful tenderers:** offers are declined immediately after the initial shortlist has been approved by the appropriate authority;
 - **Shortlisted tenderers:** at the same time as notifying unsuccessful tenderers, shortlisted tenderers (i.e. those tenderers included in the shortlist) should be notified;
 - **Non-preferred tenderers:** following source selection by the appropriate authority, non preferred tenderers should be notified;
 - **Preferred tenderer:** the preferred tenderer or tenderers are notified and invited to enter into contract negotiations; and
 - **Unsuccessful shortlisted tenderers:** when a contract has been awarded, the remaining shortlisted but unsuccessful tenderers should be notified within 48 hours.

PREPARING FOR NEGOTIATIONS

- 107 The evaluation process should identify key issues and priorities which must be addressed during negotiations with individual tenderers. These issues may be used to:
- prepare for negotiation;
 - determine the negotiation process to be adopted, e.g. the estimated time required for negotiations and/or whether sequential or parallel negotiations will be used etc;
 - determine the technical skills required in the negotiation team; and
 - develop the negotiation directive.
- 108 Guidance on negotiation is contained in chapter 5.7A.

TENDERER SUBSTITUTION

- 109 In many Complex procurements, an extended period of time may pass between the issue of request documentation and the award of a contract. A company's ownership can change over that time. To accommodate the possibility of such a change in company ownership, the conditions of tender may make provision for the substitution of one company (already involved in a tender process) by another legal entity (the new or prospective owner of the tendering company). This situation poses many risks to Defence and accordingly a thorough analysis should be undertaken of the new company's management, relevant experience and financial capacity to undertake the contractual requirements adequately before approval for substitution is given.

KEY REFERENCES

- *Commonwealth Procurement Guidelines – December 2008*
- *For DMO, DMI (PROC) 13-0-001 - Mandatory Procurement Policy Requirements for all DMO Acquisitions (including Sustainment Procurements) to Contract Signature*