



**Australian Government**  
**Department of Defence**  
Capability Acquisition and  
Sustainment Group

# Tender Evaluation in Complex Procurement Better Practice Guide

Version 1.0  
12 September 2017



# Tender Evaluation in Complex Procurement Better Practice Guide

## Defence Scope

This publication should be considered better practice guidance for Defence staff undertaking tender evaluation in complex procurement.

## Authority

Procurement Better Practice Guides do not create new mandatory procurement policy. All Defence mandatory procurement policy is contained in the Defence Procurement Policy Manual. Any mandatory procurement guidance referred to in this Better Practice Guide is sourced from appropriate legislation and mandatory Commonwealth and Defence policy.

## Monitor and Review

This BPG will be reviewed whenever relevant sections of any of the identified references are updated or amended.

All feedback and suggestions for improvement should be sent to: [procurement.policy@defence.gov.au](mailto:procurement.policy@defence.gov.au)

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This publication should be attributed as the Better Practice Guide – Procurement Delivery Models.

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# Chapter 1

## Introduction

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### Overview

1 This Guide should be read in conjunction with the Defence Procurement Policy Manual (DPPM) and Complex Procurement Guide (CPG) and provides practical guidance to assist those conducting tender evaluations for complex procurements. The primary purpose of this Guide is to assist users to understand some of the key issues to consider when conducting tender evaluations in complex Defence procurements. It is important to note that it is rarely the case that any two procurements are the same and there is no 'one size fits all' approach when conducting tender evaluations. Tender evaluations should therefore, be appropriately tailored to reflect the specific characteristics of the particular procurement at hand.

2 Tender evaluation represents a critical stage in complex procurements and, as noted in the Complex Procurement Guide (CPG), it will be more likely to be successful where earlier activities in the procurement lifecycle have been conducted appropriately - such as the development of the procurement strategy, the request documentation and the tender evaluation plan (TEP).

3 While this Guide principally addresses tender evaluation in the context of a request for tender for a major capital acquisition project (using an ASDEFCON template), the principles outlined in this Guide also apply to other forms of request documentation (such as an invitation to register interest, or a request for proposal) as well as other kinds of Defence procurements. Defence officials need to consider and apply the principles appropriately in light of the nature of the procurement and the request documentation being used.

4 For further advice regarding the conduct of tender evaluation, Defence officials should refer to the [Commercial Help Desk Kiosk](#).

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### Key principles

5 Defence officials should plan and conduct tender evaluations to reflect the nature, risk and complexity of the particular procurement, and so that Defence can be confident that it achieved the best value for money for the Commonwealth, the process is publicly defensible and is able to withstand challenge and scrutiny.

6 The CPRs require Defence officials to undertake their tender evaluations having regard to key principles such as value for money, probity, confidentiality, ethics and fair dealing, accountability and transparency. Adoption of the steps described in this Guide will assist those conducting complex procurements to adhere to these principles.

7 These principles can be summarised as follows:

- **Value for money** - The key objective of Defence procurement is to obtain value for money. The tender that offers best value for money will not necessarily be the tender which offers the lowest price. Defence officials need to assess which tender offers the best value for money having regard to an assessment against each of the evaluation criteria - including price - and the risks associated with the tender and tenderer.
- **Fairness** - Defence officials should not unfairly advantage or disadvantage any tenderer. All tenderers should be given the same information about the tender process and afforded an equal opportunity to participate in it.
- **Confidentiality** - The CPRs require that tenders are treated as confidential before and after the award of a contract (see CPRs, paragraph 7.21). Defence officials should therefore take appropriate measures to protect the confidentiality of tenders. Tenders and evaluation information should be kept secure and confidential, with distribution of information being undertaken on a need to know basis.
- **Probity** - When undertaking tender evaluation, Defence officials should exercise the highest standards of probity and fair dealing. This includes ensuring there is no bias or favouritism throughout the process, and promptly declaring and managing any conflicts of interest.
- **Accountability and transparency** - Defence officials should maintain a clear audit trail for all procurements. All key steps taken and decisions made should be promptly and

accurately documented in a logical sequence and using clear and concise language to ensure the process is able to withstand challenge and scrutiny. The level of detail of documentation should be commensurate with the scale, scope and risk of the procurement.

**Example:** In a particular tender process, Defence selected a preferred tenderer on the basis that it offered the best technical solution and one of the lowest overall prices, and hence assessed that it offered significantly better value for money than the other tenders. The incumbent contractor was unsuccessful and challenged the outcome of the tender process.

Because the tender evaluation team was subject to significant time pressures, it did not document the evaluation process and the outcome in sufficient detail in the evaluation report. In addition, the evaluation report did not fully address the compliance issues and risks which were identified and considered in making the source selection decision. As a result, while the actual outcome of the tender evaluation was fair and defensible, the poor documentation of the evaluation made it more difficult for Defence to justify and defend the outcome in response to the challenge by the incumbent contractor.

## Chapter 2

# Preparing for tender evaluation

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### Key considerations arising from the request documentation

- 1 Defence officials need to fully understand what is being sought through the request documentation to be able to properly plan and prepare for tender evaluation. While the TEP is the manifestation of this planning and preparation, the content of the TEP will in large part be driven by how Defence officials have drafted the request documentation, and in particular what the request documentation says about the evaluation criteria, information deliverables and requirements prioritisation.
- 2 The following discussion expands on the guidance on these matters provided by Chapters 3 and 5 of the CPG.

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### Evaluation criteria

- 3 As required by the DPPM, the evaluation team is required to evaluate tenders against the evaluation criteria contained in the request documentation. These criteria will also be set out in the TEP. The evaluation criteria are used to assist the evaluation team to objectively assess tenders and identify which tender offers the best value for money. The TEP should provide the clear and defensible basis for how the evaluation team will evaluate tenders against all of the evaluation criteria, and should ensure that the evaluation team does not introduce any additional criteria during the evaluation.
- 4 Given the wide range of Defence procurements, the evaluation criteria can vary between them, however, in the context of procuring defence materiel, the evaluation criteria detailed in the ASDEFCON templates are comprehensive and typically will not require amendment. Nevertheless, template evaluation criteria should always be reviewed to ensure that they are appropriate for the relevant procurement. Where amendments are justified, specialist contracting and/or legal advice should be obtained to ensure that the amendments do not preclude Defence from assessing key aspects of each tender and that the consequences of amending the evaluation criteria are clearly understood. It is important to ensure that the evaluation criteria allow Defence to assess all relevant aspects of a tender to enable an effective procurement outcome.
- 5 As noted in the CPG, Defence templates do not typically weight evaluation criteria or put them into any order of priority or importance. This allows the evaluation team to undertake its evaluation and determination of best value for money on a balance of its assessment of tenders against all the criteria.
- 6 The CPG provides general guidance about the merits of weighting evaluation criteria – which may be done qualitatively (for example, Important, Very Important etc) or quantitatively (for example, 10%, 20% etc). As noted in the CPG, Defence officials need to ensure that the weightings are appropriate and accurately reflect Defence's requirements. Otherwise, it can result in Defence being unable to place appropriate significance on key issues and risks identified as part of the tender evaluations (for example, if a significant issue or risk is identified but the evaluation criterion to which it relates has been given a very low weighting). Specialist contracting and/or legal advice should be obtained before weighting evaluation criteria in order to ensure that the potential effects are appraised and understood.
- 7 Evaluation criteria are communicated to tenderers but the relative importance of each evaluation criteria is not normally provided to tenderers. Evaluation criteria should be objective, measurable, clear and transparent.

**Example:** The evaluation criteria for a Defence procurement were weighted in the request documentation. A weighting of 5% was given to the evaluation criterion relating to the tenderer's compliance with the terms of the contract and a weighting of 5% was given to the evaluation criterion relating to the financial standing of the tenderer. A tenderer proposed a technically superior solution at a competitive price, however, the tenderer had a poor financial standing and proposed significant changes to the risk allocation in the contract.

The poor financial standing and the proposed changes to the contract risk allocation were such that Defence could not accept the tender. However, because the relevant evaluation criteria were given such a low weighting of 5%, it meant that it was difficult for Defence to exclude the tender or rate it below other tenders in the assessment against the evaluation criteria.

In the end, and after seeking probity advice, Defence was able to take these matters into further consideration as part of assessing the overall risk associated with each tender and hence in the assessment of overall value for money. However, the weighting of the criteria did complicate the evaluation process. The CPG and Chapter 3 of this Guide discuss quantitative scoring based evaluation methodologies further.

### Tender information deliverables

8 Defence officials should ensure that tenderers are required to submit only that information which is necessary to enable Defence to properly assess each tender against each of the evaluation criteria and to make an overall value for money assessment. In addition to increasing the costs of tendering, requiring tenderers to submit unnecessary information can make tender evaluation more difficult due to the volume of information to be assessed and increase the tender evaluation period unnecessarily. In addition, Defence needs to be careful that it does not unnecessarily request the same information in multiple formats.

9 In ASDEFCON templates, the information which tenderers are required to submit as part of their tender is set out in Tender Data Requirements (TDRs) which are attached to the conditions of tender. The ASDEFCON TDRs are comprehensive and each TDR has been mapped to evaluation criteria in the conditions of tender. Nevertheless, in preparing the request documentation for a particular procurement, Defence officials should confirm that the TDRs capture appropriate information requirements in relation to the relevant evaluation criteria. This mapping exercise will assist to identify any gaps in the TDRs or evaluation criteria.

**Example:** Defence conducted a procurement for the provision of transportation services. Due to the specific nature of the services and the requirements of the procurement, the evaluation criteria in the applicable ASDEFCON template were modified to meet the requirements of the procurement. During tender evaluation, the evaluation team identified two issues. First, the amendments to the evaluation criteria had not been carefully thought through and because a number of the criteria were quite narrow, this made it difficult for the evaluation team to assess a number of issues which it had identified during evaluation. Second, Defence had not made the appropriate corresponding amendments to the TDRs (by mapping the TDRs against the evaluation criteria) and, as a result, tenderers were not required to submit all of the information which Defence required in order to make an assessment against the relevant evaluation criteria.

While the evaluation team was able to complete the tender evaluation and identify a tenderer which represented best value for money, many issues that should have been able to have been addressed during the evaluation needed to be explored and resolved during contract negotiations with the preferred tenderer.

### Requirements prioritisation

10 Defence officials will often prioritise Statement of Work (SOW) and specification requirements in request documentation. Requirements prioritisation can be an effective tool for communicating to tenderers the relative importance of individual requirements in the SOW or specification, and can therefore assist in the correct technical evaluation of tenders albeit also adding complexity.

11 Where Defence prioritises its requirements, this is usually done by reference to one of the four following categories:

- a. Essential: Indicates a requirement that has the highest level of consideration without which the achievement of the capability would not be possible;
- b. Very Important: Indicates a requirement that has a high level of consideration and without which the achievement of the capability may not be possible;
- c. Important: Indicates a requirement that has a moderate level of consideration and which is necessary to achieve an intended functionality and/or level of performance, however there is some latitude regarding meeting the intended functionality and/or level of performance; and
- d. Desirable: Indicates a low level of consideration, that is, not a key factor in the achievement of any intended functionality and/or level of performance, but which is perceived as beneficial.

12 As noted in the DPPM and the CPG, it is important that Defence officials do not unnecessarily categorise requirements as being 'Essential'. This is particularly the case for those tenders where the

additional rules in Division 2 of the CPRs apply concerning the exclusion of tenders that do not achieve 'Essential' requirements. The key reasons why the use of 'Essential' requirements should be minimised are:

- a. where the procurement is above the relevant procurement threshold under the CPRs and is not otherwise exempt from Division 2 of the CPRs, the failure to comply with an 'Essential' requirement means that the tender must be excluded as part of the initial screening and shortlisting of tenders;
- b. even if the procurement is exempt from Division 2 of the CPRs, tenderers would normally expect that a failure to comply with an 'Essential' requirement should lead to exclusion of a tender; and
- c. prescribing too many 'Essential' requirements will reduce the ability of tenderers to offer innovative or value for money technical solutions, including proposing capability trade-offs.

**Example:** In a particular procurement, Defence included a large number of 'essential' requirements in the technical specification. The procurement was above the relevant procurement threshold and was not exempt from Division 2 of the CPRs. Only three tenders were submitted (and one supplier decided not to submit a tender because of the level of non-recurrent engineering that would have been involved in meeting an 'essential' requirement). One of the three submitted tenders had to be set aside as part of the initial screening and short listing of tenders as the tenderer failed to meet a number of the essential requirements.

While the remaining two tenderers satisfied all of the essential requirements, in order to meet them they were required to significantly modify what was otherwise substantially commercial/military off the shelf equipment. This resulted in a significant increase in cost and risk for Defence given the scope and nature of the modifications

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### Evaluation against a tender evaluation baseline

13 The 'tender evaluation baseline' comprises the totality of Defence's requirements for the procurement as contained in the request documentation. The tender evaluation baseline is the common foundation against which the evaluation team will assess and compare all tenders so as to establish a basis for making informed value for money judgements. If the request documentation includes a Commonwealth initiated option, Defence will need to consider whether the Commonwealth initiated option is to be treated as part of the tender evaluation baseline.

14 Where Defence prioritises its requirements, Defence will need to also consider whether some or all of the 'Desirable' requirements should be included in the tender evaluation baseline. Depending on the nature of the procurement, many of Defence's 'Desirable' requirements can significantly add to the cost, risk and schedule of delivering a capability, particularly where they are aspirational or not already part of a military off the shelf solution. Defence officials should advise tenderers in the request documentation if 'Desirable' requirements are not considered part of the evaluation baseline so that tenderers are not misled about what is important to Defence for the purposes of the procurement decision.

15 During evaluation, the evaluation team will assess the extent to which a tender departs from the tender evaluation baseline. Depending on the evaluation methodology being used (refer to Chapter 3 of this Guide), the departure (or 'non-compliance') may be evaluated qualitatively (for example, through a rating of 'deficient', or similar), quantitatively (for example, through a price adjustment to the tendered price), or through a combination of the two. The tender evaluation methodology to be used will need to be outlined in the TEP.

**Example:** Examples of departures from the tender evaluation baseline which may result in a price adjustment include where a tenderer proposes:

- (a) a different delivery schedule or milestone payment arrangement. In these circumstances it may be necessary to assess tenders by calculating the net present value of the payments to be made (i.e. assessing the payments in base date dollars to the extent that they have not been expressed in base date dollars);
- (b) a different warranty period;
- (c) alternative indices for the adjustment/indexation of the contract price; or



(d) an alternative risk allocation (i.e. to allocate risk to the Commonwealth which was allocated to the contractor under the draft contract issued as part of the request documentation).

16 The basis and methodology for making price adjustments, and the amount of any price adjustments, should be set out in the evaluation report. To the extent that assumptions are made in making a price adjustment, the assumptions should also be set out. The evaluation team should also consider whether it should carry out any sensitivity analysis in relation to the assumptions made having regard to the nature of the assumptions.

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### Timeframe for the conduct of tender evaluation

17 The timeframe for the conduct of the tender evaluation should be sufficient to enable the evaluation team to properly assess all of the tenders in accordance with the evaluation criteria and to make a value for money assessment. Given the complexity of many Defence procurements, tender evaluations can take a significant period of time, although political and capability requirements can sometimes put pressure on evaluation teams to carry out tender evaluations within tight timeframes.

18 Early planning will assist Defence to carry out evaluations in a timely manner. Planning considerations should include the governance arrangements for the evaluation, membership and availability of the tender evaluation board and tender evaluation working groups (if applicable), the logistics of where the evaluation will be conducted and associated administrative arrangements.

19 Not allowing sufficient time to conduct a tender evaluation is often the cause of poor evaluation outcomes. Failure to properly evaluate tenders (including not properly identifying and understanding key issues and risks or clarifying uncertainties or ambiguities with tenderers) due to time constraints or poor planning can result in delay to the procurement timetable through significantly extended negotiations and subsequent contractor non-performance.

20 Defence officials should determine the appropriate time allowed for the conduct of tender evaluation having regard to the expected number of tenders to be received. The more tenders that are submitted the longer tender evaluation is likely to take. There needs to be sufficient flexibility to extend the evaluation where more tenders than originally expected are submitted. Alternatively, if timeframes are limited, Defence should have considered this as part of the procurement plan and structured the procurement process accordingly. For instance, Defence could conduct an invitation to register interest to shortlist tenderers to participate in a subsequent request for tender process, or short list tenderers during the request for tender process to participate in offer definition and improvement activities.

21 Better practice is that the timeframe allocated to the conduct of tender evaluation and selection of the preferred tenderer (excluding any offer definition and improvement activities) should be no longer than the time allocated for the tender response period.

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### The Tender Evaluation Plan

22 Chapter 3 of the CPG provides a good overview of the purpose, structure and content of a TEP as the key document for the management and conduct of tender evaluations for complex procurements.

23 The aim of a TEP is to detail the process for the evaluation of submissions received by Defence in response to request documentation. The TEP should provide for:

- a. a clear and defensible basis for the evaluation process to occur in accordance with the request documentation;
- b. the application of a 'best value for money' assessment; and
- c. an evaluation process that meets the requirements of Commonwealth and Defence procurement policy and good practice.

24 The TEP should be consistent with the request documentation, and the TEP will usually provide that in the event of any inconsistency between the conditions of tender and the TEP, the conditions of tender take precedence.

25 In particular, the evaluation criteria set out in the TEP should be the same as set out in the request documentation. In some cases, to facilitate the conduct of the evaluation against the criteria, the TEP may contain an evaluation breakdown structure that breaks out the evaluation criteria into subordinate sub-criteria or lower level elements. These may or may not be included in the request

documentation. If they are not, then the evaluation team needs to ensure that the sub-criteria or elements are consistent with the higher level evaluation criteria.

26 The TEP will usually provide that all members of the evaluation team are provided with a copy of (or have easy access to) the TEP, and are briefed on the content of the TEP prior to commencing tender evaluation. The evaluation team should have appropriate procedures to ensure continued compliance with the TEP. For example, members of the tender evaluation board and, where applicable, tender evaluation working group leaders, should be given responsibility for ensuring continued compliance with the TEP with the assistance of the legal process and probity adviser (if one is appointed).

27 While Chapter 3 of the CPG provides guidance about the structure and content of a typical Defence TEP, the content of a TEP should be tailored to reflect the particular procurement. For example, if it is intended that the procurement will be divided into a series of stages (for example, shortlisting of tenderers followed by offer definition and improvement activities or parallel negotiations), Defence officials should consider including details of each stage in the TEP.

28 In more complex tender evaluations, best practice is to include in the TEP a description of or guidance as to how the detailed evaluation will be conducted by the evaluation team in assessing each of the evaluation criteria. For example, in relation to the evaluation of the tendered prices, Defence should include details of how it will evaluate the whole of life costs and any model which it will use in doing so. This could include details as to how the evaluation team proposes to evaluate the rates tendered for Task Priced Services, including details of any assumptions made and sensitivity analysis to be conducted. The key benefit of such an approach is that the methodology can be planned and clearly established prior to the commencement of tender evaluation. In adopting such an approach, however, Defence officials need to ensure that the detailed evaluation methodology included in the TEP is appropriate and enables the evaluation team to effectively assess the relevant evaluation criteria.

29 Defence officials should ensure that the TEP does not unnecessarily constrain Defence from exercising the rights it has under the request documentation.

30 A template TEP is available on the [Commercial Division Tools and Templates Intranet page](#).

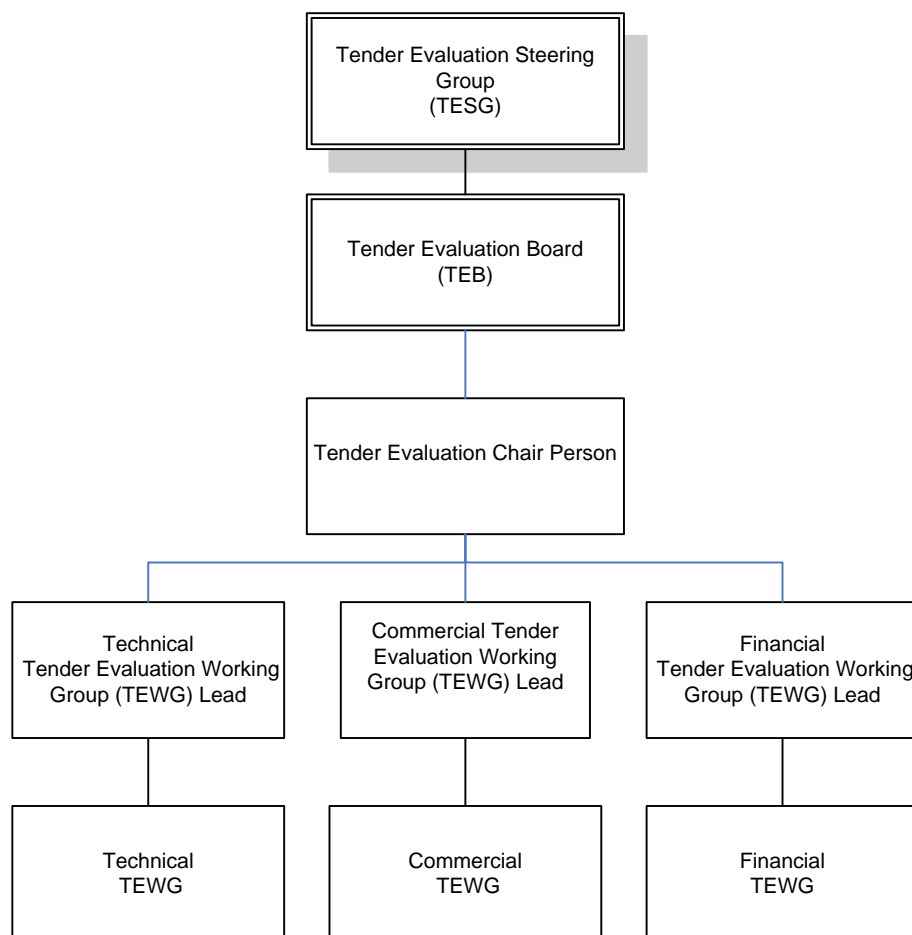
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## Tender evaluation organisation (TEO)

### Overview

31 A key element of the TEP is to set out the governance arrangements that will be established for the evaluation, and the various roles and responsibilities of the constituent elements of the evaluation team. In major Defence procurements, the evaluation team is often called the Tender Evaluation Organisation (TEO). In some cases, the TEO may simply be a single evaluation committee or tender evaluation board (TEB), which may include the delegate for the procurement. In other cases, the TEO may be a delegate, a tender evaluation team (TET) (or TEB) and TEWGs. In the more complex cases, the delegate may be supported by a tender evaluation steering group (TESG), TEB and tender evaluation working groups (TEWGs). The delegate or the TESG will normally be given responsibility for overseeing the evaluation process and providing guidance to the evaluation team on the conduct of the evaluation and approving the evaluation report. The TET or TEB will usually be responsible for managing the evaluation and ensuring that correct process and probity is adhered to during the evaluation period. The TET or TEB will normally comprise a chair and each of the TEWG leaders will have administrative support, as well as support from relevant advisers (for example, financial, legal, probity etc). For many complex procurements, one or more TEWGs will be formed to undertake the evaluation of specific elements of tenders (for example, Technical TEWG, Commercial TEWG, Financial TEWG etc).

Example Tender Evaluation Organisation (TEO)



### Key considerations

32 Defence officials should structure the evaluation team (or TEO) having regard to the size and scale of the tender evaluation, and the nature and complexity of the issues and risks which may need to be considered during the evaluation. As noted above, in more complex procurements, the TEO is often organised into three tiers comprising the TESSG, the TEB and the TEWGs. In less complex procurements, the TEO may comprise two tiers (the TET/TEB and the TEWGs) or even one tier (the TET/TEB). Chapter 5 of the CPG discusses how a standard 'one tier' evaluation committee or board might be set up. However, the following discussion focusses on a more complex procurement process (for example, a major capital acquisition) where a 'three tier' TEO would normally be used.

33 The TESSG is usually chaired by a member of the Senior Executive Service or a Star Rank Officer who has strong complex procurement experience. The role of the TESSG is to provide high level input from stakeholders, such as the sponsor/end user, and management input from outside the TEB. The responsibilities of the TESSG will typically include the following:

- a. ensuring the evaluation is conducted in accordance with Commonwealth and Defence procurement policy, the request documentation and the TEP;
- b. ensuring the appropriate actions and procedures are instituted to support the highest standards of probity and official conduct;
- c. providing advice and direction to the TEB throughout the tender evaluations;

- d. reviewing and finalising the evaluation report prepared by the TEB;
- e. approving the evaluation report, or endorsing the evaluation report for forwarding to Section 23 Delegate Approval (depending on the approval requirements outlined in the TEP); and
- f. providing advice to the Chair of the TESG.

34 All tender evaluations require a TEB (sometimes called a TET). The TEB is typically chaired by the Project Director for the procurement and is made up of the TEWG leaders. The responsibilities of the TEB will usually include the following:

- a. the overall leadership and management of the evaluation process;
- b. ensuring that the evaluation is conducted in a manner which is fair and equitable;
- c. receipt and registration of tenders;
- d. conduct of the initial screening and any shortlisting of tenders;
- e. ensuring the TEWGs conduct their evaluations in accordance with Commonwealth and Defence procurement policy, the request documentation and the TEP;
- f. ensuring the reasons for setting aside any tenders that are clearly not competitive are clearly stated and substantiated;
- g. conducting a comparative assessment of the tenders and the value for money assessment based upon the TEWG reports;
- h. providing guidance to the TEWGs on the preparation of the TEWG reports;
- i. reviewing the TEWG reports to ensure that all information has been taken into consideration in the evaluation report;
- j. reviewing clarification questions proposed by the TEWGs; and
- k. preparing the evaluation report based upon the TEWG reports, and presenting the report to the TESG and delegate.

35 The TEB chair will play a key role in managing the overall conduct of the evaluation, including managing the TEWGs, timetable for the evaluation, and issues which arise during the evaluation.

36 TEWGs are not required for all tender evaluations but are used in more complex evaluations. TEWGs are typically used where the volume of work required in order to carry out the tender evaluation is significant and there is a need to create teams with appropriate specialist expertise and experience. For less complex tender evaluations, the detailed evaluation is typically undertaken by the TET/TEB rather than the TEWGs.

37 The number of TEWGs and the focus of each TEWG will vary depending on the nature of the relevant procurement and the issues which will need to be evaluated, however, may include at least the following TEWGs:

- a. Technical (including operations/project management, and capability) TEWG ; and
- b. Commercial/Contracting/Financial TEWG (includes legal, intellectual property, technical data and other detailed contract matters) .

38 The responsibilities of a TEWG will usually include the following:

- a. assessing each tender against the evaluation criteria allocated to that TEWG (noting that some evaluation criteria may be allocated to more than one TEWG);
- b. conducting a comparative assessment of the tenders in respect of the evaluation criteria allocated to that TEWG;
- c. identifying any risks associated with each tender;
- d. preparing clarification questions; and
- e. preparing a report detailing the TEWG's findings.

39 Each TEWG should have a Defence official that is designated as TEWG leader and the members of the TEWG should be appropriately qualified, skilled and experienced having regard to the focus of the TEWG. Where contractors are proposed to be used as part of a TEWG, this should be

detailed in the TEP, In addition, the probity adviser be consulted to ensure that the required level of care is taken to ensure that probity is appropriately considered and applied.

40 It is important to match the size, skills and structure of the evaluation team / TEO to the complexity and level of risk of the procurement. Defence will need to ensure that it has a sufficient number of appropriately skilled and experienced personnel and appropriate subject matter and/or domain knowledge experts available to conduct the evaluation. This may require Defence to engage consultants with specific industry knowledge or other skills relevant to the evaluation. For particularly large or complex evaluations, Defence should identify potential back up or replacement evaluation team members if evaluation team personnel become unavailable.

41 Evaluation team members should have a detailed understanding of the procurement (including the proposed risk allocation under the draft contract) in order to facilitate the identification of issues and risks during tender evaluation. This can be a significant risk as Defence officials are often brought in to assist in carrying out a tender evaluation that have not been involved in preparing the request documentation and therefore do not have a detailed understanding of the procurement. In these circumstances it is necessary to ensure that these persons are comprehensively briefed on the material.

42 Tender evaluations for complex procurements are typically lengthy and time consuming. Accordingly, it is preferable if evaluation team members work full time on the evaluation rather than seeking to participate in the evaluation while also continuing to perform their usual work activities.

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### Regular communication within the evaluation team

43 Although each of the TEWGs have their own distinct area of focus, it is important that each TEWG advises other TEWGs of issues which may impact on the evaluation being conducted by the other TEWG. For example, it is often the case that statements contained throughout a tender will indicate that the tenderer is not in fact compliant with a provision of the draft contract notwithstanding the fact that the tenderer has indicated in its Statement of Compliance that it is compliant. These statements can be found in sections of a tender where they would not normally be expected. It is important that TEWGs which identify any such non-compliances or risks advise other relevant TEWGs to ensure non-compliances or risks are not missed. Often these issues require clarification with the relevant tenderer.

44 Accordingly, the evaluation team should encourage regular formal and informal meetings/discussions between TEWG leaders. TEWG leaders will summarise the information and meet with the TEB Chair and Deputy Chair (if there is one). If arrangements are not put in place to facilitate communication between TEWGs, there is a risk that issues will be missed, or their significance not fully appreciated.

**Example:** In relation to Defence procurement for the provision of training services, Task-Priced Services formed a significant proportion of the overall scope of work under the proposed contract (with each Task-Priced Service comprising the delivery of a training course). The contract did not guarantee any particular volume of Task-Priced Services and allocated the risk of the volume of Task-Priced Services to the contractor. The preferred tenderer indicated in its statement of compliance that it was compliant with Defence's proposed risk allocation in relation to the volume of Task-Priced Services.

During contract negotiations, the preferred tenderer advised that it would not accept the risk of the volume of Task-Priced Services and that if the volume of Task-Priced Services fell below the maximum rate of effort specified in the contract it would need to renegotiate its prices for Task-Priced Services. The tenderer's position was that this non-compliance was included in its tender as it was included as a footnote to the pricing table for Task-Priced Services (notwithstanding that the tenderer had indicated compliance with the relevant contract provisions in the statement of compliance). The financial TEWG was the only TEWG which had access to the pricing tables during tender evaluations. While the financial TEWG had seen the notes, they had not informed the TEO generally or the other TEWGs of the content of the notes.

Although Defence was able to negotiate an acceptable position in relation to the issue, the lack of communication between TEWGs complicated the negotiations and required Defence to re-assess whether the tenderer still represented best value for money.

45 It is beneficial to have the TEO geographically co-located as far as practicable, however if this is not practicable and members of the TEWGs or the TEB are geographically dispersed, the evaluation team will also need to have appropriate arrangements to allow all team members to actively participate as required in relevant meetings and receive relevant information. This may require

establishing secure Information and Communications Technology (ICT) systems to facilitate the required information access and sharing of information.

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### Evaluation logistics

46 As noted in Chapter 5 of the CPG, the TEP should set out the logistical arrangements for the evaluation. These can be significant for large procurements, and include issues relating to the safe custody of tenders, evaluation facilities, ICT requirements and travel arrangements for evaluation team members.

47 Tender evaluation rooms assist in maintaining the confidentiality and security of tenders and minimise the risk that tenders will be discussed in an open work environment shared by staff members who are not involved in the evaluation. While Defence has a number of on-site tender evaluation rooms, given the number of evaluations that are conducted by Defence, the demand for these facilities can be high and it may be necessary for the evaluation team to arrange alternative facilities (which in some cases could be off Defence premises).

48 The evaluation team should establish rules and processes for the storage of and access to electronic copies of tenders and evaluation material. This may include establishing and using a database or tender evaluation tool, electronic folders and naming conventions. Appropriate security (for example, password protected folders) should also be established. These requirements may also be addressed as part of the Legal Process and Probity Plan (if a separate plan is developed). Legal Process and Probity Plans are discussed in Chapter 3 of the CPG.

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### Planning, briefing and training

49 Defence officials will usually need to address a number of practical issues prior to commencing tender evaluation, including:

- a. identifying the documents or reports (and their format) relevant to the conduct of the tender evaluation which the evaluation team will need to have in place (for example, tender receipt and registration log, facility entry and exit log and report, communications officer log and report etc);
- b. identifying the manner in which each TEWG will assess each of the evaluation criteria allocated to it and the documentation or tender evaluation tools required, and whether any training is required. This should be set out in the TEP;
- c. identifying the required outputs of the tender evaluation (for example, screening and/or shortlisting report, TEWG reports and the evaluation report etc) and the format of those reports;
- d. identifying key project issues and potential risks that need to be considered during tender evaluation; and
- e. preparing the tender evaluation schedule.

50 For major tender evaluations, evaluation team members will usually participate in a project briefing at the start of the evaluation to inform members about the evaluation process. This briefing would usually cover some or all of the following matters:

- a. an overview of the project;
- b. accountability, probity, ethics and fair dealing, including confidentiality and conflict of interest requirements (this part of the briefing may be given by the legal process or probity adviser, if one is appointed);
- c. security requirements and arrangements;
- d. evaluation organisation structure, membership, roles and responsibilities;
- e. tender evaluation schedule and administrative arrangements (for example, distribution of tender volumes, the tender room, the use of tender evaluation tools or databases etc);
- f. evaluation methodology and process, including a review of the TEP, areas of responsibility for evaluation, evaluation stages and required outputs;
- g. the tender clarification process; and
- h. where a tender evaluation tool or database is being used, guidance on how to use the tender evaluation tool or database.

51 Prior to the commencement of the evaluation, evaluation team members should be provided with copies of (or have electronic access to) all relevant documents, including the request documentation, TEP and any related guidance, Legal Process and Probity Plan, draft report formats (for example, TEWG report/evaluation report), tender evaluation schedule, and any other documents which may assist the tender evaluation members in understanding the project or the issues which need to be considered in carrying out the tender evaluation (which might include the Project Execution Strategy, a more detailed Acquisition or Procurement and Contracting Strategy, Support Procurement Strategy, the Delegate Submission and any Liability Risk Assessment).

52 Members of the TEB and the TEWG leaders should also ensure that all evaluation team members (particularly external advisers) are aware of Commonwealth and Defence procurement policy applicable to the conduct of tender evaluation.

## Chapter 3

# How to conduct a complex tender evaluation

### Overview of evaluation stages

1 Subject to the terms of the request documentation and the content of the approved TEP, the evaluation process for complex Defence procurements typically comprises the following sequential stages (see Annex A to this Guide for a diagrammatic representation of the evaluation process):

#### Receipt and registration of tenders

2 Procedures to receive and register tenders should be conducted in accordance with the TEP and ensure fairness and impartiality with submissions being kept secure and treated in confidence.

3 Defence officials should identify and record any late tenders. Subject to the terms of the request documentation, a late tender should not be opened and accepted into tender evaluation, unless there has been mishandling by Defence.

4 Defence officials will usually prepare a Tender Receipt and Registration Report for approval by the delegate.

#### Initial screening

5 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 for participation, or 'Essential' requirements specified in the request documentation. The initial screening process should be set out in and conducted in accordance with the TEP.

6 Any tender that does not meet the screening requirements should be excluded from further consideration unless Defence considers that there has been an unintentional error of form (usually relevant only in the case of minimum content and format requirements). Any decision by the TEB to exclude a tenderer at the initial screening stage should be endorsed by the TESG and probity adviser (if one is appointed)

7 The evaluation team should identify any alternative tenders and assess whether the alternative tender should be evaluated. Alternative tenders should be documented in the initial screening report together with an explanation as to whether the alternative tender will be evaluated and the reasons for the decision.

8 Depending on the terms of the request documentation, an incomplete tender may also be excluded from further consideration during the initial screening process. This should only be the case where the tender is so incomplete that it would not be capable of a meaningful evaluation.

9 At this stage, Defence officials will usually identify all pricing information in a tender and quarantine this for evaluation by the financial TEWG.

10 During the initial screening stage, any tenders from a tender associated with a current Project of Concern should be identified and referred to the delegate, including the detail of the role that the tenderer has in the Project of Concern. The information provided should be endorsed by the relevant Project of Concern Project Manager. This is because some of the ASDEFCON conditions of tender provide Defence with a discretion to exclude a tender from a tenderer who is involved in a current Project of Concern.

11 An initial screening report should be prepared and approved by the delegate prior to conducting detailed tender evaluation. The purpose of the initial screening process is to undertake a brief initial review of tenders. If any tenders are to be excluded from further consideration as a result of the initial screening, this should be clearly documented in the initial screening report. The reasons should be clearly stated and substantiated as any decision to exclude a tenderer must be justified and defensible.

12 Tenderers who are excluded should be advised as soon as possible that their tenders have been declined after the delegate has approved the recommendation.

#### Detailed tender evaluation

13 During detailed tender evaluation, the tenderers are assessed against each of the evaluation criteria set out in the request documentation and the TEP. The manner in which the evaluation team will undertake the detailed tender evaluation will depend on the tender evaluation methodology set out



in the request documentation and the TEP. During detailed evaluation, tenders may be progressively shortlisted out of the tender process. Shortlisting is used to identify and exclude tenders which are clearly non-competitive and have no reasonable prospect of exhibiting the best value for money (or where it subsequently becomes apparent during detailed evaluation that the tender does not meet a condition for participation or 'Essential' requirement). The degree of analysis applied to shortlisting must be of sufficient rigour to ensure that excluded tenderers, under further detailed evaluation, stand no reasonable chance of providing the best value for money. Shortlisting (or setting aside) tenderers during detailed evaluation reduces the costs for both Defence and industry. Tenderers who are set aside on this basis should be advised as soon as practicable that their tenders have been declined after the delegate has approved the recommendation, normally based on a shortlisting report. If a tender is set aside late in the process, this recommendation may be included in the evaluation report, rather than a separate shortlisting report.

14 Where the comparative assessment and ranking tender evaluation methodology is adopted, detailed tender evaluations are typically broken into two stages:

- a. First, the evaluation team assesses each of the tenders individually against each of the elements in the evaluation breakdown structure (which might be undertaken at the evaluation sub-criterion or a lower level), on the basis of compliance and/or risk (depending on the criterion), and identifies any risks and potential issues for negotiation. This assessment is then usually rolled up and presented at either the evaluation sub-criterion or more usually at the evaluation criterion level; and
- b. Second, the evaluation team undertakes a comparative assessment of tenders across each of the evaluation criteria (or sub-criteria). Comparative assessment involves the ranking of tenderers in relative order of merit against each evaluation criterion / sub-criterion, including in relation to risk. The comparative assessment should draw out the major differences between tenderers as they relate to the evaluation criteria / sub-criteria. This provides the basis for determining value for money. The ranking of tenders in respect of each of the evaluation criteria / sub-criteria needs to be substantiated and supported by the assessments in the individual TEWG reports.

15 The TEWGs should document the outcomes of their respective evaluations in TEWG reports, with the TEB then recording the outcomes at a higher level in the evaluation report. The evaluation report needs to contain sufficient detail to reflect the outcomes of the evaluation and the key points of differentiation between tenders.

16 As noted above, if it becomes evident during the detailed evaluation that a tender is clearly not competitive, a decision may be made to set aside the tender from further evaluation. A decision to set aside a tender must be justified and defensible. The reasons for setting aside a tenderer should be clearly stated and substantiated in the evaluation report.

#### **Initial value for money assessment**

17 Following detailed evaluation, the TEB should conduct an initial value for money assessment and ranking of tenderers. The value for money assessment should be based on the outcomes of the detailed evaluation, including the assessments of tendered prices and risk which are detailed later in this chapter.

18 Following the initial value for money assessment, the evaluation team may recommend:

- a. appointing a preferred tenderer and entering into contract negotiations with that tenderer; or
- b. shortlisting two or more tenderers to participate in further tenderer engagement activities, such as offer definition and improvement activities or parallel negotiations.

#### **Final value for money assessment**

19 Following the completion of any further tenderer engagement activities with the shortlisted tenderers (where applicable), the TEB should reassess the tenders in light of the outcome of the engagement activities. This will not be a full re-evaluation of the tenders, but rather an assessment of whether, and if so, how the initial evaluation and value for money assessment needs to be updated in light of the outcomes of the tenderer engagement activities. The evaluation team should record the final value for money assessment in the updated evaluation report (or in some cases, a separate final source evaluation report).

## Tender evaluation methodologies

20 Tender evaluation methodologies are the processes set out in the TEP that an evaluation team will apply to conduct the detailed evaluation of tenders in accordance with the evaluation criteria in the request documentation. There is no single tender evaluation methodology that is appropriate in every case, and Defence officials should consider and apply the appropriate methodology for the nature and scope of the particular procurement. Tender evaluation methodologies will typically comprise a mix of qualitative and quantitative assessments.

21 As noted in the CPG and earlier in this Guide, a tender evaluation methodology commonly used for complex Defence procurements is the comparative assessment and ranking method. An overview of the comparative assessment and ranking method is included in Annex B of this Guide. Annex B also includes an example of a simpler evaluation methodology.

22 If the evaluation team is using a software based evaluation tool to facilitate tender evaluations (including the scoring functionality associated with some tender evaluation tools), the evaluation team needs to ensure that the tool is consistent with the tender evaluation methodology detailed in the TEP and the request documentation.

23 As discussed in the CPG, Defence officials should be careful in adopting quantitative based tender evaluation methodologies which are heavily reliant on weighted scoring methodologies. These methodologies are often used as part of software based tender evaluation tools. The risk with a weighting or scoring based methodology is that if it is not carefully designed, it may result in Defence being unable to place appropriate weight on key issues identified as part of the tender evaluations. For example, while a key issue may result in a low score for a particular aspect of the tender evaluation, that score may represent only a small part of the overall score and not be truly reflected in the overall evaluation outcome of the tender. Accordingly, Defence usually prefers to use a tender evaluation methodology that allows key issues to be captured qualitatively outside of a narrow scoring methodology.

## Risk

24 The CPRs require that Defence 'should consider risks and their potential impact when making decisions relating to value for money assessments' (CPRs paragraph 8.2). Accordingly, evaluation teams need to ensure that the tender evaluation includes an assessment of the level of risk associated with each tender.

25 The evaluation team should assess risk in accordance with the risk ratings and methodology set out in the TEP. The CASG Project Risk Management Manual (PRMM) should be used as the prime source of reference for risk assessment in tender evaluations (An example of a risk assessment methodology is included in Annex B to this Guide).

26 Risk assessments in tender evaluations are informed judgments of the risk associated with all aspects of a tender. The kinds of risks that should be considered include those associated with the achievement of the performance of a system/equipment, alignment of the Contract Work Breakdown Structure (CWBS) with the Statement of Work (SOW), schedule, cost, project management, work health and safety, Australian Industry Capability, through life support, corporate structure and the financial viability of the tenderer. These risks need to be taken into account not only in the context of the tenderer itself, but also the contribution that key members of its team (for example, key subcontractors) make to these risks.

27 Some requirements in request documentation will be more demanding or difficult to satisfy than others, and therefore inherently more 'risky', requiring particular attention in the assessment of the risk of a tender. For example, claims by a tenderer that it complies with the performance requirements of a system/equipment will typically warrant further investigation by Defence to ensure that the claim can be substantiated (See the helicopter evaluation example given in Chapter 5 of the CPG). In addition, requirements which are relatively less demanding or difficult to satisfy might be made inherently more risky by the manner in which a tenderer proposes to satisfy them and may therefore also be deserving of particular attention in the assessment of risk of a tender.

28 Insufficient information or lack of clarity in a tender will have an impact on the assessment of risk and, as a consequence, the robustness of the evaluation. Accordingly, the evaluation team should seek to clarify relevant aspects of a tender to ensure it is properly able to assess the risk with the tender. If, despite rigorous clarification, the evaluation team concludes that the tenderer has provided insufficient information in relation to a stated requirement, the evaluation team should assess and record the risk associated with that element of the tenderer's response.

29 Wherever practicable, the evaluation team should further investigate risks as part of the detailed evaluation process (for example, through clarification or offer definition and improvement activities) so that risks can be addressed with greater certainty in the value for money assessment and hence the selection of the preferred tenderer. By investigating the risk, Defence may be able to downgrade its severity in light of a better understanding of the risk, its likelihood or consequences or any risk mitigation strategies which are in place or may be available. During tender negotiations, Defence may then seek to negotiate the appropriate strategies with the tenderer in order to mitigate the risk.

30 While an initial assessment of risk associated with tenders commences at the level of compliance assessments, overall judgments on the collective implications of risk generally do not become apparent until they are aggregated and an overall assessment of risk is made for each tenderer; typically at the level of discussion in the evaluation report. The assessment of risk in the evaluation report should provide an explanation of the nature of risk, its likelihood and its probable consequences for each tenderer, particularly where the nature of such risks are a major factor in establishing a basis for ranking tenderers. Comparative assessments should contrast relative risks between tenderers and be factored into the value for money assessment leading to the ranking of tenderers.

31 The TEP should outline the process for the assessment of risk (consistently with the PRMM), which should involve:

- a. identifying the risks associated with the tender;
- b. analysing the identified risks to determine:
  - likelihood rating - that is, the likelihood (or probability) of the risk event occurring; and
  - consequence rating - that is, the seriousness of the consequences (or impacts) should the risk event occur.
- c. A single risk rating is then calculated for each risk by assessing the likelihood and consequence of that risk, using the standard risk analysis criteria in the PRMM (see PRMM, Annex D);
- d. evaluating the risks. Each of the identified risks needs to be evaluated in order to determine whether they are acceptable or unacceptable. Unacceptable risks need to be treated; and
- e. treating the risks. This involves identifying options for the treatment of risks and selecting the most appropriate treatment strategy.

### **Financial evaluation**

32 Under Defence templates, the financial evaluation criteria generally address the total tendered price, financial and corporate viability of the tenderer, payment structure and the suitability of foreign currencies and price escalation indices and formulas.

### **Disclosure of pricing information**

33 Chapter 5 of the CPG notes that, in conducting tender evaluations for more complex procurements, it is usual for the pricing information in relation to each tender to be provided only to the financial TEWG and not more broadly within the evaluation team (including the other TEWGs). The reason for this is to ensure that the other TEWGs carry out tender evaluations without being influenced by knowledge of the respective prices tendered.

34 As part of the tender opening process, Defence officials will remove the pricing section of each tender (whether hard copy or electronic) and provide this to the financial TEWG. As part of the tender administrative arrangements, the evaluation team needs to put in place appropriate mechanisms to ensure that other evaluation team members do not have access to the pricing information. In addition, financial TEWG members will need to ensure that they do not openly discuss pricing information in front of other evaluation team members.

35 However, as noted in the CPG, the principle that pricing information should not be disclosed more broadly needs to be applied in a sensible manner. There may be circumstances where it is entirely appropriate to disclose pricing information to other members of the evaluation team to enable those members to properly carry out their own part of the tender evaluation. These circumstances need to be assessed on a case by case basis and any disclosure should be on a need to know basis and restricted to the relevant parts of the pricing information in consultation with the TEB Chair and probity advisor.

**Example:** As part of its tender, a tenderer sought to cap its liability under the contract by reference to the contract price. The liability provisions and liability caps were being evaluated by the commercial/contracting TEWG. As the commercial/contracting TEWG did not have access to the pricing information, the commercial/contracting TEWG was not able to properly evaluate the proposed liability cap without understanding the amount of the contract price for that tenderer.

The overall contract price in respect of that tenderer was disclosed to the relevant individual in the commercial/contracting TEWG to enable it to complete the evaluation of the liability provisions in respect of that tenderer. The pricing information was disclosed late in the tender evaluation to minimise any potential adverse impact of the disclosure of the information and on the basis that the individual to whom it was disclosed would not communicate the information to anyone else during tender evaluations.

### Financial evaluation issues

36 As discussed in the CPG, the financial evaluation team will need to establish the extent to which tendered prices should be normalised between tenderers to ensure that a like for like comparison of each tendered price can be undertaken. The financial evaluation team may also be required to evaluate the impact of any financial arrangements proposed in the tender, including the level of risk assumed by the tenderer in its proposed pricing structure.

37 In evaluating the tendered price, the team will often need to make various assumptions, for example, where the team is evaluating prices which vary depending on volume and the volume is not certain at the commencement of the contract. This may be the case for:

- a. Survey and Quote (S&Q) services where the price payable typically varies based on the number of hours and the mix of labour to be used (as usually there is a mix of labour categories for which different rates are used); or
- b. Task-priced services where the price payable typically varies based on the nature and number of taskings requested by Defence.

38 In order to evaluate the tendered prices for S&Q services and task-priced services, Defence needs to assess the volume of hours/taskings which are expected to occur during the course of the contract term and the mix of labour for S&Q services. This assessment should ideally be based on historical data to the extent that historical data is available and relevant to the procurement (for example, if there is an existing contract which the new contract will replace, the evaluation team could use the volume of hours/mix of labour/taskings which occurred under that previous contract). If, however, relevant historical data is not available, Defence will need to assess the volume of hours/mix of labour/taskings based on its expectations and having regard to any similar contracts which may provide guidance.

39 The basis for determining the volume of hours/mix of labour/taskings for S&Q services and task-priced services should be logical and clearly documented (including in the evaluation report) so it is capable of withstanding challenge and scrutiny. This is particularly important where the expected volume of S&Q services/task-priced services forms a significant part of the overall scope of work under the contract.

40 In addition, where the volume of S&Q services/task-priced services is significant relative to the overall scope of work under the contract, Defence should consider whether it should provide tenderers with an indication of the anticipated volume of such services, or at least provide information which tenderers can use to make their own assessment of the volume of such services. In either case, the request documentation should make it clear that Defence is not promising any particular volume of such services, and tenderers need to rely on their own assessment. In addition, Defence officials should consider the extent to which it sets out in the request documentation its proposed methodology for assessing tenderer pricing for S&Q services/task-priced services, including assumptions about volume of hours/mix of labour/ taskings.

41 In assessing the mix of labour for S&Q services and applying that mix to a particular tender, Defence officials should carefully consider the categories of labour proposed by the relevant tenderer, as often as each tenderer will propose their own unique categories of labour. The evaluation team needs to ensure a 'like for like' comparison during evaluation, and if it is not clear how each of the categories of labour apply under a particular tender, the evaluation team may need to clarify this with the relevant tenderer.

42 Given that the volume of hours/taskings and the mix of labour for S&Q services/task-priced services used for the purpose of carrying out the evaluations will often be an estimate, the evaluation team should also consider whether to conduct sensitivity analysis in order to understand the impact on

the overall price evaluation of a change (increase or decrease) in the volume of hours/mix of labour/taskings. Where the outcome of the sensitivity analysis demonstrates that the outcome is sensitive to the volume of hours/mix of labour/taskings, the evaluation team will need to consider how this affects its evaluation and the value for money assessment.

**Example:** In the tender process for the support of an existing Defence capability, the overall scope of work under the contract comprised both Recurring Services and S&Q Services, of which the S&Q Services constituted a significant proportion. Of the two tenderers which were shortlisted to participate in parallel negotiations, Tenderer A had a lower price for Recurring Services but on average more expensive rates for S&Q Services across each category of labour than Tenderer B.

Given the significance of S&Q Services relative to the overall scope of work, Defence determined an estimate of the likely number of hours of S&Q Services over the term of the contract. Given that the contract was replacing an existing contract with a similar scope of work, the estimate was determined having regard to the volume of S&Q hours under the existing contract and then adjusted for any differences in the scope of work between the two contracts and other relevant factors. The methodology for determining the estimate and the detailed calculations and adjustments made to historical data were documented in the evaluation report. The request documentation required tenderers to provide rates for a number of different categories of labour. The categories of labour used would depend on the nature of the S&Q Services being performed. Based on the nature of the S&Q Services to be performed, Defence made an assessment of the likely mix of labour.

The effect of incorporating the evaluation of S&Q Services into the overall price evaluation was that Tenderer A was determined to offer a higher overall price, as the anticipated price for S&Q Services based on the estimate of hours for the S&Q Services for Tenderer A was significantly higher than the anticipated price for Tenderer B. Defence also conducted extensive sensitivity analysis to determine the extent to which the outcome of the overall price evaluation was sensitive to both the volume of hours estimated and the mix of labour used. The sensitivity analysis included determining at what volume of S&Q Services Tenderer A had an overall cheaper price (based on Recurring Services and S&Q Services) than Tenderer B. This volume of services was well below the expected volume of S&Q Services. In light of the sensitivity analysis conducted, the evaluation team concluded that the outcome of the evaluation of S&Q Services was not sensitive to either the volume of hours estimated or the mix of labour used. Details of the sensitivity analysis and the outcomes were recorded in the evaluation report.

### Evaluating whole of life costs

43 For most complex Defence procurements relating to goods or works, the tendered price is seldom the only relevant cost and the evaluation of whole of life costs is a critical aspect of the tender evaluation. In making a value for money assessment, a comparison of the relevant benefits and costs on a whole of life basis should be undertaken. Whole of life costs are the total costs arising from a decision to purchase and are incurred in respect of the purchased item over its life cycle from acquisition to disposal.

44 The assessment of whole of life costs seeks to take into account the full potential financial implications of a purchase. A 'whole of life' cost assessment for the procurement of Defence materiel will typically include the initial purchase price, installation costs (including, for example, modification of existing platforms), operating and support costs, cost of spares, licence fees, and disposal costs. It may also take into account (where relevant) the timing of replacement of a product or systems within a product at the end of their life of type.

45 For example, a tendered item may have an initial cheaper price but thereafter require more extensive (or expensive) maintenance or more frequent replacement of components as compared to other tendered items. Some items may impose costs on Defence outside the project itself, such as modification of platforms or other equipment. In these circumstances, to ensure the selection of the tender which represents best value for money, all relevant costs associated with a purchase should be factored into the financial evaluation.

46 In some cases, the assessment of whole of life costs will be a simple process as the total costs and benefits of ownership will be readily apparent. In respect of more complex procurement, evaluating whole of life costs may require the development of a detailed methodology to ensure that all relevant costs are identified and quantified where appropriate. Financial advisers may need to be engaged to assist in the evaluation of whole of life costs for more complex procurements especially where life cycle cost modelling is required.

47 There is no simple formula for assessing whole of life costs. Assessing whole of life costs will require some judgement about options and future events. To the extent that assumptions are made in

evaluating whole of life costs, the evaluation team will need to assess whether it should carry out sensitivity analysis in relation to the assumptions.

48 The TEP should outline the methodology to be adopted in assessing whole of life costs. The evaluation report should provide an overview of the methodology adopted and details of any assumptions made and sensitivity analysis conducted.

**Example:** As part of the evaluation of tenders for the acquisition of a new aircraft, the evaluation team assessed the whole of life costs of the purchase. Modifications were required to ships and existing facilities and the extent and nature of the modifications required were dependent on the aircraft acquired. In addition, the weapons to be acquired varied depending on the successful solution. The price evaluation factored in the anticipated cost of the modification to the existing ships and facilities and the cost of acquiring the relevant weapons for each of the solutions. As part of the assessment, the evaluation team made independent investigations of the anticipated costs including, in the case of the cost of acquiring the weapons, obtaining tender quality pricing from prospective suppliers.

### Value for money assessment

49 'Achieving value for money is the core rule of the CPRs. Officials responsible for a procurement are required to be satisfied, after reasonable inquiries, that the procurement achieves a value for money outcome' (see CPRs, paragraph 4.4). The application of this rule requires consideration of the financial and non-financial costs and benefits associated with the procurement, for example, the achievement of qualitative outcomes such as improved or innovative design and service standards, as well as quantitative outcomes such as an overall reduced cost of delivering capability and related services.

50 As noted in Chapter 1 of this Guide, the price of the goods, works or services being acquired is not the sole determining factor in assessing value for money. Defence officials need to assess which tender offers the best value for money having regard to the outcome of the assessment against each of the evaluation criteria, including price, and any risks associated with the tender. Accordingly, the value for money assessment should take a holistic view of the tenderer and its offer against the evaluation criteria. The assessment should be based on:

- a. the evaluation of each tender against the evaluation criteria (or sub-criteria), including relative ranking of tenders against each criterion and across all criteria;
- b. the identification and assessment of the key areas of discrimination between each tender in relation to the criteria or sub-criteria (for example, the relative strengths and weaknesses);
- c. whole of life costs (including tendered prices) and an explanation of cost risk attributable to each tender;
- d. an assessment of the risks associated with each tender and an indication of the strategies that are necessary to manage the risks; and
- e. an explanation of the actions that would be necessary to enter into a contract, for example, the extent of negotiation required in relation to contractual non-compliances (which would normally take the form of a draft Contract Negotiation Directive).

51 If further tenderer engagement activities and/or negotiations are conducted following the initial evaluation outcome, Defence officials should confirm at the conclusion of those activities or negotiations that the preferred tenderer's offer continues to represent value for money. This is because if the preferred tenderer's offer changes significantly during negotiations, there is a risk that that tender may no longer represent value for money.

**Example:** In a tender process, the two leading tenderers were assessed to be very close with little distinguishing the two. The tenderer who was assessed as offering the best value for money was appointed as the preferred tenderer and contract negotiations with the preferred tenderer commenced. During contract negotiations, the preferred tenderer raised a number of issues and non-compliances which were not included in its original tender submission. While the Defence negotiation team made a number of minor concessions in relation to some of the new issues and non-compliances (primarily in relation to the wording of the contract), the team advised the tenderer that it was not in a position to make any additional amendments of a more significant nature given the closeness of the two tenders. Following completion of contract negotiations, Defence confirmed that the negotiated contract continued to represent best value for money.

52 To support the assessment of value for money in the evaluation report, the TEP may provide for the use of a 'value' descriptor to describe the overall value of a particular tender, before price is considered. This is another mechanism that can be used to assist in the ranking of tenderers. In this context, 'value' is a judgement based on the combined influences of the compliance and risk assessments. Value is considered in isolation of price. An example of a value rating table is set out in Annex B to this Guide.

53 Annex C identifies some of the key issues which can arise during tender evaluations and identifies possible steps which can be adopted to assist in preventing or mitigating those issues.

#### **Offer Definition and Improvement Activities**

54 In the most complex of Defence procurement processes, the request documentation and the TEP may provide for the conduct of offer definition and improvement activities (ODIA) as a further stage in the detailed evaluation process. ODIA is usually undertaken with two tenders that have been shortlisted following the initial detailed evaluation.

55 For more information about ODIA, Defence officials should refer to Chapter 5 of the CPG and the ODIA Better Practice Guide which is currently under development.

#### **Negotiation issues**

56 A key part of the work of evaluation teams during evaluation is to identify those issues and risks that it will be imperative to successfully address should Defence undertake contract negotiations (or ODIA) with the relevant tenderer. When recording their assessment of tenders against the evaluation criteria, the TEP will usually require evaluation team members to record negotiation issues (and/or issues for ODIA), as well as an indicator as to how essential it is to successfully negotiate the issue.

57 The following indicators are sometimes used in TEPs to support the identification of negotiation issues:

| <b>Classification</b>     | <b>Description</b>   |
|---------------------------|--|
| Must obtain               | Any contract which does not achieve the acceptable resolution of the issue is likely to be unacceptable. Additional cost may need to be incurred by the Commonwealth to achieve resolution, but may affect value for money assessment.   |
| Should obtain at cost.    | The negotiation team should attempt to hold the Commonwealth's desired position in relation to this issue, but a reasonably negotiated compromise would be acceptable. Additional cost may need to be incurred by the Commonwealth to achieve resolution, but may affect value for money assessment. |
| Should obtain at no cost. | An inconsequential issue which may be traded off to reduce cost to improve negotiated outcome in another area.   |

## Chapter 4

# Products of the tender evaluation process

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### Overview

1 This Chapter provides an overview of the documents which will be required by Defence in relation to its tender evaluations. While the documents which will be produced as a result of the conduct of tender evaluation will vary from procurement to procurement, it is imperative that the process followed and the tender evaluation itself is clearly documented to ensure that the process delivers good outcomes which are defensible, particularly if an unsuccessful tenderer challenges the outcome of the process. The level of detail in each of the documents should be commensurate with the nature and complexity of the procurement.

2 As discussed in the CPG, prior to commencement of the tender evaluation for a complex procurement, Defence officials will have developed and approved the key procurement documentation, including the procurement plan, request documentation, TEP and, for the more complex or sensitive procurements, a Legal Process and Probity Plan and/or associated probity documentation (for example, conflict of interest declarations and confidentiality agreements etc).

3 The following documents will typically be produced as a result of conducting tender evaluations. The range of documents necessary for a particular evaluation will depend on the nature and complexity of the procurement and the activities which are conducted as part of the tender evaluations (and in particular, the scope of tenderer engagement activities):

- a. Tender Receipt and Registration Log – to record the receipt and registration of tenders;
- b. Communications Officer Log and Report - to record all communications with tenderers;
- c. Initial Screening and/or Shortlisting Report – to record the outcome of the initial screening and any shortlisting of tenders;
- d. TEWG reports which records the findings from the detailed evaluation conducted by each TEWG;
- e. Source Evaluation Report (SER) or tender evaluation report - to record the findings and outcomes of the tender evaluation;
- f. If ODIA is undertaken, any additional process documentation to support those activities;
- g. The updated or final TEWG reports and SER (following the outcomes of the ODIA). The updated or final TEWG reports can often be incorporated into the updated or final SER rather than separate standalone reports being prepared;
- h. Contract Negotiation Strategy and Contract Negotiation Directive – to set out the Commonwealth's negotiation strategy with the preferred tenderer/s, and the issues to be negotiated and Defence's positions on the issues, respectively;
- i. Contract Negotiation Report – to set out the outcome of the negotiations;
- j. Legal Process and Probity Report – to set out the probity report and sign off provided by the legal process and probity advisor;
- k. Other adviser's reports – to set out the reports and sign offs from other advisers, for example, the legal adviser in relation to the negotiated contract, the financial adviser in relation to matters such as the financial evaluation, financial viability assessment, or the final pricing and payment schedule;
- l. Debriefing Reports - to set out the content of each proposed debriefing to tenderers; and
- m. Delegate Submission - to seek formal approval of the SER and for Defence to enter into the contract negotiations.

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### Source Evaluation Report

4 Defence officials should prepare an evaluation report for all complex procurements. The SER should clearly outline the considerations and justifications that led to the source selection recommendation(s). If Defence proposes to shortlist tenderers to participate in further tenderer engagement activities, the evaluation team may prepare an interim SER which clearly outlines the considerations leading to the shortlisting of tenderers. The relevant delegate should approve the



interim SER before the team proceeds with the further activities. Following completion of the further activities, the evaluation team should either update the interim SER or prepare a final SER which documents the decision to select a preferred tenderer.

5 The SER (and the TEWG reports) should contain sufficient detail to ensure the source selection recommendation and each of the findings/conclusions are substantiated, defensible and able to withstand challenge and scrutiny. The level of detail included in the SER (and the TEWG reports) should be commensurate with the nature and complexity of the procurement. The level of detail in the documentation will also be determined by the nature and range of issues which arise during the tender evaluations and the need to clearly articulate the key points of differentiation between tenders.

6 The evaluation team needs to ensure that all material issues and risks identified in the TEWG reports are captured in the SER and that the findings/conclusions contained in the SER are consistent with the findings/ conclusions in the TEWG reports.

7 Preparing the SER can be resource intensive and the evaluation team therefore needs to ensure that it allocates sufficient resources to this activity so that it is done properly.

8 The SER should contain sufficient detail on each of the following:

- a. the outcome of the initial screening and any shortlisting;
- b. details of the evaluation process and methodology used, including details of any tenderer engagement activities conducted;
- c. the justification for setting aside any tenders that are clearly not competitive;
- d. the outcome of the evaluation in relation to each of the evaluation criteria;
- e. the outcome of the comparative assessment of tenders against each of the evaluation criteria;
- f. a clear statement of the risks in relation to each of the tenders;
- g. the value for money assessment and recommendations; and
- h. details of further actions to be taken.

9 An SER (Medium to High Risk Acquisitions) template can be found on the [Commercial Division Tools and Template Intranet Page](#). The SER template assumes the preparation of separate TEWG reports. As with all templates, the SER template should be tailored as appropriate in the context of the particular evaluation.

## Chapter 5

### Evaluating Foreign Military Sales (FMS) vs commercial procurement

1 For some materiel related procurements, Defence may issue request documentation for a commercial procurement and a letter of request for a Foreign Military Sale (FMS) case in parallel to meet the capability requirement. This raises a number of unique evaluation issues which need to be carefully considered and addressed as part of planning the procurement and in conducting the evaluation. Given the terms under the FMS system are significantly different to the ASDEFCON contract terms for a commercial procurement, there is no common commercial tender evaluation baseline against which the respective responses can be evaluated. Accordingly, the evaluation methodology needs to address how a 'like for like' evaluation can be undertaken between the commercial responses and the FMS response.

2 As discussed in the DPPM, an FMS case involves a direct government-to-government arrangement between Defence and the US Government under the FMS program. The procurement officer in Australia forwards a complete statement of requirement to Defence Materiel Washington (DEFMAT (W)) using a request for a Letter of Request (LOR). The LOR is sent to the US Government by the Director Foreign Military Sales within DEFMAT (W). After considering the LOR, the US Government responds to Defence with a Letter of Offer and Acceptance (LOA) which, following the signature of both parties, forms the FMS contract.

3 As noted above, the terms of an FMS contract are significantly different to the standard contract provisions and risk allocation in the ASDEFCON templates, generally adopting an approach which is less favourable to Defence. Some of the key issues and risks arising from conducting a procurement under FMS compared to a commercial procurement include:

- a. the US Government procures the items on terms and conditions that conform to US Department of Defense regulations and procedures. There can be a disparity between the acceptance procedures applied by the US Government and those used by Defence to satisfy itself as to the condition of the goods or services being procured. Accordingly, it is important to identify in the LOR any specific requirements regarding the condition of the goods or services;
- b. FMS contracts require the purchasing government to pay all costs that may be associated with the sale as the US Arms Export Control Act 1976 (US) requires that the FMS program be conducted at no cost to the US Department of Defense. As a result, the total price of items procured is billed to Defence even if that cost exceeds the amount estimated in the LOA;
- c. Defence assumes the risk of delay, with the US Government only being required to use its best efforts to advise Defence where the delays may substantially affect delivery dates;
- d. the indemnity, liability and warranty provisions in an FMS arrangement are far less favourable to Defence than the ASDEFCON provisions, and in fact require the Commonwealth to indemnify the US Government against loss or liability;
- e. the scope of intellectual property rights and access to technical data are less favourable to Defence; and
- f. the US Government has no liability for infringement or violation of intellectual property or technical data rights.

4 In order to facilitate the tender evaluation, Defence could seek to reduce the 'gap' between the FMS case and the commercial procurement by attempting to more closely align the terms of the FMS contract in the LOR to the terms of the contract used for the commercial procurement. However, Defence's ability to do this is usually limited as it depends on the willingness of the relevant US Government contracting officer to agree to the additional terms included in the LOR. Alternatively, Defence officials can seek to negotiate separate agreements with the relevant FMS contractors, for example, to ensure the necessary technical data and IP rights are given to Defence (which may not otherwise be available through the FMS provisions). The cost of these separate agreements can then be factored into the evaluation.

5 Given that there is no common tender evaluation baseline, the tender evaluations of the commercial responses and FMS response need to include an assessment of the key areas of difference between the LOA for the FMS case and the tender for the commercial procurement. Typically, the assessment of the difference between the LOA and the tender will identify the areas of difference which have a cost or risk impact on Defence or would otherwise provide a benefit to Defence. These differences are either evaluated quantitatively through a price adjustment to the tendered price or qualitatively (or through a combination of the two).

**Example:** Defence conducted a procurement process that competed an FMS case against a commercial procurement. As part of planning the procurement, Defence considered its proposed tender evaluation methodology and its approach to evaluating the differences between the LOA and the tender. In drafting the LOR, Defence included a number of additional terms to more closely align the terms of the FMS contract to the terms of the contract used for the commercial procurement, for example, by seeking more extensive warranties, intellectual property rights and access to technical data. In addition, Defence sought more information than is typically requested under an FMS case to more closely align the LOR with the information requested in respect of the commercial procurement (i.e. in the Tender Data Requirements). Defence was aware that given the manner in which the FMS program operated, there was no guarantee that the US Government would agree to the additional terms or provide the additional information, but ultimately was able to narrow the gap in some respects.

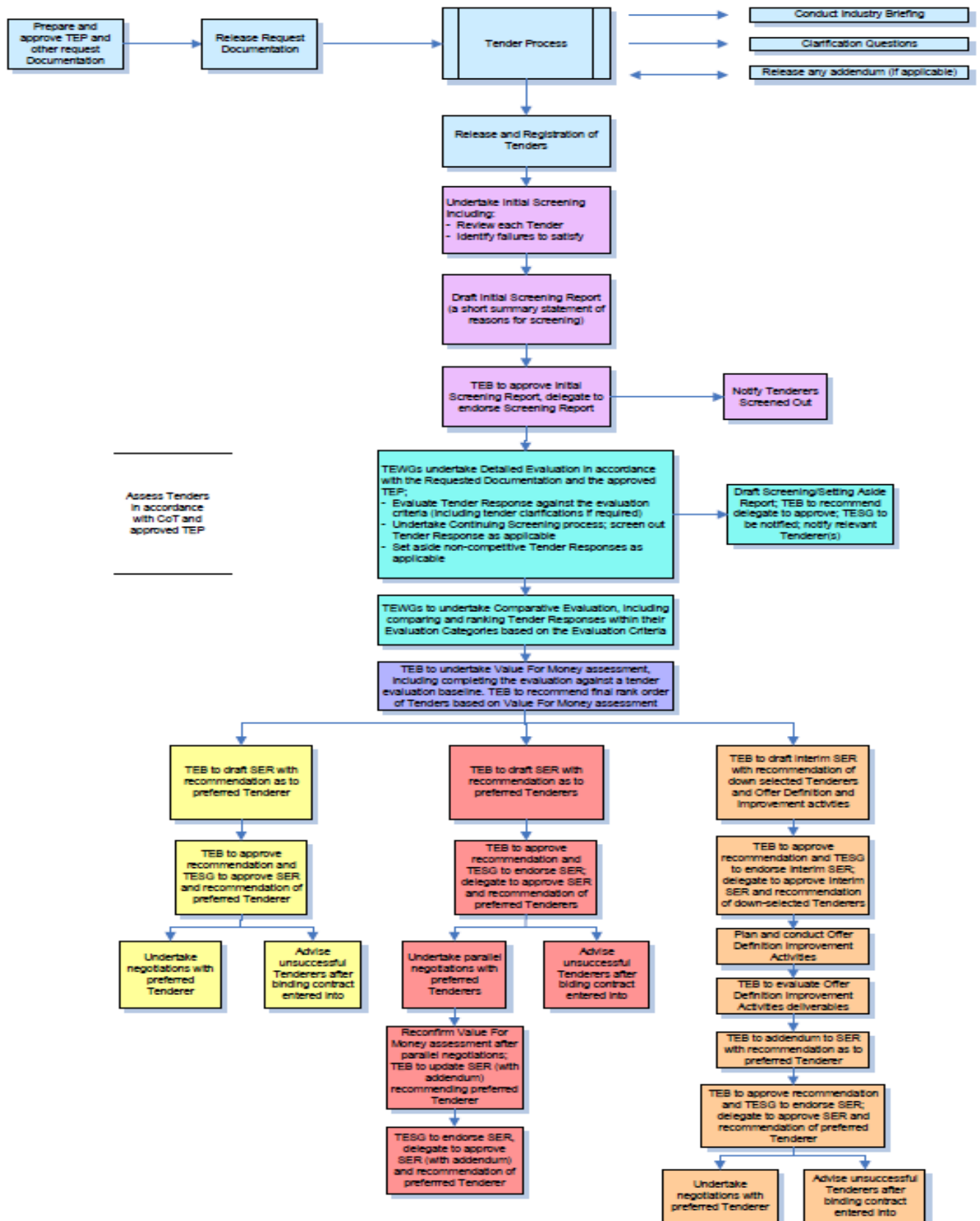
In conducting the evaluation, the key areas of difference between the LOA for the FMS case and the tender for the commercial procurement which had a cost or risk impact on Defence or would otherwise provide a benefit to Defence were identified and evaluated. Examples of the key areas of difference which were evaluated included:

- (a) warranties - the assessment involved a price adjustment and a qualitative assessment;
- (b) intellectual property rights and access to technical data - the assessment involved a qualitative assessment;
- (c) indemnity and liability provisions - the assessment involved a price adjustment;
- (d) Australian Industry Capability - the assessment involved a price adjustment and a qualitative assessment; and
- (e) differences in the allocation of other key risks - the assessment involved a combination of price adjustments and qualitative assessments depending on the particular risk and the extent to which it was capable of being costed.

6 In light of the difficulties associated with evaluating an FMS case against a commercial procurement, it is important that Defence officials set out the agreed evaluation methodology in the TEP, and in particular the approach to evaluating the differences between the LOA and the commercial tenders. It is also important that the outcomes of the evaluation (and in particular the outcome of the assessment of the differences between the LOA and the tenders) are set out in the SER to ensure the outcome of the evaluation is defensible and able to withstand challenge and scrutiny.

Annex A

Overview of Tender Evaluation Process



## Comparative Assessment and Ranking Method

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### Introduction

- 1 Comparative assessment involves ranking tenders in their relative order of merit against the requirements of the request documentation by evaluating tenders (including their associated risks) against each evaluation criterion, to arrive at a recommendation of the overall merit of the tenders against the requirements.
- 2 The three key steps in the comparative assessment and ranking method are:
  - a. evaluating each tender against each of the evaluation criteria;
  - b. conducting a comparative assessment of tenders in respect of each of the evaluation criteria; and
  - c. conducting a value for money assessment.
- 3 These steps are discussed in turn below.

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### Evaluating against each of the evaluation criteria

#### The 'Technical' evaluation

4 Each tender will normally be assessed against an evaluation criterion that relates to the extent to which the tender meets the Statement of Requirements and related specifications of the request documentation. This assessment is often described the 'technical' evaluation. The Technical TEWG will normally undertake its evaluation by reference to a detailed evaluation breakdown structure of the requirements, with the compliance and risk assessments being done at the lowest level of the breakdown structure (which might be at the evaluation element or sub-sub-criterion level). These individual assessments are then 'rolled up' and presented in the TEWG report (and SER) at the evaluation criterion or sub-criterion level.

5 The TEP should define the 'compliance' ratings to be used during the technical evaluation to assist in differentiating between tenders. As noted in Chapter 5 of the CPG, ratings that are commonly used include:

- a. **Exceeds:** the tendered solution exceeds the requirement specified in the request documentation in a manner which offers significant additional benefits to Defence;
  - b. **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
  - c. **Deficient:** the tendered solution does not meet the requirement specified in the request documentation.
- 6 Deficiencies are often further classified as:
- a. **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;
  - b. **Significant:** a deficiency that has the potential to prevent an element of the principal project objectives from being achieved; and
  - c. **Minor:** a deficiency that has no substantial implications for the project objectives and, subject to negotiations with the tenderer, may be acceptable without remedial action.

7 In applying the deficiency ratings, the evaluation team (which may be a Technical TEWG) needs to judge each deficiency on its merits as presented, irrespective of the case or cost of rectification. Having made this judgement, the evaluation team then assesses how readily the deficiency might be overcome and whether or not such deficiencies should be rectified or identified as a shortcoming in the response.

8 'Critical' deficiencies will typically only be relevant to 'Essential' (if any) or 'Very Important' requirements. All 'Critical' deficiencies should be highlighted and explained in the SER in terms of why the deficiency was assessed as 'Critical' and why the deficiency cannot be readily remedied. If a tender is assessed as having a 'Critical' deficiency, the evaluation team will need to assess whether the tender should be set aside.

9 As well as assessing the tenderers' compliance against the technical requirements, the evaluation team needs to assess the risk that the tenderers' solution will perform to the level of compliance offered against the requirements. In the context of the technical evaluation criterion, risk is assessed in terms of the probability of the tenderer's solution not achieving the stated level of compliance, and the consequence of the risk event based on the risk categories identified in the TEP (which, for example, might be the risk to performance, schedule, cost or supportability). Risk assessment is discussed further below in this Annex.

### Other non-price evaluation criteria

10 The evaluation of tenders against other non-price evaluation criteria may use a similar assessment approach as with the technical evaluation, or may adopt a modified methodology, as appropriate for the particular criterion. Evaluation criteria may be broken down into sub-criteria or lower level evaluation elements to assist with the evaluation of tenders against the particular criterion.

11 In the case of the evaluation of compliance with the draft conditions of contract, this usually involves an assessment of the 'risk' to Defence (that is, the Commonwealth) of the non-compliances. This risk assessment may involve a qualitative assessment of the implications of the changed risk allocation that arises as result of the non-compliance. This assessment may also use standard risk descriptors (see the risk assessment methodology below). In addition, the evaluation will also usually involve the evaluation team undertaking a quantitative assessment of the 'cost' to the Commonwealth of the changed risk allocation, which will then need to be 'priced in' (that is, added on) to the tendered price.

12 The evaluation of compliance with the draft conditions of contract often takes the form of a table, an example of which is at Annex D to this Guide. This table can also be used for any offer definition and improvement activities or negotiations (for example, as an attachment to the Contract Negotiation Directive), and can be further updated with the outcomes of those activities or negotiations, as the case requires.

13 The assessment against the non-price criteria should generally be in the form of a qualitative statement that addresses the key strengths and weaknesses of the tender together with the risks identified. Quantitative methods may be used to support the qualitative statement where appropriate.

### Financial (price) evaluation

14 Some considerations relating to the financial evaluation (including the evaluation of the tendered price, and whole of life costs) are discussed in Chapter 3 of this Guide.

### Comparative assessment of tenders

15 Following the assessment of each of the tenders against each of the evaluation criteria, a comparative assessment is undertaken of all tenders on a qualitative basis in respect of each of the evaluation criteria. Comparative assessment involves the ranking of tenderers in relative order of merit against each of the evaluation criteria, including risk. The comparative assessment should draw out the major differences and identifies discriminators between the tenders as they relate to the evaluation criteria.

16 Where the TEO involves TEWGs, the comparative assessment will be conducted firstly at the TEWG level in respect of those evaluation criteria for which each TEWG is responsible and then at the TEB level in respect of all evaluation criteria.

17 In relation to the technical evaluation, the evaluation team may decide to record the compliance and risk assessments of the technical requirements in a table, as follows:

| Requirement<br>(from SoW or<br>specification) | Tenderer A      |        | Tenderer B            |      | Tenderer C |           |
|---|-----------------|--------|-----------------------|------|------------|-----------|
|   | Compliance      | Risk   | Compliance            | Risk | Compliance | Risk      |
| 1.1.1   | Deficient minor | Medium | Deficient significant | Low  | Meets      | Very High |
| 1.1.2   | etc             |        |                       |      |            |           |
| 1.1.3 etc                                     | etc             |        |                       |      |            |           |

18 Recording the evaluation in this kind of format may allow the evaluation team to more easily identify and draw out the key areas of discrimination across the relevant evaluation criteria.

## Value for money assessment

19 Following the completion of the comparative assessment of tenders, the evaluation team conducts a value for money assessment to determine which tender offers best value for money.

20 It should be noted that the tender which receives the highest overall ranking as part of the comparative assessment (for example, is ranked first against the most number of evaluation criteria) will not necessarily be the tenderer which offers the best value for money. This is because the value for money assessment involves a more holistic assessment of each of the tenders, including an aggregates assessment of overall risk, and in particular allows the evaluation team to consider price in the context of the 'value' of the tenders against the non-price criteria.

### Value rating table

21 As noted in Chapter 3 of this Guide, the TEP may provide for the use of a 'value' descriptor to describe the overall value of a particular tender, before price is considered, with 'value' being a judgement based on the combined influences of the compliance and risk assessments against the non-price evaluation criteria.

| Value Rating        | Value Rating Guidance   |
|---------------------|---|
| <b>Very Strong</b>  | Corresponds to compliance levels of Exceeds or Compliant with Negligible or Low risk magnitude.   |
| <b>Strong</b>       | Corresponds to compliance levels of Exceeds or Compliant with Moderate risk magnitude, or Deficient – Minor with Negligible or Low risk magnitude.  |
| <b>Fair</b>         | Corresponds to compliance levels of Exceeds or Compliant with High risk magnitude, Deficient – Minor with Moderate risk magnitude, or Deficient – Significant with Negligible or Low risk magnitude.        |
| <b>Marginal</b>     | Corresponds to compliance levels of Exceeds or Compliant with a Very High risk magnitude, Deficient – Minor with High or Very High risk magnitude, or Deficient – Significant with Moderate risk magnitude. |
| <b>Unacceptable</b> | Corresponds to compliance levels of Deficient – Significant with High or Very High risk magnitude, or Deficient – Critical with any risk magnitude.   |

## Risk assessment methodology

22 This section sets out a basic risk assessment methodology. Defence officials need to consider and tailor the consequence and probability descriptors by reference to the particular procurement they are undertaking.

23 In the more complex procurements, the TEP may set out separate Consequence tables for specific evaluation criteria. For example, for the technical evaluation, the Consequence table may have descriptors that are focussed on the performance of the platform, equipment or system being procured. Whereas for the financial evaluation, the Consequence table may have descriptors focused on potential cost increases of increasing magnitudes. Alternatively, the TEP may set out Consequence tables by risk category that are able to be applied across all evaluation criteria, where relevant. For example, the TEP could set out individual Consequence tables for Performance, Schedule, Cost and Supportability.

24 Identification of risks during assessment is made at the lowest level of assessment. Assessment encompasses consideration of the Consequence or Impact of risk on the function under consideration, and the Probability or Likelihood of the risk arising. The consequence and probability are then combined to determine an overall Risk Rating.

25 The determination of the consequence of risk on each function forming part of the requirements is influenced by various factors. Consequence can be considered by identifying the overall outcomes

to be delivered across the contract and considering the likely consequences of risk as a result of the identified factors.



**Risk Consequence Example 1 (Major Capital Acquisition)**

| <b>Consequence</b> | <b>Consequence Description</b>   |
|--------------------|--|
| Extreme            | <p>Critical increase in acquisition cost – <b>eg project unaffordable</b></p> <p>Critical increase in Through Life Costs. – <b>eg support unaffordable</b></p> <p>Critical schedule slip. <b>[eg &gt; 3 years – consider project cancellation]</b></p> <p>Critical reduction in operational performance. – <b>eg project will not deliver a capability usable by Capability Manager</b></p> <p>Critical reduction in supportability – <b>eg platform unable to be supported</b></p> <p>Critical reduction in technical integrity. – <b>eg platform unable to be safely or reliably operated</b></p> <p>Critical failure of equipment leading to death/serious injury of personnel <b>eg platform unsafe to use</b></p> |
| High               | <p>Significant increase in acquisition cost <b>[insert range, eg \$20-50m]</b>.</p> <p>Significant increase in Through Life Costs. <b>[insert range, eg \$20m pa]</b></p> <p>Significant schedule slip. <b>[insert range, eg 2-3 years]</b></p> <p>Significant reduction in operational performance.</p> <p>Significant reduction in supportability.</p> <p>Significant reduction in technical integrity.</p> <p>Significant failure of equipment leading to injury of personnel.</p>  |
| Medium             | <p>Moderate increase in acquisition cost. <b>[insert range]</b></p> <p>Moderate increase in Through Life Costs. <b>[insert range]</b></p> <p>Moderate schedule slip. <b>[insert range]</b></p> <p>Moderate reduction in operational performance.</p> <p>Moderate reduction in supportability.</p> <p>Moderate reduction in technical integrity.</p> <p>Failure of equipment leading to damage to platform.</p>   |
| Low                | <p>Minor increase in acquisition cost. <b>[insert range]</b></p> <p>Minor increase in Through Life Costs. <b>[insert range]</b></p> <p>Minor schedule slip. <b>[insert range]</b></p> <p>Minor reduction in operational performance.</p> <p>Minor reduction in supportability.</p> <p>Minor reduction in technical integrity.</p> <p>Minor failure of equipment.</p>   |
| Negligible         | The consequences would be dealt with through routine management and operations.  |

**Risk Consequence Example 2 (Services based procurement)**

| <b>Consequence</b> | <b>Consequence Description</b>  |
|--------------------|---|
| Extreme            | <p>Would threaten the survival of not only the program or project, but also Defence's operations; or</p> <p>Has extreme political and/or community sensitivity</p>  |
| High               | <p>Would threaten the survival or continued effective function of the program or project;</p> <p>Could significantly impact on Defence's strategic/operational objectives; or</p> <p>Has significant political and/or community sensitivity</p> |

|            |  |
|------------|--|
| Medium     | Would not threaten the program or project, but would mean that the program or project could be subject to significant review or changed ways of operating.<br>Has moderate impact on Defence's strategic and/or operational objectives; or<br>Has moderate political and / or community sensitivity. |
| Low        | Would threaten the efficiency or effectiveness of some aspect of the program or project, but would be dealt with internally, or<br>Has minimal impact on Defence's strategic/operational objectives, or<br>Has low political and/or community sensitivity  |
| Negligible | The consequences would be dealt with through routine operations.   |

26 An assessment of probability of the risk occurring is also required. The assessment is made on occurrence, that is, it is not a constant like impact, but is an individual assessment in each case. The assessment will be based upon the likelihood that the risk will occur in light of the response provided by the tenderer. Probability will be assessed as follows:

#### Risk Probability

| Likelihood     | Frequency Description                     |
|----------------|---|
| Almost Certain | Almost certain to occur                   |
| Likely         | Likely to occur                           |
| Moderate       | Could occur                               |
| Unlikely       | Unlikely to occur                         |
| Remote         | Would only occur in extreme circumstances |

27 This assessment will result in the allocation of a Risk Rating, which is a function of the assessment of the Consequence and Probability of these two factors as follows:

#### Risk Assessment Table

| Consequence/<br>Impact | Likelihood     |           |          |          |          |
|------------------------|----------------|-----------|----------|----------|----------|
|                        | Almost Certain | Likely    | Moderate | Unlikely | Remote   |
| Extreme                | Significant    | Very High | High     | Medium   | Low      |
| High                   | Very High      | High      | Medium   | Low      | Very Low |
| Medium                 | High           | Medium    | Low      | Very Low | Nil      |
| Low                    | Medium         | Low       | Very Low | Nil      | Nil      |
| Negligible             | Low            | Very Low  | Nil      | Nil      | Nil      |

#### Less complex evaluation methodology

28 As noted in Chapter 5 of the CPG, evaluation methodologies can take various forms depending on the nature and risk of the relevant procurement. The following is an example of a less complex scoring system which includes both quantitative and qualitative aspects. Under this methodology, the scoring of tenders determines the extent of compliance and quality of each tendered response against the requirements set out in the request documentation. Note that the scoring system combines the risk assessment with the qualitative rating to determine the score.

29 This kind of approach could be used for most non-price evaluation criteria, and may be suitable for services based contracts.

| Descriptor | Definition | Risk Level | Score |
|------------|------------|------------|-------|
|------------|------------|------------|-------|

| <b>Descriptor</b> | <b>Definition</b>  | <b>Risk Level</b>            | <b>Score</b> |
|-------------------|--|------------------------------|--------------|
| Excellent         | <ul style="list-style-type: none"> <li>- The tendered offer meets the requirement in all respects.</li> <li>- The evaluator has complete certainty and without reservation that the Tenderer will be able to meet the required standard at the highest level.</li> <li>- The Tenderer's claims are fully supported by the information provided.</li> <li>- The supporting information is comprehensive and complete.</li> <li>- Where consulted, all reference sites confirmed the superior nature of the Tenderer's performance.</li> </ul> | Nil risk                     | 10           |
| Very Good         | <ul style="list-style-type: none"> <li>- The tendered offer meets the requirement in most but not all respects.</li> <li>- The evaluator has no reason to believe that the Tenderer will not meet the required standard.</li> <li>- The Tenderer's claims are well supported by the information provided.</li> <li>- Supporting information is comprehensive and complete.</li> <li>- Where consulted, the majority of reference sites generally confirmed the high quality of the Tenderer's performance.</li> </ul>                        | Very low risk                | 9 - 8        |
| Good              | <ul style="list-style-type: none"> <li>- The tendered offer generally meets the requirement but not in all respects.</li> <li>- The evaluator has no reason to believe that the Tenderer will not meet the required standard.</li> <li>- Supporting information is complete.</li> <li>- Where consulted, the majority of reference sites generally confirmed a good level of service</li> </ul>  | Low risk                     | 7 - 6        |
| Satisfactory      | <ul style="list-style-type: none"> <li>- The tendered offer just satisfies the requirements but there are some deficiencies and shortcomings in the scope and detail of the supporting information.</li> <li>- The evaluator has some reservations regarding the satisfaction of the required standard.</li> <li>- Where consulted, the reference sites generally confirmed a level of service that was satisfactory without being exceptional.</li> </ul>   | Medium risk                  | 5 - 4        |
| Poor              | <ul style="list-style-type: none"> <li>- There are major deficiencies in the scope and detail of the tendered offer and/or supporting information and the evaluator has significant reservations regarding the Tenderer's ability to meet the requirement.</li> <li>- Where consulted, the reference sites had reservations about the quality of the service provided.</li> </ul>  | High risk                    | 3 - 2        |
| Unsatisfactory    | <ul style="list-style-type: none"> <li>- The supporting information is insufficient to allow any judgment.</li> </ul>  | Very High - Significant risk | 1            |
| Nil Response      | <ul style="list-style-type: none"> <li>- There is no response.</li> </ul>  | N/A                          | 0            |

## Common tender evaluation issues

This Annex identifies some of the key issues which can arise during tender evaluations and identifies possible steps which can be adopted to assist in preventing or mitigating those issues.

| Issue  | Potential steps to prevent issue arising   |
|--|--|
| <ul style="list-style-type: none"> <li>Insufficient time, resources or skills to carry out the tender evaluations effectively.</li> </ul>  | <ul style="list-style-type: none"> <li>Ensure that the request documentation is released early.</li> <li>Plan the tender evaluation upfront so the TEO is aware of how it will go about assessing each of the evaluation criteria, what information it will require to assess each of the evaluation criteria and what key issues are anticipated.</li> <li>Ensure the TEO is adequately resourced and has the necessary skills, training and knowledge/subject matter experts. For large evaluations, identify potential back up or replacement team members.</li> <li>Ensure that tenderers are required to submit all information which Defence requires in order to assess tenders against the evaluation criteria.</li> </ul>   |
| <ul style="list-style-type: none"> <li>Failure to effectively plan for and resource tender evaluation.</li> </ul>  | <ul style="list-style-type: none"> <li>Ensure logistics support is planned well in advance of receipt and opening of tenders.</li> <li>Ensure tender rooms are available for the duration of the tender evaluation.</li> <li>Ensure members of the TEB and TEWG are appropriately skilled, experienced and available to conduct the tender evaluation.</li> </ul>  |
| <ul style="list-style-type: none"> <li>Failure to justify findings/conclusions contained in the SER, the TEWG reports do not adequately differentiate between tenders, or the SER or the TEWG reports otherwise do not include sufficient detail.</li> </ul> | <ul style="list-style-type: none"> <li>Include sufficient detail in the SER and the TEWG reports to justify the source selection recommendation and the various findings / conclusions.</li> <li>Articulate in the SER and TEWG reports the key points of differentiation between the tenders.</li> <li>Include sufficient detail in the TEWG reports about the outcome of the evaluation in relation to each of the evaluation criteria.</li> <li>Include sufficient detail in the SER about each of the following: <ul style="list-style-type: none"> <li>the outcome of the evaluation in relation to each of the evaluation criteria;</li> <li>the outcome of the comparative assessment of tenders against each of the evaluation criteria;</li> <li>the risks in relation to each of the tenders; and</li> <li>the value for money assessment and recommendations.</li> </ul> </li> <li>Clearly state in the SER details of the evaluation process and methodology used.</li> <li>Ensure that the level of detail included in the SER and the TEWG reports is commensurate with the nature and complexity of the procurement. Cite all supporting information sources from the tenders.</li> </ul> |
| <ul style="list-style-type: none"> <li>Incomplete or poorly drafted SER due to insufficient time being devoted to the preparation of the SER following completion of the TEWG reports.</li> </ul>  | <ul style="list-style-type: none"> <li>Ensure that sufficient time and resources are devoted to the preparation of the SER.</li> <li>Plan the format and structure of the SER as part of preparing for and planning the tender evaluation.</li> <li>Obtain specialist commercial contracting advice and input on the draft SER.</li> </ul>   |

| Issue  | Potential steps to prevent issue arising  |
|--|---|
| <ul style="list-style-type: none"> <li>Failure to ensure consistency between the various reports resulting from tender evaluation.</li> </ul>  | <ul style="list-style-type: none"> <li>Ensure that all material issues and risks identified in the TEWG reports are captured in the SER.</li> <li>Ensure that the findings / conclusions contained in the SER are consistent with the findings / conclusions in the TEWG reports and use cross-referencing where appropriate in the SER.</li> </ul>   |
| <ul style="list-style-type: none"> <li>Failure to properly understand an aspect of a tender.</li> </ul>  | <ul style="list-style-type: none"> <li>Where an aspect of a tender is unclear or ambiguous, clarify the matter with the tenderer.</li> <li>If a material matter which is unclear or ambiguous is not clarified, outline the reasons for not doing so in the relevant TEWG report and the SER.</li> </ul>  |
| <ul style="list-style-type: none"> <li>Inability to consider certain information as part of the tender evaluation due to the limited scope of the evaluation criteria.</li> </ul>  | <ul style="list-style-type: none"> <li>Ensure that the evaluation criteria are sufficiently broad. Except where justified in the circumstances, avoid using narrow evaluation criteria.</li> <li>Do not introduce additional evaluation criteria as part of tender evaluation to compensate for narrowly drafted evaluation criteria.</li> </ul>  |
| <ul style="list-style-type: none"> <li>Failure to require tenderers to submit all information which is required by Defence in order to assess each of the evaluation criteria and to make a value for money assessment.</li> </ul> | <ul style="list-style-type: none"> <li>In preparing the request documentation, map each of the Tender Data Requirements against the evaluation criteria to identify any gaps and to ensure that the TDRs are comprehensive and capture all of Defence's information requirements.</li> </ul>  |
| <ul style="list-style-type: none"> <li>Failure to properly identify and assess risk treatments for risks associated with a tender.</li> </ul>  | <ul style="list-style-type: none"> <li>Ensure that as part of the tender evaluation risks are identified and recorded in respect of each tender. Each of the risks can then be assessed and appropriate risk treatments identified.</li> <li>Risks associated with each tender must be taken into consideration as part of the value for money assessment.</li> <li>If required, clarify the identified risks with tenderers.</li> </ul>  |
| <ul style="list-style-type: none"> <li>Failure of the TEO members to fully understand the key aspects of a tender.</li> </ul>  | <ul style="list-style-type: none"> <li>Ensure that each of the TEO members have a good understanding of the key aspects of each tender.</li> <li>For example, often pricing information (even at a more general level) is not disclosed to any members of the TEWGs outside the Finance TEWG. This can result in a failure by other TEWGs to identify issues or risks in conducting their own evaluation as they do not have an understanding of the basis on which each tenderer has priced the tender.</li> <li>Hold regular meetings of the TEO to assist with communication between TEO members on key issues associated with each tender.</li> <li>Ensure that all TEO members can participate in relevant meetings including those who are working remotely.</li> </ul> |
| <ul style="list-style-type: none"> <li>Failure to properly consider all relevant information included in a tender which is relevant to the procurement.</li> </ul>   | <ul style="list-style-type: none"> <li>Implement arrangements to ensure that all relevant information is considered as part of the tender evaluations.</li> <li>For example, often information relating to a legal or commercial issue may be included in that part of a tender submission relating to technical matters. In such circumstances the Technical TEWG should advise the Commercial/Contracting/Financial TEWG about the information.</li> <li>Hold regular meetings of the TEO to assist with communication between TEO members.</li> </ul>  |

| Issue  | Potential steps to prevent issue arising  |
|--|---|
| <ul style="list-style-type: none"> <li>Failure to effectively evaluate tendered prices.</li> </ul>   | <ul style="list-style-type: none"> <li>Ensure the evaluation of the tendered prices considers all pricing aspects. For example, if the tendered prices include S&amp;Q Services or Task-Priced Services, these need to be considered as part of the price evaluation.</li> <li>Similarly, ensure that 'whole of life' costs are properly assessed on a consistent basis across all tenders.</li> <li>Ensure that any pricing assumptions are plausible, tested and clearly stated in the TEWG reports and the SER.</li> <li>Where appropriate, conduct sensitivity analysis to test the outcomes of the price evaluation.</li> <li>Where appropriate, prices should be 'normalised' or adjusted to ensure a complete and 'like for like' cost comparison of all tenders.</li> <li>Where an aspect of the tenderer's pricing is unclear or ambiguous, clarify the matter with the tenderer – do not make assumptions about a tenderer's pricing if it is not clear.</li> </ul> |
| <ul style="list-style-type: none"> <li>Failure to comply with any processes, requirements or criteria detailed in the request documentation or the TEP.</li> </ul>     | <ul style="list-style-type: none"> <li>Ensure the TEP is consistent with the request documentation.</li> <li>Implement safeguards to ensure that the tender evaluation is conducted in accordance with the TEP.</li> <li>Ensure that all members of the TEO understand the request documentation and the TEP and are briefed appropriately.</li> <li>Hold regular meetings of the TEO to facilitate identification of possible non-compliances.</li> <li>Ensure that the TEP is drafted so that the TEO can comprehensively evaluate tenders and does not unnecessarily restrict Defence's flexibility in relation to the conduct of tender evaluation.</li> </ul>  |
| <ul style="list-style-type: none"> <li>Failure to evaluate tenders consistently.</li> </ul>  | <ul style="list-style-type: none"> <li>Review the outcomes of the tender evaluation to ensure that tenderers have been treated consistently.</li> <li>Ensure that the advantages and disadvantages of each tender are identified.</li> <li>Ensure that where a benefit, issue or risk in respect of one tenderer has been identified, it is also identified in respect of other tenderers where that benefit, issue or risk exists in respect of the other tenderer.</li> </ul>   |
| <ul style="list-style-type: none"> <li>Failure to treat tenderers equally or to give tenderers equal opportunity.</li> </ul>   | <ul style="list-style-type: none"> <li>Ensure that where an opportunity is given to one tenderer that it is given to all tenderers (where applicable).</li> </ul>   |
| <ul style="list-style-type: none"> <li>Focussing on scoring tenders and failure to adequately capture key issues and risks through qualitative assessments.</li> </ul> | <ul style="list-style-type: none"> <li>Ensure that any key issues and risks are captured and appropriately addressed through qualitative statements.</li> <li>Consider the qualitative statements as part of the overall value for money assessment.</li> </ul>   |
| <ul style="list-style-type: none"> <li>Failure to maintain confidentiality.</li> </ul>   | <ul style="list-style-type: none"> <li>Ensure that the TEP and the Legal Process and Probity Plan adequately set out clear requirements in relation to confidentiality.</li> <li>Ensure members of the TEO are briefed, understand and are regularly reminded of their obligations of confidentiality.</li> <li>Ensure appropriate security of tenders and documentation relating to the conduct of tender evaluations.</li> </ul>  |
| <ul style="list-style-type: none"> <li>Changing evaluation criteria.</li> </ul>  | <ul style="list-style-type: none"> <li>Evaluate tenders in accordance with the evaluation criteria set out in the request documentation.</li> <li>Ensure that the evaluation criteria set out in the TEP are consistent</li> </ul>  |

| Issue  | Potential steps to prevent issue arising  |
|--|---|
|  | <p>with the evaluation criteria set out in the request documentation.</p> <ul style="list-style-type: none"> <li>Do not introduce additional evaluation criteria during the evaluation.</li> <li>Ensure that the evaluation criteria are sufficiently broad. Except where justified in the circumstances, avoid using narrow evaluation criteria.</li> </ul>  |
| <ul style="list-style-type: none"> <li>Failure to comply with process documents governing the conduct of offer definition and improvement activities.</li> </ul>   | <ul style="list-style-type: none"> <li>Where Defence proposes to conduct offer definition and improvement activities ensure that any supporting process documents are prepared and provided to tenderers which clearly outline the process to be followed and the rules governing the proposed activities.</li> <li>Ensure that Defence complies with the process documents.</li> </ul>   |
| <ul style="list-style-type: none"> <li>Failure to make a proper value for money assessment.</li> </ul>   | <ul style="list-style-type: none"> <li>Understand that the tenderer whose tender offers the best value for money will not necessarily be the tenderer which offers the lowest price.</li> <li>Assess which tender offers the best value for money having regard to the assessment against all the evaluation criteria, including price, and any risks associated with the tender.</li> <li>Consider both quantitative and qualitative issues identified from the conduct of the tender evaluation.</li> </ul> |
| <ul style="list-style-type: none"> <li>Dominant personalities amongst members of the TEO exert undue influence on other members.</li> </ul>  | <ul style="list-style-type: none"> <li>The Chair of the TEB needs to take steps to ensure that any member of the TEO, particularly those with a leadership role such as TEWG leaders, does not exert undue influence on other members of the TEO during the course of the tender evaluations.</li> </ul>  |
| <ul style="list-style-type: none"> <li>Failure to appoint a legal process and probity adviser or a failure to consult the legal process and probity adviser when probity issues arise.</li> </ul>          | <ul style="list-style-type: none"> <li>Ensure that a legal process and probity adviser is appointed where appropriate to do so (see DPPM and CPG for more information).</li> <li>Ensure that appropriate arrangements are established within the TEO to identify legal process and probity issues (for example, ensure that probity is an agenda item at all TEWG and TEB meetings) and that the legal process and probity adviser is consulted in relation to issues which have been identified.</li> </ul>  |
| <ul style="list-style-type: none"> <li>Operational bias amongst members of the TEO (for example, understating technical issues and risks of the solution with the best perceived capabilities).</li> </ul> | <ul style="list-style-type: none"> <li>Ensure that the risk assessment of tenderers' ability to achieve capability requirements is rigorous and realistic.</li> <li>Ensure that developmental solutions (including integration of COTS/MOTS items) are not described in the SER as COTS/MOTS.</li> <li>The Chair of the TEB needs to ensure that the operational view does not exert undue influence during the course of the tender evaluations.</li> </ul>  |

**CONTRACT COMPLIANCE – [INSERT NAME OF TENDERER]**

| CoC Reference | Details of clause and tenderer's response   | Compliance (Complies / Does not comply) | Evaluation (risk assessment) of any non-compliance   | Assessment rating of any non-compliance (Critical / Significant / Minor) | Price Adjustment (if any) | Negotiation Issues and Comments   | Indicator of criticality for negotiations (Must obtain / Should obtain at cost / Should obtain at no cost / desirable at no cost) |
|---------------|---|---|--|--|---------------------------|---|---|
| 1.1.1         | <p>[INSERT DETAILS OF CLAUSE]</p><br><br><br><br><br><br><br><br><br><br><br><p>[INSERT TENDERER'S PROPOSED MARK UP (IF ANY)]</p> | <p>[Example: Does Not Comply]</p>       | <p>[INSERT NARRATIVE ASSESSMENT OF THE NON-COMPLIANCE, FOR EXAMPLE:</p> <ul style="list-style-type: none"> <li>- WHAT IS THE NON-COMPLIANCE</li> <li>- WHAT IS THE ISSUE OR RISK FOR THE COMMONWEALTH AS A RESULT OF THE NON-COMPLIANCE</li> <li>- IS THERE A REASON OR JUSTIFICATION FOR THE NON-COMPLIANCE.</li> <li>- IS THERE A RISK TRANSFER TO THE COMMONWEALTH AS A RESULT OF THE NON-COMPLIANCE</li> <li>- CAN THE RISK TRANSFER BE QUANTIFIED</li> <li>- IS THE RISK TRANSFER UNACCEPTABLE</li> <li>- ARE THERE MITIGATIONS</li> <li>- ANY OTHER OBSERVATIONS ABOUT THE NON-COMPLIANCE</li> <li>- CAN AN ACCEPTABLE SOLUTION BE NEGOTIATED</li> <li>- ETC]</li> </ul> | <p>[Example: Significant]</p>  | <p>[Example: \$30m]</p>   | <p>[IDENTIFY RELEVANT ISSUES FOR NEGOTIATION AND SUPPORTING COMMENTS]</p> | <p>Must obtain</p>  |



| CoC Reference | Details of clause and tenderer's response | Compliance (Complies / Does not comply) | Evaluation (risk assessment) of any non-compliance | Assessment rating of any non-compliance (Critical / Significant / Minor) | Price Adjustment (if any) | Negotiation Issues and Comments | Indicator of criticality for negotiations (Must obtain / Should obtain at cost / Should obtain at no cost / desirable at no cost) |
|---------------|---|---|--|--|---------------------------|---------------------------------|---|
| 1.1.2         |   |   |  |  |                           |                                 |   |
| 1.1.3         |   |   |  |  |                           |                                 |   |
| ...           |   |   |  |  |                           |                                 |   |

## WORKED EXAMPLE

| CoC Reference | Details of clause and tenderer's response  | Compliance (Complies / Does not comply) | Evaluation (risk assessment) of any non-compliance  | Assessment rating of any non-compliance (Critical / Significant / Minor) | Price Adjustment (if any)   | Negotiation Issues and Comments  | Indicator of criticality for negotiations (Must obtain / Should obtain at cost / Should obtain at no cost / desirable at no cost) |
|---------------|--|---|---|--|---|--|---|
| 3.3.2         | <b>Authorisations</b>  | Complies                                | N/A   | N/A  | N/A   | Nil  | N/A   |
| 5.3.2b        | <p><b>Intellectual Property Licence</b></p> <p>Tenderer requires restrictions on ability of Platform Integration Contractor (PIC) to sub-licence and transfer licence granted.</p> <p><b>Proposed mark up:</b><br/>Without limiting clause 5.3.1 and subject to clause 5.3.3, unless the Contractor has specified otherwise in the IP Plan:<br/>a. ...<br/>b. subject to clause 5.3.2c, in respect of all Third Party IP the</p> | Does Not Comply                         | <p>Tenderer proposes to prevent a PIC from being able to issue a third party (ie a subcontractor) with a sub-licence to use Third Party IP. This could significantly hinder the PICs ability to use and maintain the platform. Accordingly, tenderer's proposed changes at 5.3.2b(i) and (ii) present a high risk to Defence. The self-sufficiency of the PICs would be undermined if the proposed changes were accepted, which could lead to a greater reliance on the Commonwealth to engage and arrange maintenance/support activities.</p> <p>If tenderer holds to this position, there is a serious possibility that the deficiency cannot be remedied or mitigated. This would mean the principal requirements of the project could be prevented from being achieved.</p> | Critical   | Cannot be quantified at this stage (to be reassessed after negotiation, eg if tenderer requires additional licence fee) | <p>The proposed restrictions will need to be negotiated with tenderer.</p> <p>The Commonwealth's preferred position is to retain the provisions as written in the draft Conditions of Contract.</p> <p>Defence could consider whether suitable protections can be agreed with tenderer, eg a restricted list of contractors, confidentiality deeds etc.</p> <p>Tenderer may demand additional fee to agree to licence, which may affect VFM of the tender.</p> | Must obtain   |

|                    |  |                 |  |             |  |   |                           |
|--------------------|--|-----------------|--|-------------|--|---|---------------------------|
|                    | Contractor shall ensure that the PIC is either:<br>(i) entitled to be granted a <u>non-transferable</u> sublicense from the Commonwealth in accordance with clause 5.3.1b(i); or<br>(ii) is granted a Licence in respect of all Third Party IP to use, maintain and dispose of the Supplies.   |                 |  |             |  |   |                           |
| 9.2.1 (new clause) | <p><b>Warranty</b><br/>Tenderer proposes addition of 'industry standard' provisions relating to warranties applying to the Supplies.</p> <p>Proposed mark up:<br/><u>Contractor's liability under this clause 9.2.1 shall not extend to:</u><br/><u>a. remedial work arising after the Supplies have, temporarily or otherwise, ceased to be operated other than in accordance with this Contract;</u><br/><u>b. remedial work necessitated, by any act, omission or neglect of the Commonwealth and/or a PIC, its servants or agents, or where defects arise or are</u></p> | Does not comply | <p>The risk of agreeing to this clause is that the Commonwealth will be unable to successfully rely on the warranty under the contract. The clause is very broad and will prevent warranty claims arising from normal usage.</p> <p>Proposed para (a) limits the ability of the PICs to use the platform without voiding warranty.</p> <p>Proposed para (b) will leave open to argument any warranty claim where it could be argued the Commonwealth/ PIC has attempted repair work and increase the burden on the Commonwealth as many warranty claims will likely be disputed.</p> <p>Proposed para (c) is extremely broad and would cover many legitimate warranty claims – something that is subject to fair wear and tear yet still breaks during the warranty period should not be an exception from the warranty.</p> <p>Proposed para (d) is not on the subject of warranty and should not be located in the warranty clause.</p> <p>In general, the proposed provisions do not appreciate how the platforms are to be operated and may prevent warranty claims where the defect arises from normal usage.</p> | Significant | \$10m (estimated warranty claims that would be foregone - based on remedial work undertaken on platform under previous contract) | <p>Proposed para (a) is potentially acceptable in principle (defects arising from use outside the scope of the contract) but the proposal fails to provide any scope/limitation to the clause. For example, need a clear statement as to what 'operated in accordance with the contract' means (eg reference to FPS, OCD, potentially reference to other plans/operational documentation). Further, the proposed wording excludes all defects occurring <i>after</i> use outside the contract, not defects <i>caused</i> by such use.</p> <p>Proposed para (b) can probably also be accepted with amendment – if Defects are caused by the willful negligence or willful damage of the Cth or the PICs. Current wording is unacceptable – the proposal to exclude 'any' act, omission etc. of the Commonwealth causing remedial work is extremely broad. Similarly, the principle</p> | Should obtain at no cost. |

|   |  |  |  |  |  |  |
|---|--|--|--|--|--|--|
| <p><u>aggravated by repair work or attempts to repair by the Commonwealth and/or a PIC, their servants, agents and contractors not approved by the Contractor;</u><br/> <u>c. remedial work arising out of the normal wear and tear and use of the Supplies and any of their components;</u><br/> <u>d. any claim by any person or party howsoever arising including, but not limited to injury, loss, loss of profits or damage caused by or sustained by the Supplies, the Commonwealth and PICs.</u></p> |  | <p>It is possible an acceptable outcome can be negotiated but will require extensive redrafting.</p> |  |  | <p>behind 'caused by or aggravated by' repair work may also be acceptable if it is limited in scope, for example, only to the extent that such work was not in accordance with any repair manuals/TD provided by the contractor. The contractor does not get the right to approve all repairers and this suggestion indicates that the tenderer does not understand the nature of the contract and how the PICs will be maintaining the platform.</p> <p>Proposed para (c) is extremely broad and would cover many legitimate warranty claims. This should not be agreed.</p> <p>Proposed para (d) is not on the subject of warranty and should not be located in the warranty clause.</p> |  |
|---|--|--|--|--|--|--|