



Designing a competitive flexible procedure, evaluation and record keeping

**Efficiency North event
5th November 2025**

**Kieran McGaughey,
Consultant Solicitor**


Introduction...



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Housekeeping

- Please put yourself on mute – thank you!
- Questions very welcome! There will be an opportunity for questions at the end, you can also put them in the chat if you wish



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Designing a competitive flexible procedure...

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What is the competitive flexible procedure?

Under the Procurement Act there are now only 2 competitive procedures available:

1. The open procedure
2. The new **competitive flexible procedure (“CFP”)**

“such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract”

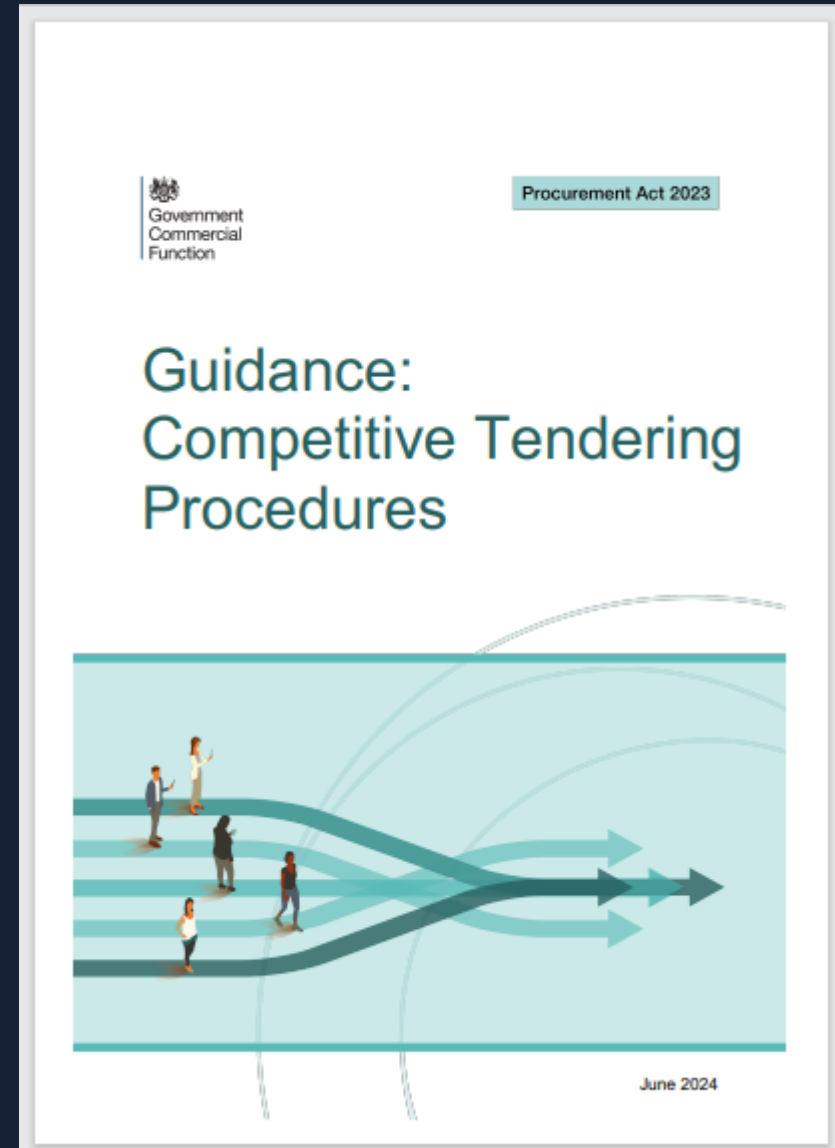
Section 20(2)(b)



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Guidance

- Guidance on the competitive flexible procedure under the Procurement Act has been published – can be accessed via clicking on the image:



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The new competitive flexible procedure

- Whilst no overarching duty of **proportionality** under the Procurement Act (unlike PCR 2015), it applies here:

“A contracting authority must ensure that the procedure is a proportionate means of awarding the public contract, having regard to the nature, complexity and cost of the contract”

Section 20(3), Procurement Act 2023

“Accordingly, the procurement procedure should not be overly burdensome. Unnecessarily complex and/or time-consuming procedures are also potential barriers that could deter SMEs and other suppliers from participating”

Guidance: Competitive Tendering Procedures



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CFP: what does the guidance say?

Theme 1: Freedom of choice...

“The competitive flexible procedure replaces many of the previous more prescriptive procedures. It provides contracting authorities with more opportunity and flexibility to design their own competitive tendering procedure.

“A contracting authority can design a procedure similar to one of the procedures in the previous legislation if helpful, or tailor one of those procedures as it considers appropriate, or design its own procedure entirely”

Guidance: Competitive Tendering Procedures

CFP: what does the guidance say?

Theme 2: Transparency...

“...in designing and carrying out their procedure, contracting authorities must have regard to the procurement objectives (section 12) and meet the procedural requirements...such as those relating to...transparency”

“Section 12 of the Act requires that contracting authorities must have regard to the importance of “sharing information for the purpose of allowing suppliers and others to understand the authority’s procurement policies and decisions”. This is particularly relevant during the carrying out of a competitive flexible procedure”

“The contracting authority must set out in the tender notice how the competitive flexible procedure is to be carried out”

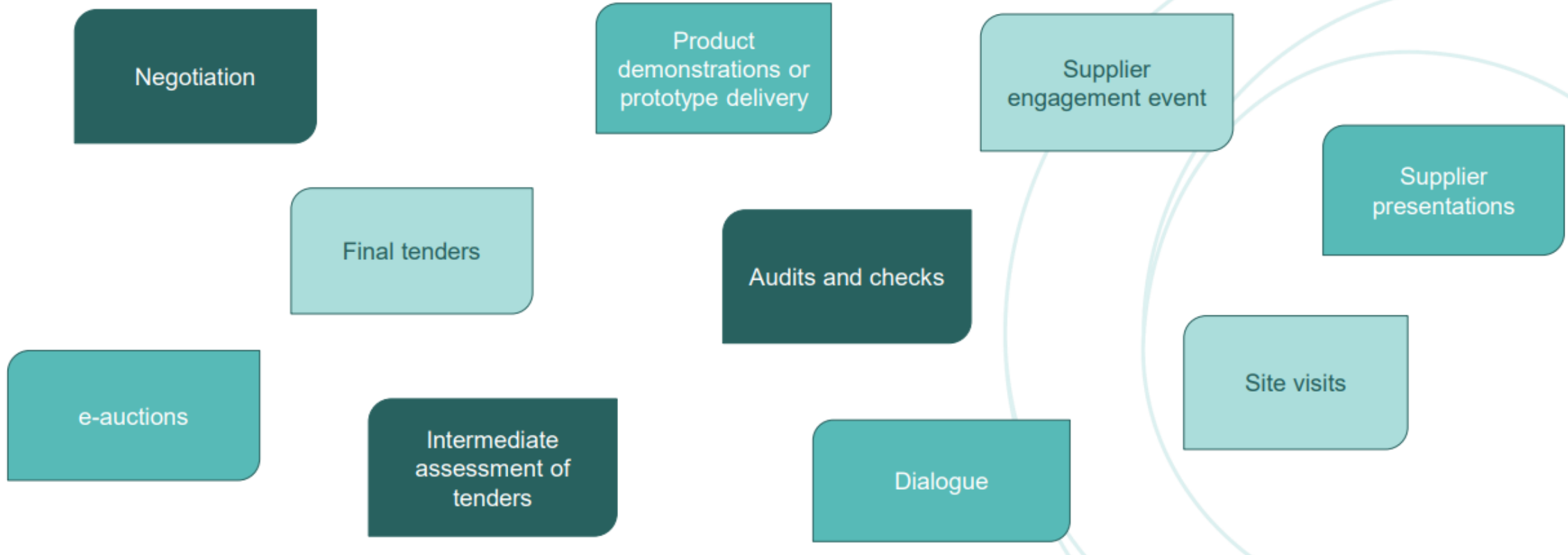
CFP: what stages might it contain?

A CFP might simply include what was the old restricted procedure, or something entirely more “fancy”!

(see next slide from previous Cabinet Office presentation)

Tools or processes you could use in a competitive flexible procedure

This slide gives examples of some tools or processes that may be used in a competitive flexible procedure, it's not an exhaustive list and there are more that you may use based on you specific circumstances.



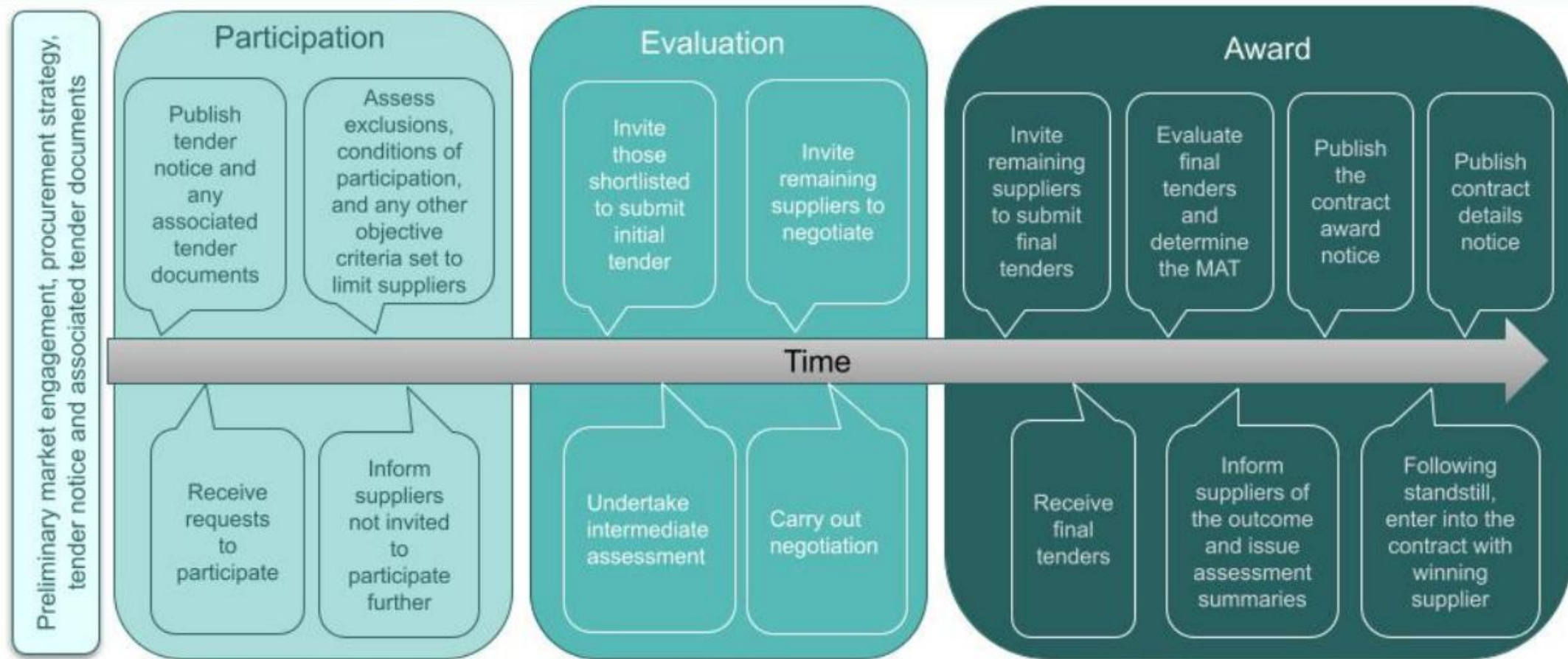
CFP in practice – what might it look like?

- a. including post-tender negotiations following a round of open tendering, where all suppliers are invited to submit a tender;
- b. including post-tender negotiations following a round of selective tendering, where short-listed suppliers are invited to submit a tender;
- c. including multi-staged negotiations after an initial round of tendering; or
- d. building in a stage where there is a physical inspection or demonstration of the product, technology or software to be supplied, such as a site visit or requiring suppliers to deliver a pilot.

Guidance: Competitive Tendering Procedures

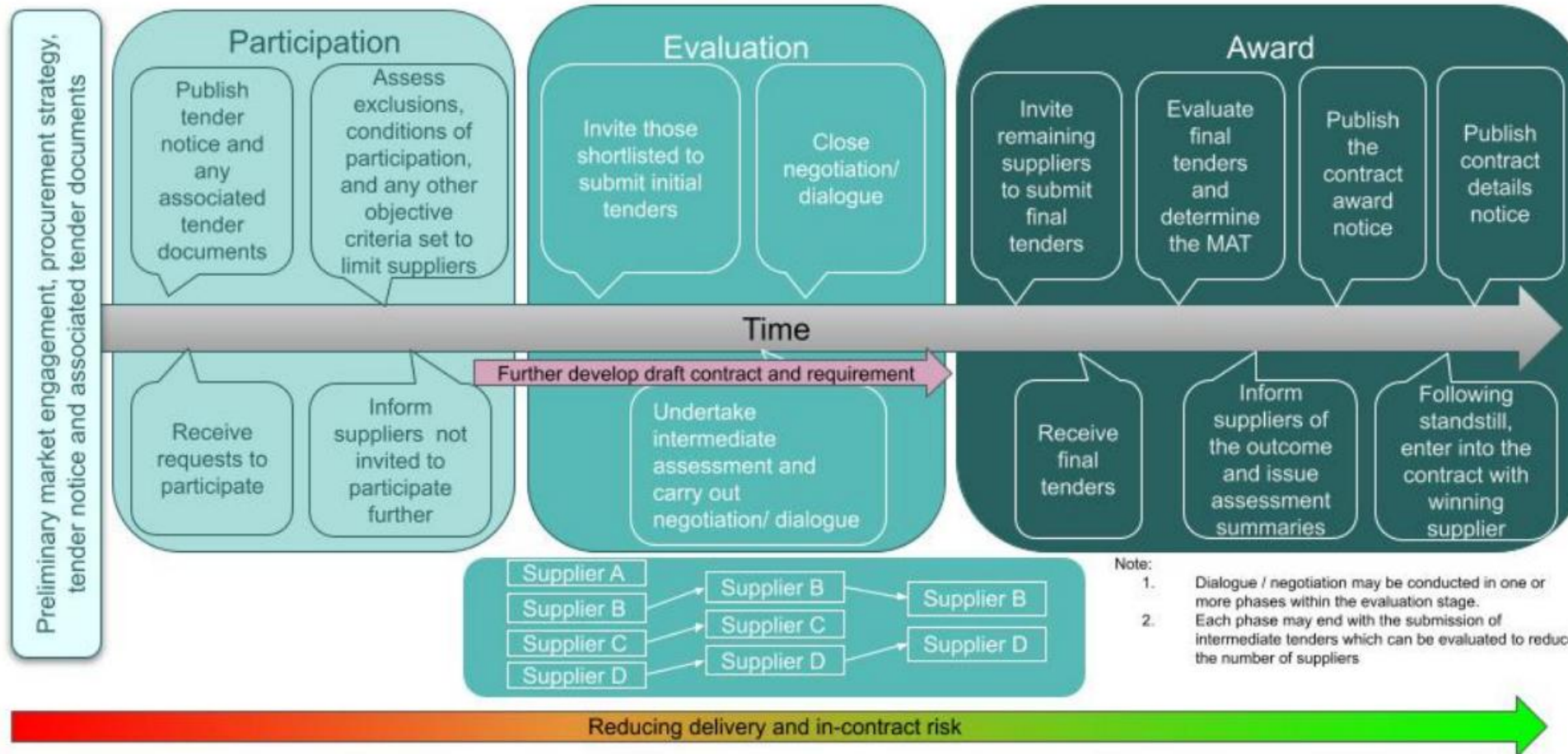
CFP in practice – what might it look like?

Annex C- Multi-stage competitive flexible procedure with limited negotiation⁵



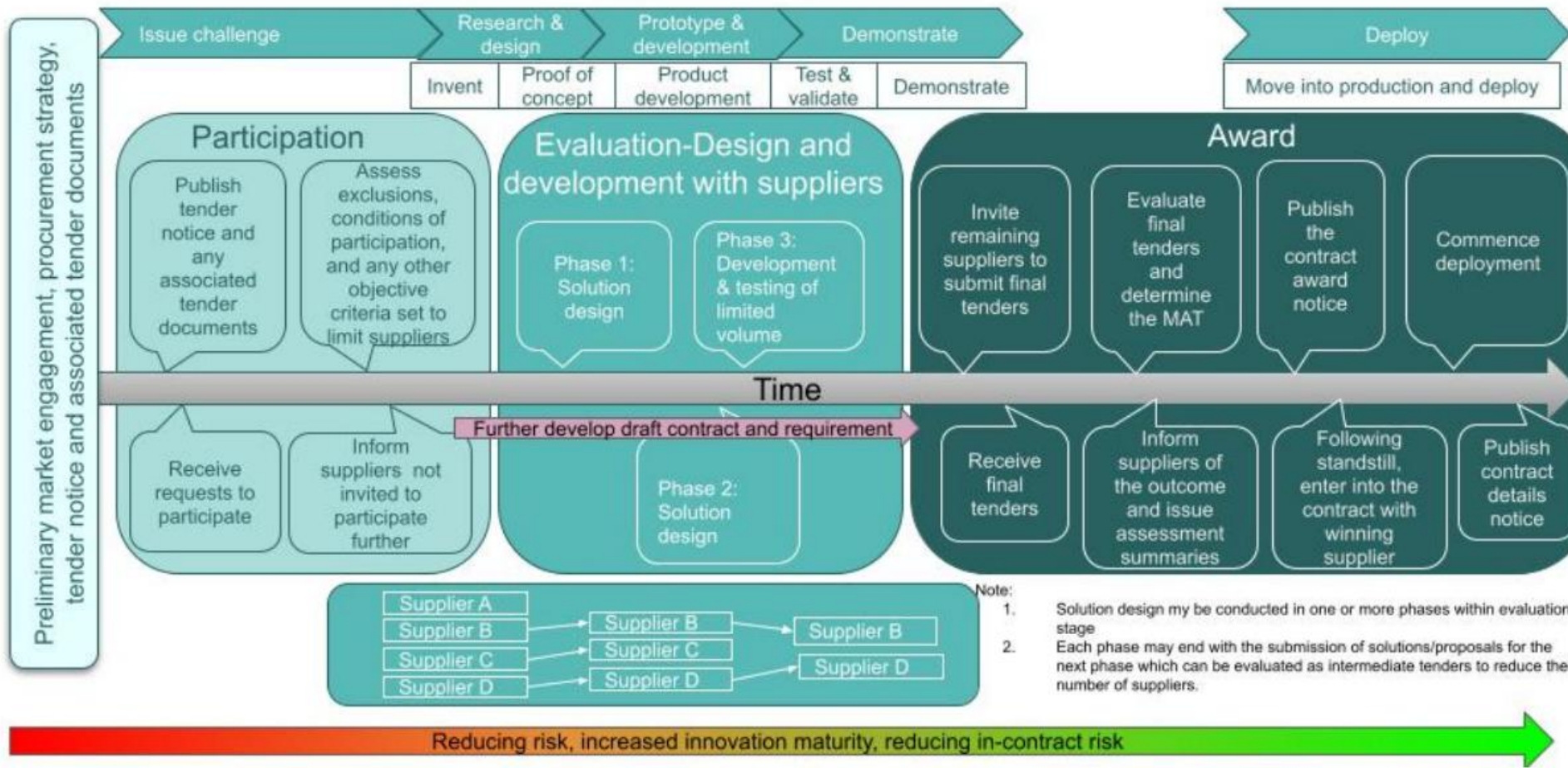
CFP in practice – what might it look like?

Annex D-Competitive flexible procedure with dialogue and/or negotiation to further develop the requirement⁶



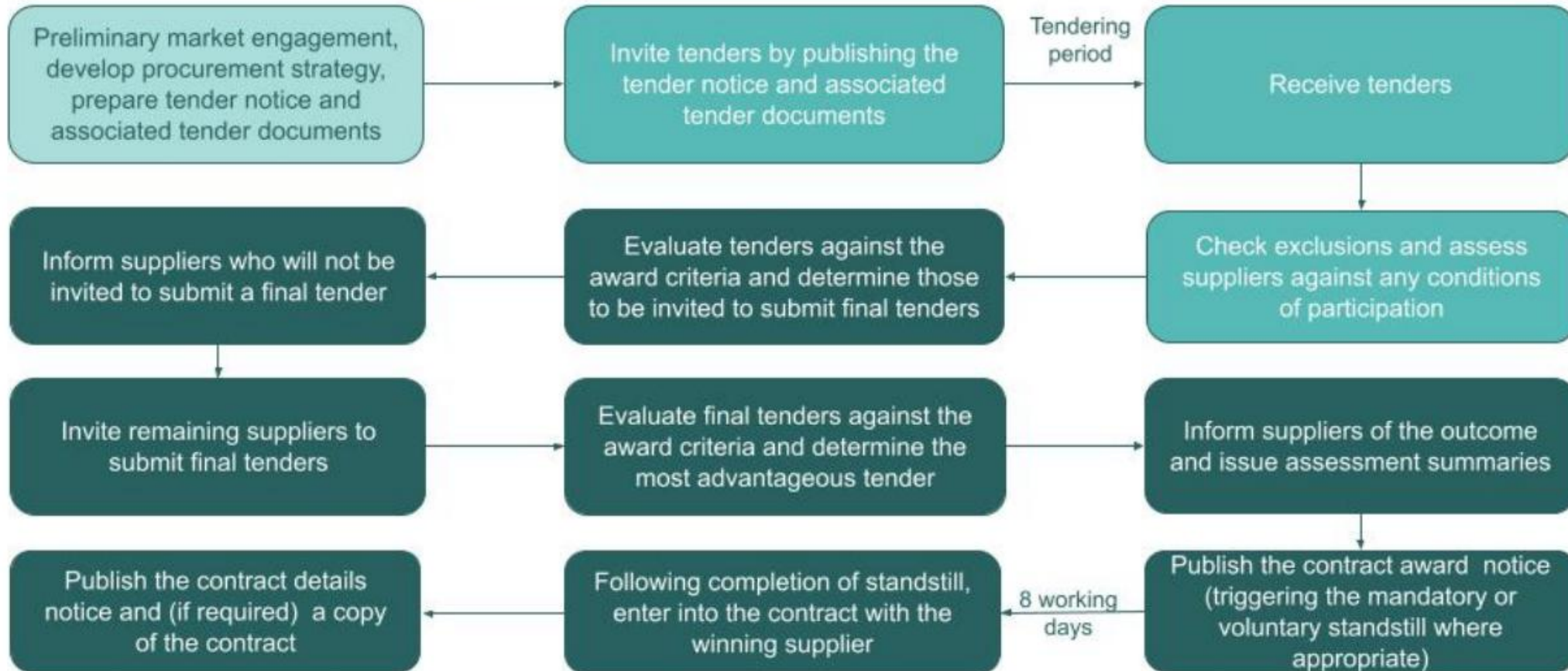
CFP in practice – what might it look like?

Annex E-Competitive flexible procedure when tendering for innovation or product development⁷



CFP in practice – what might it look like?

Annex F-Competitive flexible procedure without a separate participation stage⁸



CFP: what stages might it contain?

Presentations?

- Can be popular with the procuring clients, but certainly an area of potential **risk** from a legal perspective. Risk of lack of transparency, bias, subjectivity etc
- See for example *Consultant Connect* case, or Provider Selection Regime case involving Liverpool University Hospitals NHS Foundation Trust's procurement for urgent care service
- In both the above cases bidders were unaware they were being scored. In PSR case, panel “*did not see a methodology for how the presentations would be used to inform the scoring in a consistent way*”. The “*lack of any notes from the presentations and not retaining copies of the presentations reinforces these concerns*”.



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CFP: what stages might it contain?

Presentations – reducing the risks...

- Be clear on why you need a presentation - what is its *purpose*? Is it to aid the written response? Or will it be scored separately?
- Clearly articulate that purpose to all bidders
- Tell bidders it will affect the scores (seems a nonsense to suggest it *won't* – see for example cases on previous slide)
- Have a scoring matrix for the presentation and disclose it to bidders
- Follow the rules on award criteria (section 23 of the Act)
- Train your evaluators
- Consider same (equal) treatment. For example, the available time for each bidder
- Take notes and keep copies of the presentations.
- **But...** do approach with caution in the first place – do you *really* need to have a presentation stage?

CFP: what stages might it contain?

Dialogue/negotiations

The guidance defines these as follows:

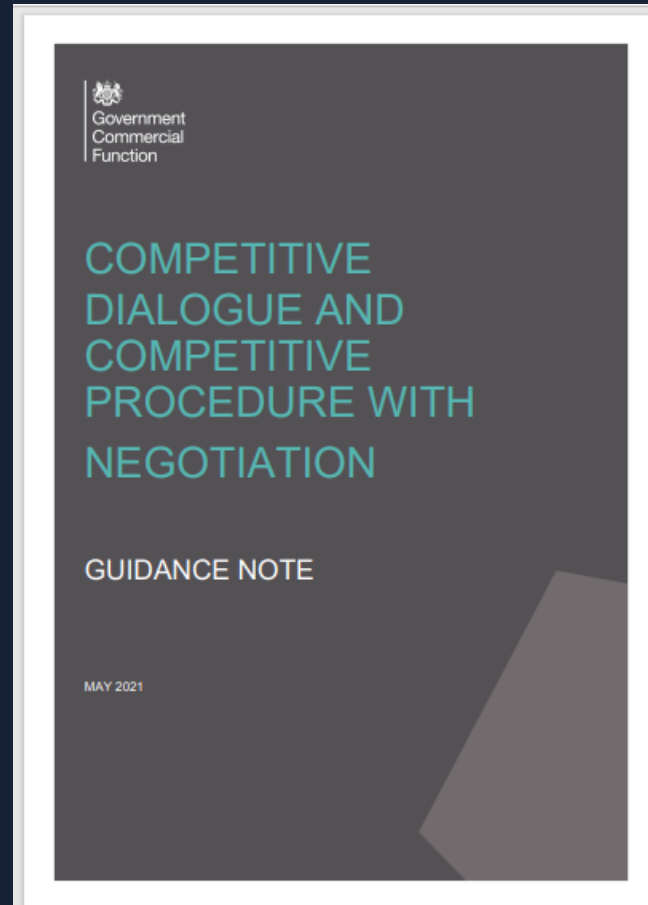
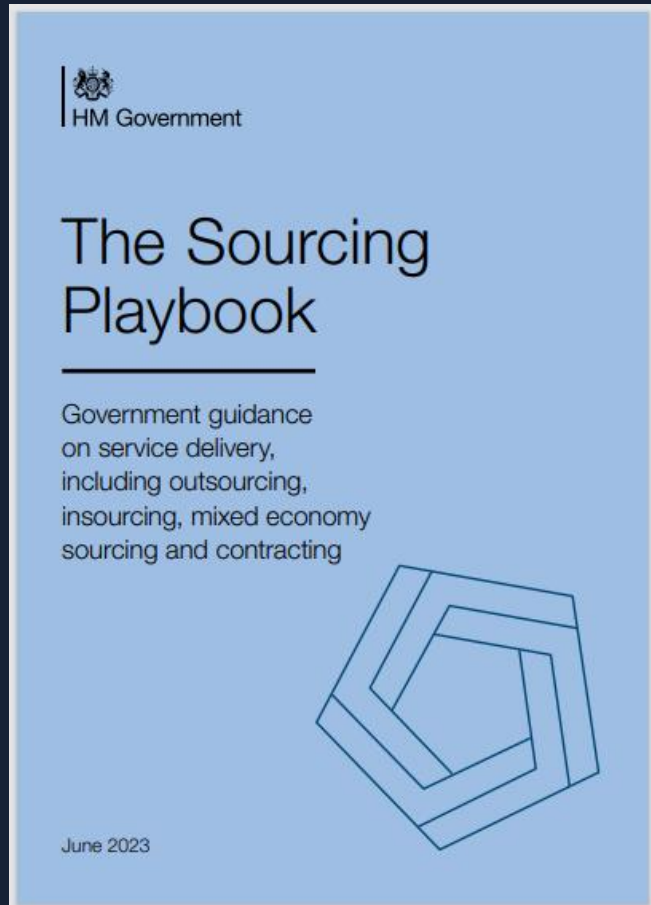
Dialogue refers to a discussion between the contracting authority and suppliers about any aspect of the procurement.

Negotiation is the discussion between the contracting authority and a supplier with a view to improving the content of tenders.



CFP: what stages might it contain?

Dialogue/negotiations: further reading



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CFP: what stages might it contain?

Negotiation/dialogue: practical points to consider

- Do we need to talk to the market during the process?
- Have we identified areas that would benefit from negotiation/dialogue?
- What is/isn't up for negotiation?
- Do we have the capacity and capability? Authority will need a strong chair to lead, supported by a team with defined roles and appropriate skills and experience
- What is our strategy (our plan to achieve the desired outcome)?
- Do we have a pre-agreed negotiation position?
- Do we have an appropriate and clear timetable?
- How are we going to project manage effectively to avoid time and cost overruns?
- Does our tender notice and invitation to tender clearly describe the dialogue/negotiation process?
- How will we ensure same (equal) treatment of bidders?

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Modifying a procurement under the Act – what are the new rules? (*section 31*)

Procedure	Overview of key rules
Open procedure	<ul style="list-style-type: none">- Any changes permitted (subject to compliance with the rest of the Act)- But... must consider revising deadlines/time limits; and- Must republish/provide again tender notice and tender documents
Competitive flexible procedure* <i>(*these rules apply to “in-progress” procedures. Where the first deadline (for example to request to participate) has not passed, the same rules as the open procedure above apply)</i>	<ul style="list-style-type: none">- Only changes which are “non-substantial” are permitted (unless light touch contract) – see sections 31(2) and (3)- But... must consider revising deadlines/time limits; and- Must notify participating suppliers

"Refining" award criteria (section 24)

- Only permitted under competitive flexible procedure, not open
- Only allowed where (a) tender notice or tender docs provide it may happen and (b) you haven't yet invited supplier to submit tenders to be assessed under section 19
- Refinement not permitted if would have allowed progression of suppliers who already did not progress at an earlier round
- Where the refinement happens you need to modify and republish the tender notice and any tender documents affected
- What constitutes a 'refinement' is not defined in the Act
- However, the Guidance suggests:

"it could include, for example, adding additional detail to existing criteria, adding related sub criteria to existing criteria, or amending criteria weightings within a published range). Adding new award criteria would not be permissible under section 24."

The CFP: templates

Government's Procurement Pathway website contains the following:

- Template document (describing how the procurement will be conducted):
 - [\(PA 2023\) Competitive flexible procurement template | Procurement Pathway](#)
- Accompanying guidance for the above template:
 - [\(PA 2023\) Competitive flexible procurement template guidance | Procurement Pathway](#)
- List of potential stages (including considerations and advantages)
 - [\(PA 2023\) Competitive flexible procurement template stages list | Procurement Pathway](#)

The CFP: what could go **right**?

- Letting market experts guide you towards solving a problem you're not quite sure how to solve
- Greater “face time” with the market *during* the procurement process – to discuss areas of concern, understand what is on offer, test the relationship etc.
- A more bespoke outcome, tailored to your authority's specific requirements
- Greater innovation – new ideas/products/methods etc
- Where the contract is complex, both parties can agree terms they are comfortable with. Rather than bidders “pricing up” (or walking away) due to risk, or seeking to make (potentially unlawful) modifications post-deadline in an open procedure

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The CFP: what could go wrong?

- SMEs (and others) put off from bidding due to over-complicated process
- Failure to adequately plan, and clearly describe, the procedure in advance. For me, this (in tandem with the next point below) is the greatest area of risk from a legal perspective.
- Those conducting the procedure don't follow the advertised process
- The authority underestimates the time and effort involved
- The process sounds good, but doesn't work well in practice
- Can be increasingly difficult to maintain the even playing field of "same" (equal) treatment when speaking to different bidders simultaneously

Open or CFP? Some indicative factors...

Open procedure	Competitive flexible procedure (“CFP”)
Straightforward requirement	Complex requirement
Lower value	Higher value
Smaller number of bidders	Larger number of bidders
Limited time available	Significant time available
Small budget	Higher budget
Limited internal capacity/capability	Higher level of internal capacity/capability
Standard contract terms	Complex contractual structure
Minimal legal support available	Legal support available (internal and/or external)

*(Note: It is likely most procurements will include some factors from **both** lists. As such, suitability of procedure should be considered from an **overall** perspective)*

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The new competitive flexible procedure

Five steps to success?

Remember: The CFP is DIY (Design it Yourself) not Make-It-Up-As-You-Go-Along...

1. Consider whether CFP is **appropriate**
2. If so, take time to carefully **plan the process**
3. **Tell the market** what you're going to do
4. **Do it** (and do it the way you've said you will do it)
5. Be able to **evidence** you've done it that way
(noting the new feedback and transparency obligations)

*(Steps 2-5 above also a sensible approach for procurements **outwith** CFP)*



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Evaluation...

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Evaluation: why does it matter? (1)

- Enables authority to identify the best bid and best outcome
- Subject to certain legal rules (as we will see today) with consequences for failure to comply with those rules
- The rules around evaluation are not an area of headline change under the Procurement Act. **But...** evaluation was an absolutely crucial area of the previous regime, and it is likely to remain that way
- Getting the right questions, a suitable scoring matrix, evaluator training etc all vitally important
- Record keeping very important too (and likely to become even more so – see new rules on debriefing)

Evaluation: why does it matter? (2)

- It's a very visible phase of the procurement process given the legal requirements around debrief. Emotions are high at the debrief stage, post-evaluation. Legal risk is also therefore at its highest.
- If the evaluation isn't compliant, it's going to be very difficult to prepare "assessment summaries" (the new standstill letter) which don't publicise this fact to the market...
- Most commonly challenged area of the procurement process. Complaints re scoring, undisclosed sub-criteria etc – often fertile ground for legal challenges!
- Mistakes/issues in evaluation very likely to all come out in the wash during litigation...

The Procurement Act – what's changed?

- Conflicts assessment required for every (above threshold procurement) - make sure the evaluators are listed on there and that you've got their individual conflicts declarations
- Losing bidders now receive winning bidder's feedback also (via their "assessment summary")
- Scores must be explained *"by reference to relevant information in the tender"* so your moderation records need to capture that detail
- Guidance says you should explain why bidder didn't achieve the score above

The Procurement Act – what’s changed?

- No express principle imposing duty of **transparency** (unlike PCR 2015)
- However, new “objective” around “**sharing information**” which authorities must “have regard to the importance of”
- Guidance on “assessing competitive tenders” under the Act states that

“The basis on which contracts are awarded is largely unchanged from the previous legislation, in terms of what can be assessed when evaluating tenders”

and that *“The process of awarding contracts must be transparent...”*

- In practice then, possibly not much change. Until we hear otherwise, would seem sensible to apply lessons from existing case law

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So, what are some of those key principles from existing case law?

- Authority must follow the process it has set itself
- Evaluators have a “margin of appreciation”
- Courts recognise competence of evaluators as subject matter experts (*see later discussion*)
- Court will only interfere where “manifest” (clear) error that impacted outcome of the procurement

So, what are some of those key principles from existing case law?

- Record keeping and reasons are very important – authority must be able to explain scores
- But doesn't need to be verbatim
- Perfection is not required
- Just because a bidder is not happy doesn't mean there's grounds for a claim

Top tips... do's

✓ **Appoint subject matter experts as evaluators** – Courts more likely to defer to their knowledge (see for example comments in Bechtel v HS2 case)

✓ **Take care when drafting evaluation questions:** focus on the bid, not the bidder. Avoid longwinded questions which are difficult to respond to and difficult to score.

✓ **Ensure “same treatment** - treat all bidders consistently. This is a cornerstone of public procurement law, and seems set to remain as such under the Procurement Act (where "equal treatment" is now "same treatment")

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Top tips... do's

✓ **Train your evaluators** - think of it as an "invest to save". A few hours spent on training could save hundreds of hours (and thousands of pounds!) dealing with a legal challenge in the courts.

✓ **Act transparently:** apply the published evaluation methodology and follow your advertised process. In short: do what you said you were going to do.

✓ **Ensure "same treatment** - treat all bidders consistently. This is a cornerstone of public procurement law, and seems set to remain as such under the Procurement Act (where "equal treatment" is now "same treatment")

Top tips... do's

✓ **Keep written records:** This is vitally important, and has possibly become even more important under the Act. This is because bidders will have sight of the winner's assessment summary along with their own feedback, hence potentially more scope for queries.

✓ **Keep an audit trail of changes in scores and reasons.** It's perfectly fine for an evaluator to change their individual score as part of the group moderation. But if you can't evidence a contemporaneous record of *why*, you're inviting trouble.

✓ **Devote sufficient time and resources to the evaluation process to make the above possible.** Evaluation done well takes time and effort - before, during and after.

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Top tips

✓ **Get the right scoring matrix** - one which allows you to *differentiate* between bids, but isn't so rigid that it's difficult to identify which score is warranted each time.

✓ **Follow your own internal rules:** If your internal governance documents (constitution/contract standing orders/contract procedure rules etc) contain rules around evaluation (or related matter such as conflicts of interest, record keeping etc) make sure you also follow those rules. Consider whether those internal rules (and other documents) need updated for the Procurement Act if not done already.

✓ Be polite and empathetic when dealing with bidders at the feedback stage. Acknowledge the news will come as a disappointment to them..

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Don't....

✘ **Introduce undisclosed sub-criteria** - *"They haven't covered x, y and z in their response"* - You didn't ask for x, y and z in the question... Remember bidders aren't mind readers!

✘ **Take account of irrelevant considerations** - *"Yes I like this bidder, we used them at my last authority..."*

✘ **Compare bids against each other** - *"Bidder 1's answer was much better, let's score Bidder 2 below that..."* The scoring matrix is there for a reason!

Don't....

✘ **Be afraid to interrupt!** As lawyers and procurement officers, I'm afraid this is an important part of our job. Whilst evaluators may be subject matter experts on what is being procured, they most probably aren't experts on procurement law. If things are heading off in the wrong direction (see above), politely-but-firmly bring them back on track. Better to be a fun sponge than end up in a legal challenge!

✘ **Average scores with no consensus reasons for the final score** – *Bromcom* case in recent years makes clear this isn't permitted. Needs to be a deliberation and debate to reach a final score, not a purely mathematical exercise

Don't....

✘ **Give a list “positives” and “negatives” when debriefing** – you do need to give reasons, but doesn't need to be in this format. Focussing on negatives likely to just get their back up and increase risk of challenge.

✘ **Make it personal** – take care with language. For example, rather than say “**you** have been unsuccessful”, consider something like “*Unfortunately on this occasion ABC Bidder Limited has not been successful..*”

Role of procurement?

Don't be a
postbox....

....be a sieve!



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Record keeping...

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Why is record keeping important?

- Helps explain the decisions you have made throughout a procurement process
- Absent contemporaneous records, your authority is unlikely to be unable to fully explain your decisions. The provision of **reasons** has been an important obligation in public procurement law, linked to ensuring transparency* and equal (same) treatment of bidders

*(*no express duty of transparency under the Procurement Act. However, new “objective” around “sharing information”. Also references to transparency in the guidance, along with increased notice publication requirements)*

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Why is record keeping important?

- Records will be needed in order to populate the various notices required throughout the procurement lifecycle
- Specific legal requirements under the Procurement Act regarding record keeping – see one of the next slides
- Poor record keeping increases likelihood of successful legal challenge (see for instance the cases cited on the next slide)

What the courts have said...

“A great many good reasons” to keep records

“I cannot think of any reason why a body such as the NDA should have contemplated shredding any documents created in this procurement competition. There are a great many good reasons to the contrary, justifying why no such shredding should have been contemplated, but it is perhaps necessary only to identify the most important one, namely the obligation of transparency”

Energysolutions EU Ltd v Nuclear Decommissioning Authority [2016] EWHC 1988 (TCC)

“It remains my view that a procurement in which the contracting authority cannot explain the reasons for its decision fails the most basic standard of transparency”

**Lancashire Care NHS Foundation Trust & Blackpool Teaching Hospitals
NHS Foundation Trust v Lancashire County Council [2018] EWHC 1589 (TCC)**

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Record keeping...

What does the Procurement Act require?

- No express requirement for a written report (unlike Regulation 84 PCR 2015)
- However, such a report (covering the same topics and some of those on the next slides) likely to remain a good idea – see for example the below...
- Section 98 of the Procurement Act (“**Record keeping**”):

“A contracting authority must keep such records as the authority considers sufficient to explain a material decision made for the purpose of awarding or entering into a public contract” (98(1))

- Must keep records of comms with suppliers
- To retain records for 3 years from contract entry

Some key records you should have in place...

Pre-procurement

- Individual conflicts of interest declarations
- Conflicts assessments
- Pre-market engagement activity and associated decision-making
- Public Services (Social Value) Act 2012 considerations
- That you have “had regard” to the various objectives under the Procurement Act (see section 12) – Value for money, maximising public benefit etc
- Consideration of NPPS, SME barriers
- Whether or not to use lots
- Internal approvals

(Recent consultation may mean in future documenting decision to outsource)

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Some key records you should have in place...

- **Post-receipt of tenders (including evaluation and moderation)**
- Reasons for disqualifying any bidders - for example abnormally low tenders (after investigating)
- Any clarifications/correspondence with bidders (and associated internal deliberations) – see *Optima v DWP*
- Individual evaluator scoring and reasons
- Group consensus scoring and reasons
- Reasons for changes in scores between the above
- Training given to evaluators

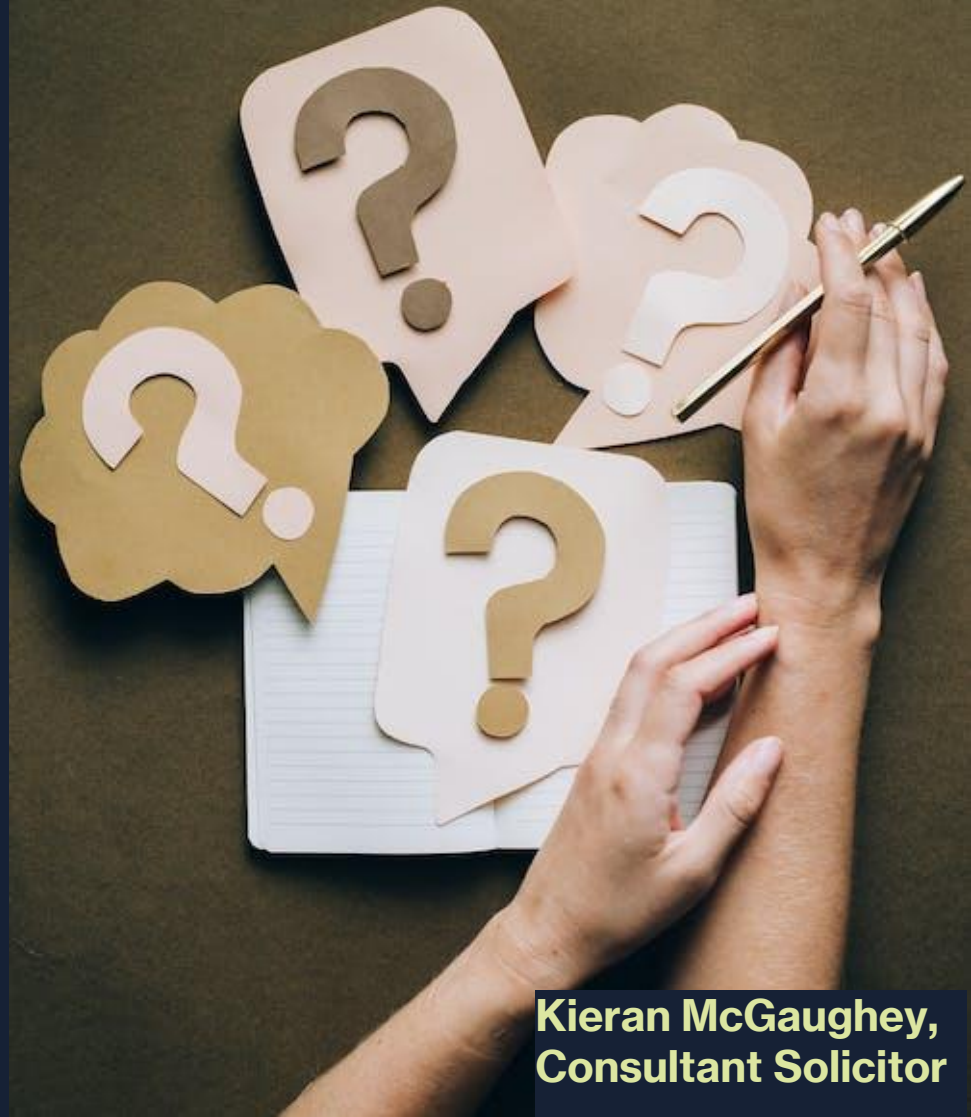
Some key records you should have in place...

- **Additional records if running a competitive flexible procedure**
- Copies of any bidder presentations
- Records of any negotiation or dialogue
- Records of any other additional stages (site visits, product demonstrations etc)

Some key records you should have in place...

- **Contract phase**
- KPI performance monitoring (where applicable, certain contracts > £5million)
- Modifications (see earlier) and why they are compliant
- Internal approvals for those modifications
- Performance issues/breaches of contract (particularly when they might lead to publication of contract performance notice or contract termination notice)

**Any
questions?**



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Thank you for listening!

Hope to see you again

Feel free to keep in touch – you can connect on LinkedIn here:

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