

PA2023.org Network Training

Evaluation, Moderation & Assessment Summaries

20 October 2026

Getting you ready - Training

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Harrow London Borough	Walsall College
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PA2023.org Training

Training schedule to March 2027		
12 November 2026	Below threshold contracts	Bitesize – 2 hours
19 November 2026	Introduction to Public Procurement	Practitioner – full day
26 November 26	Common assessment standard – how to use CAS in tenders?	Practitioner – half day
03 December 2026	How to apply social value in your tenders	Bitesize – 2 hours
10 December 2026	How to design and run a Competitive Flexible Procedure	Practitioner – full day
14 January 2027	Frameworks	Bitesize – 2 hours
26 January 2027	Introduction to JCT 2024 Contracts	Practitioner – full day
4 February 2027	Introduction to the Procurement Act 2023	Practitioner – full day
23 February 2027	Modifying contracts under the Procurement Act	Bitesize – 2 hours
16 March 2027	Direct Awards	Bitesize – 2 hours
24 March 2027	Assessing and monitoring the financial standing of suppliers	Practitioner – half day

Additional dates for recently delivered popular events are currently being scheduled

For details and bookings: [Training – In2 the bargain](https://www.in2thebargain.com)

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Evaluation, Moderation & Assessment Summaries

Objectives for today

Understanding how **evaluation** fits into the overall procurement process,

The importance of **evaluation criteria** – and using these as the basis for tender scoring

Legal position in Procurement Act 2023 and lessons from **case law** (PCR15)

How to run an evaluation **consensus meeting**,

Record keeping and transparency – how to document your decisions,

How to **reach a consensus** and deal with disagreements,

Having **clear reasons** and rationale for your decisions,

Preparing **feedback** for winning and losing suppliers,

Handling **clarifications** or queries during the evaluation process,

Dealing with **conflicts of interest** and other tricky problems,

Learning from each other and sharing **good practice**.

Timings for today

9:30	Start & Welcome
11:00 to 11:15	Break
12:45 to 13:30	Lunch
14:45 to 15:00	Break
15:45	Close

Think and Discuss

- At certain stages in this Webinar we will stop and ask you to **Think!** – take 90 seconds to consider the issue on the slide and note down a few thoughts of your own. That's where you'll see this chap:



- At the end of the session, these can help you consider what you need to do more work on – and where action may be needed “back in the office”.
- We'll also make time for **discussion points** to address specific issues and explore approaches to them.



- What are your primary goals from today's event?

Please use the chat box / audio to send your comments!



“

A good evaluation is not only about the final award decision - it is about the design and execution of the whole process, leading up to that decision, including ensuring the process is properly documented and can stand up to internal and external scrutiny.

”

Bid Evaluation guidance note - May 2021

Key Tender Doctrines

- *“Tender documents are to be construed on the basis of an objective standard, that is the standard of the Reasonably Well Informed and Normally Diligent (RWIND) tenderer.*
- *“It follows that the tender documents must state the process to be followed, including how marking of bids will be carried out, in terms that can be objectively assessed and understood by a RWIND tenderer; and, having done this, the contracting authority must stick to it”.*
- The Judge in the landmark **Lancashire** case commented:
“a procurement, in which the contracting authority cannot explain why it awarded the scores which it did, fails the most basic standard of transparency”.
- Court in *Bechtel*
The court’s role is one of supervisory jurisdiction, not one of micro-managing.

Purpose of the Procurement Rules

“The purpose of the procurement regime is to ensure open competition, not to secure the most favourable terms for the public authority”

- Gottlieb, R v Winchester County Council

What is this?



Braceurself v NHS England: Manifest scoring error not "sufficiently serious" for procurement damages

- The judgement in this case should be of great interest to procurement teams.
- It concerns the question of whether an error made by an evaluation panel is “sufficiently serious” to merit the award of damages to an aggrieved supplier.

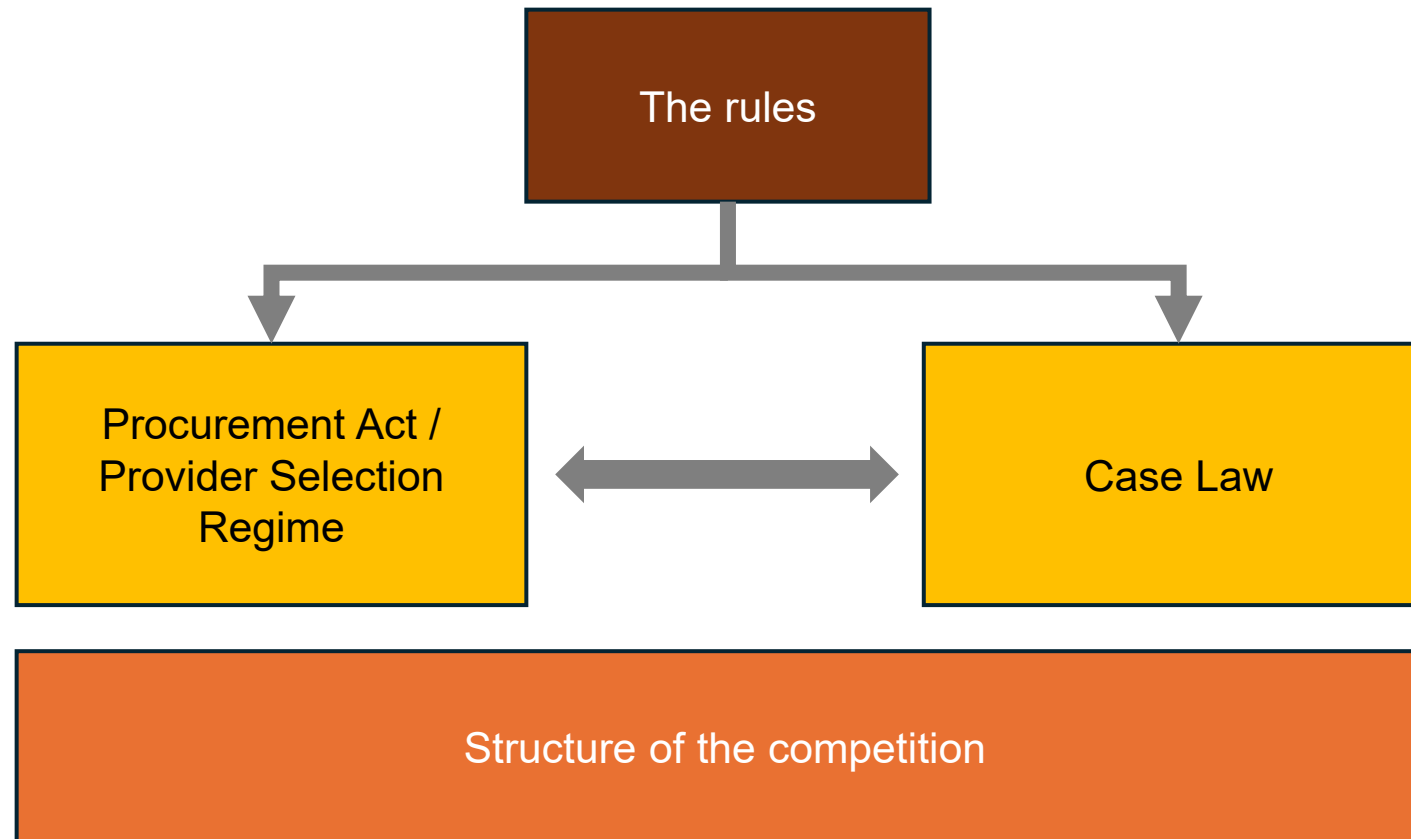


Braceurself v NHS England: Manifest scoring error not "sufficiently serious" for procurement damages

- Procurement for orthodontics equipment and related support services.
- For a particular question, two evaluators on a three-person panel gave **Braceurself** a score of 4 – the third evaluator scored their response 3 marks.
- Moderation process agreed final score of 3 marks.
- The final scores were:
 - Braceurself: 80.25%
 - PAL Ltd: 82.50%
- Evaluators had wrongly understood Braceurself intended to install stair lifts (felt to be a sub-optimal solution), when in fact the bid referred to a *stair climber*.

Braceurself v NHS England: Manifest scoring error not "sufficiently serious" for procurement damages

- Braceurself argued they should have been awarded score of 4 for that question – ***and the court agreed.***
- This would have given them an overall score 2.5% higher:
 - Braceurself: ~~80.25%~~ **82.75%**
 - PAL Ltd: 82.50%
- The evaluation panel's misunderstanding resulted in £multi-million contract being awarded to the "wrong" contractor!
- But, the Court refused to award damages to Braceurself! Why??
 - Only a single breach (*Braceurself alleged numerous other errors, none of which were upheld*),
 - **Procurement was carefully planned and well organised,**
 - **Evaluators had all received training and were acting in a professional and diligent manner,**
 - Mistake made inadvertently and in good faith – the error was not ***sufficiently serious*** to merit an award of damages.

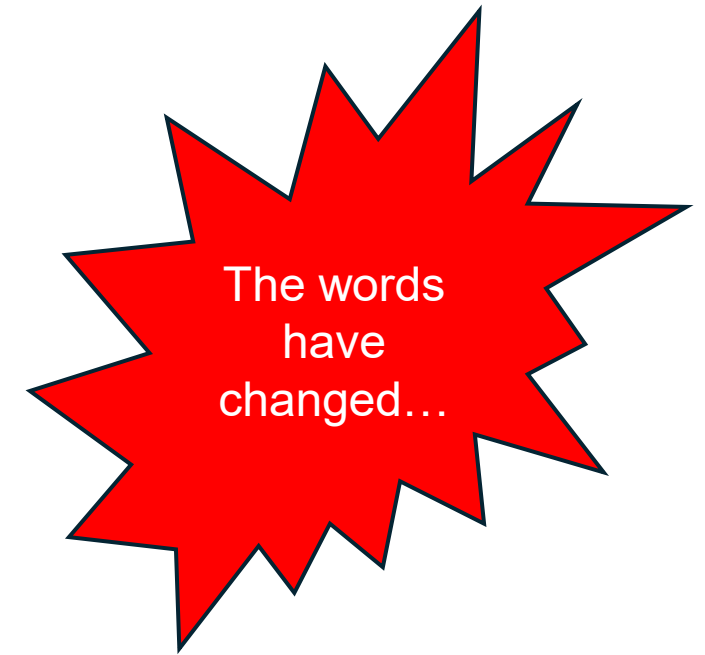


What has changed under the Procurement Act?

- The basis on which tenders are assessed is largely unchanged from the previous legislation
- The overall basis of award is now referred to as the 'Most Advantageous Tender' (MAT), rather than, as in the previous legislation, the 'Most Economically Advantageous tender' (MEAT)
- No requirement that award criteria must be considered from the 'point of view of the contracting authority' – can take into account wider factors (but see S19(2)PA23))
- May refine the award criteria in a competitive flexible procedure

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What does the Procurement Act say on tender evaluation and reaching consensus?

- The procurement Act 2023 (like the previous legislation) contains surprisingly little detail on tender evaluation and reaching a consensus
- Nothing specific is said about how evaluation panels, consensus and moderation should work
- The Procurement Act 2023 does set out how feedback should be given to winning and losing suppliers in their Assessment Summaries – the results of evaluation & consensus
- Otherwise, the main sources of legal direction in the Procurement Act 2023, on the assessment of tenders are:
 - Sec 12 - Objectives
 - Part 3 - Chapter 2 Competitive Award - Terms of Procurement. Sec 19 to 25

Reference

Part 2
[Sec 12](#)

Section 12 Covered Procurement Objectives

- (1) In carrying out a covered procurement, a contracting authority must have regard to the importance of—
- (a) delivering value for money;
 - (b) maximising public benefit;
 - (c) sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions;
 - (d) acting, and being seen to act, with integrity.
- (2) In carrying out a covered procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment.
- (3) If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage.
- (4) In carrying out a covered procurement, a contracting authority must—
- (a) have regard to the fact that small and medium-sized enterprises may face particular barriers to participation, and
 - (b) consider whether such barriers can be removed or reduced.

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 - (b) consider whether such barriers can be removed or reduced.

Terms of Procurement - Sec 19 to 25

Who

What

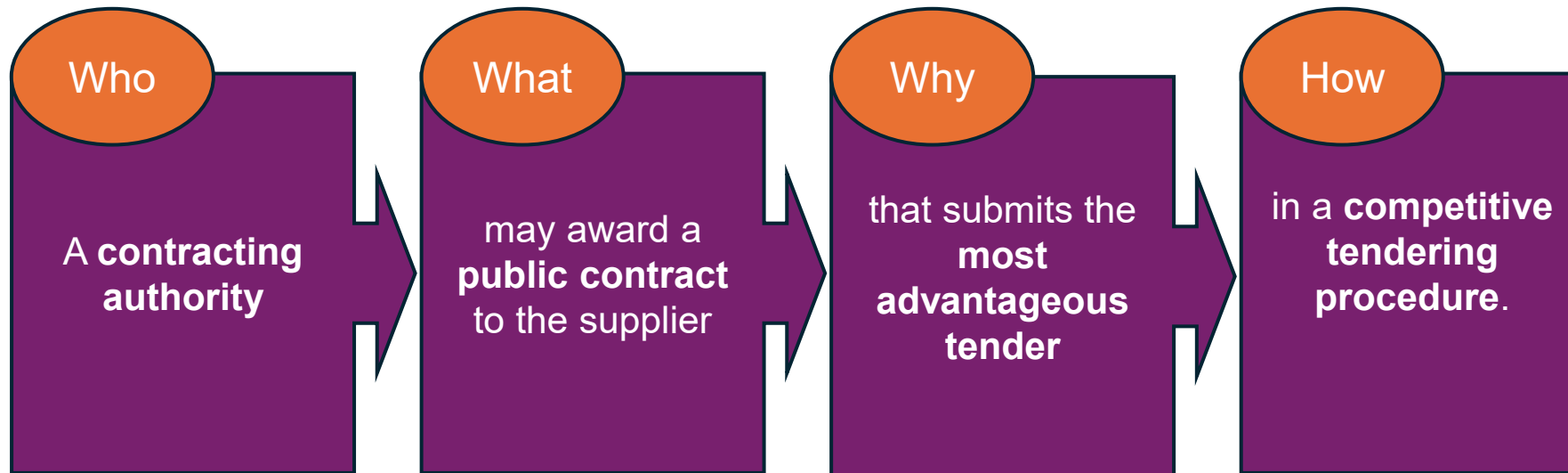
Why

How

Reference

[PART 3](#)
[CHAPTER 2](#)
[Terms of a
procurement](#)

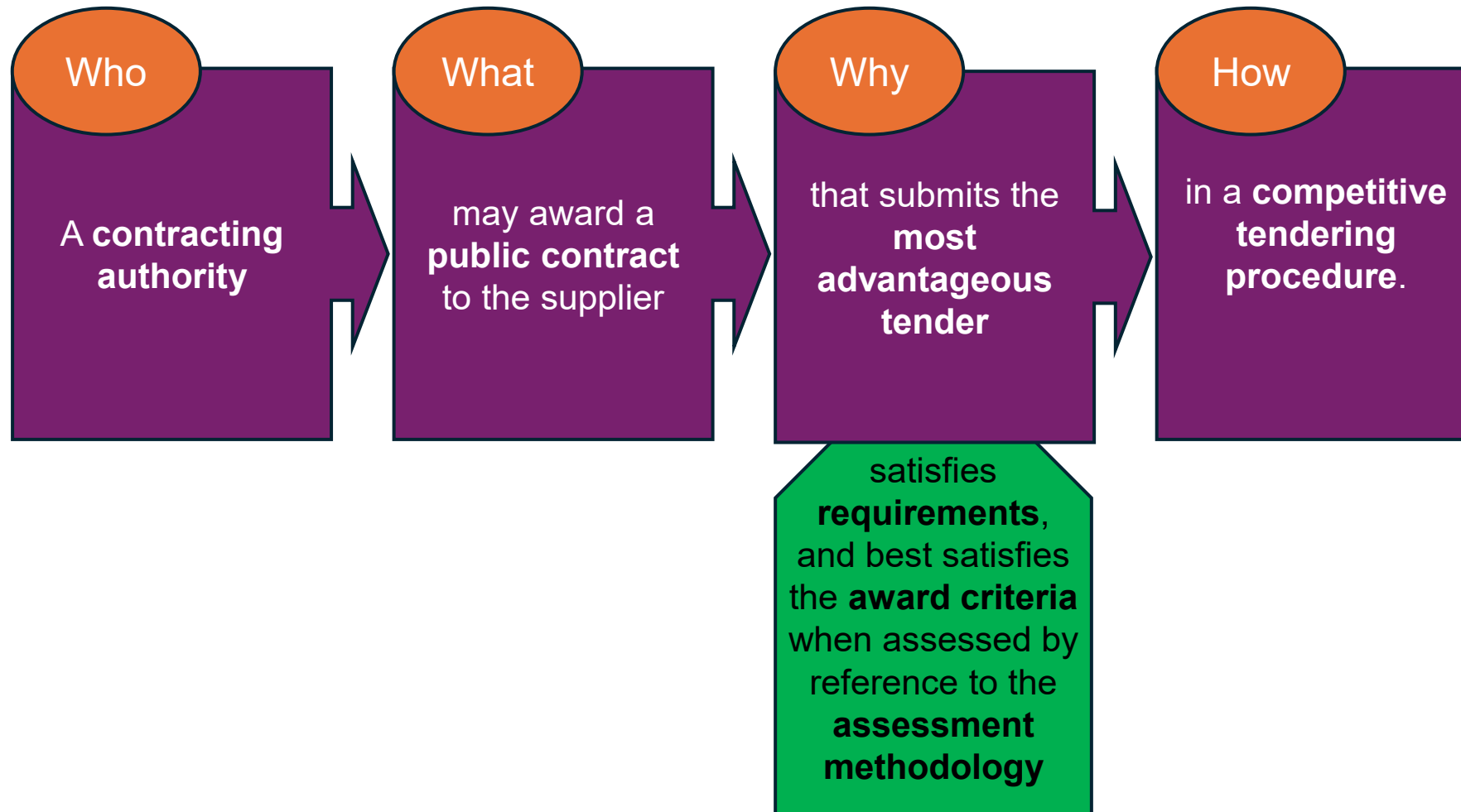
Terms of Procurement - Sec 19 to 25



Reference

[PART 3](#)
[CHAPTER 2](#)
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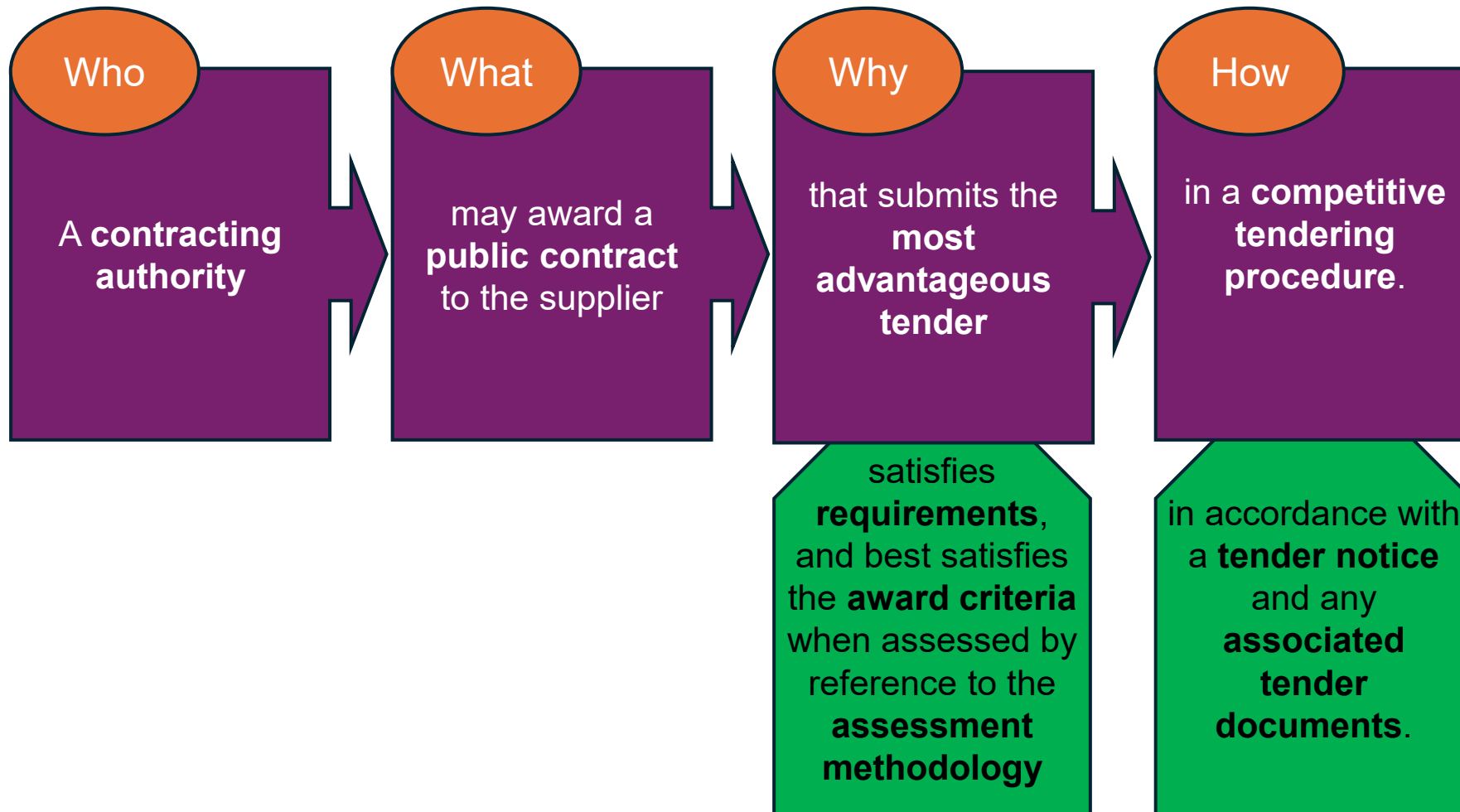
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[CHAPTER 2](#)
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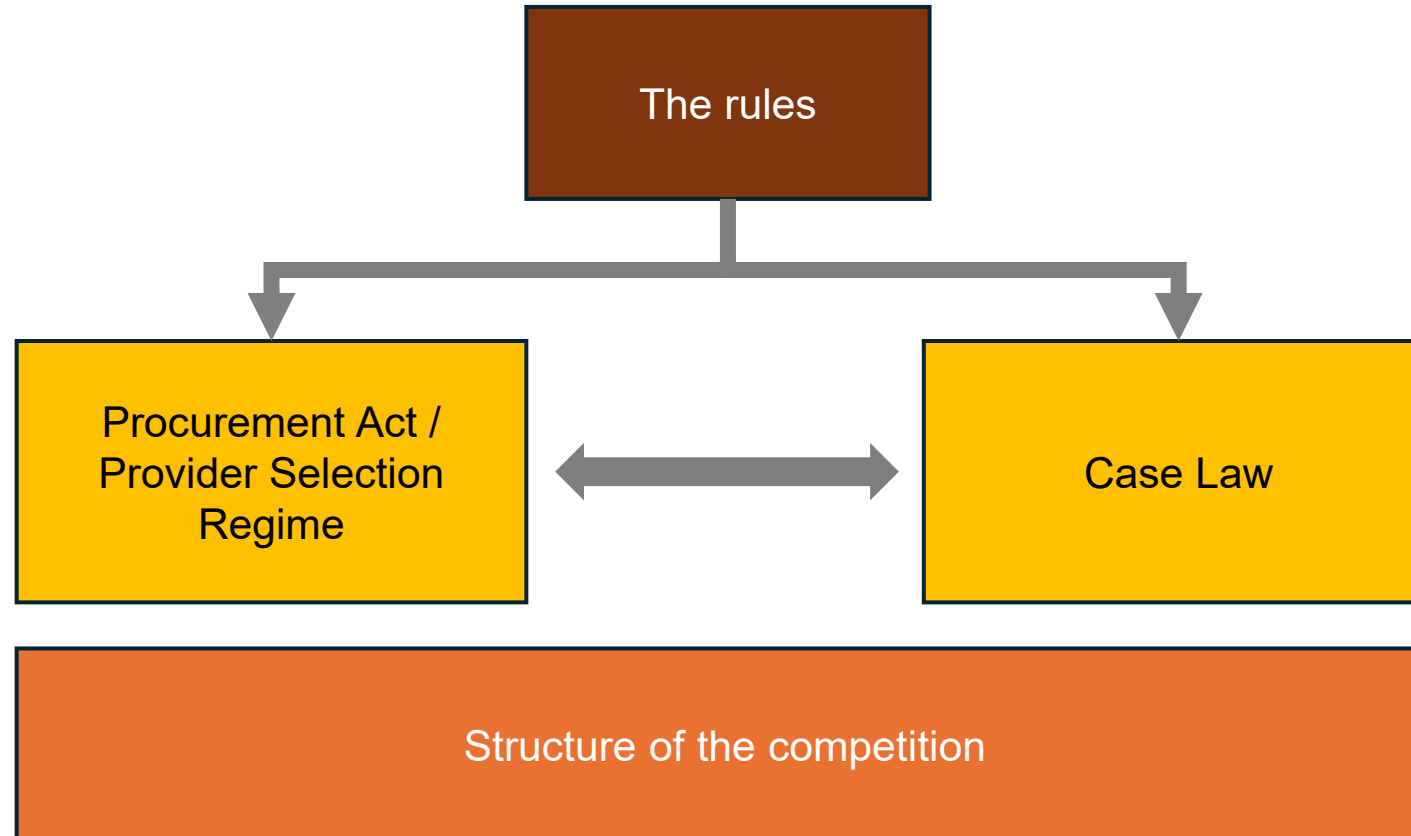
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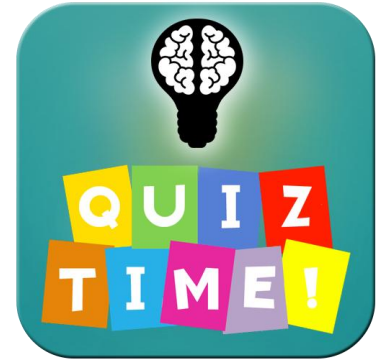
[PART 3](#)
[CHAPTER 2](#)
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Assessing Competitive Tenders



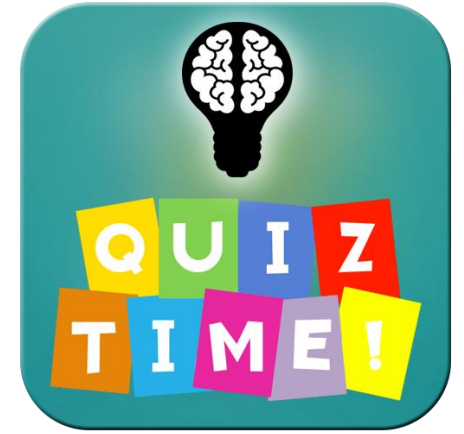
Assessment & Moderation - chose your answer:

1. Can you allow each evaluator to individually score each tender response, and then for each question calculate the average scores to give a final score for each question?
2. The tender response for a specific question exceeds the prescribed word count limit by a small margin. Can you give them some latitude and mark the whole response?
3. One of the tenders we are evaluating is not clear. Can we contact the Supplier and ask them to explain further?
4. Can we ask one Supplier to change their bid and include something another Supplier has submitted?
5. Can we use Supplier references obtained when evaluating Conditions of Participation at the quality evaluation against award criteria?
6. All of the evaluators have, prior to the moderation meeting, independently reached the same score for a particular question. Do we still need to discuss this question during the moderation meeting?
7. If an evaluator declines to attend the training, stating that they don't require training as they have assessed several other tenders, are they still required to attend?



Assessment & Moderation - chose your answer:

8. During the individual evaluation period and before the moderation meeting, you are made aware that the some of the evaluators have discussed their assessments and have amended their individual scores and rationale as a result. What should you do?
9. An evaluator raises that that they haven't been using the standard template provided to record their individual scores and rationale. What should you do?
10. During the moderation meeting, one of the assessors who knows the service and suppliers very well dominates the discussion. What should you do?
11. During the moderation meeting the evaluators attempt to use their prior knowledge and experience of the tenderers to justify their scores and rationale. What should you do?
12. During the moderation meeting one of the assessors needs to leave early, but the other assessors want to continue. Can they do this?



Tender Evaluation Key Principles

Tender Evaluation – Key Principles

- Evaluating tenders is one of the most significant steps in any competitive tender process.
- Getting it right is essential if you want to ensure you award the contract to the best **supplier** and achieve your intended outcomes.
- But tender evaluation can be **stressful**, resource-hungry, and **time-consuming**.
- It is also one of the most fertile areas for **legal challenge**...



Tender Evaluation – Key Principles



Discussion point:

- **Why** do you think the evaluation process is one of the most common sources of **legal challenge** in public procurement?



Tender Evaluation – Key Principles

Tender evaluation will be easier to get right (and safeguarded from challenge) if we have, from the outset:

- Clear criteria for picking the winner.
- A rational methodology for scoring against these criteria.
- Transparent instructions to suppliers so they understand:
 - *What their Tender needs to tell you, and*
 - *How you will evaluate the proposals they submit.*

Tender Evaluation – Key Principles

Therefore, we need to ensure:

- Clear criteria for picking the winner
- A rational methodology for scoring against these criteria
- Transparent instructions to suppliers so they understand
 - *What their Tender needs to tell you, and*
 - *How you will evaluate the proposals they submit.*

1. Appropriate and transparent Award Criteria

2. A sensible and proportionate Marking Scheme

3. Clearly worded questions for Suppliers to respond to

Evaluation at different stages

- Evaluation may occur at different stages of the process, depending on the type of procedure you have selected.
- There are also three different types of Evaluation Criteria:
 1. **Selection Criteria** of “**Conditions for Participation**” type
 2. **Selection Criteria** of **Shortlisting** type
 3. **Award Criteria** used to **pick the winner**

Evaluation at different stages

- Evaluation may occur at different stages of the competitive tendering process, depending on the type of procedure you have selected.
- There are also three different types of Evaluation Criteria:
 - **Selection Criteria as “Conditions of Participation”.**
 - Used on a PASS/FAIL basis to determine if the Supplier should be considered at all.
 - Not given a score – the Supplier either proves they can satisfy the criteria, or not. If they fail, they are disqualified.
 - May cover, in particular, **legal and financial capacity; or technical ability** (s22 PA23).

Conditions of Participation in PA 23

S.22 Conditions of participation

- (1) A contracting authority may set conditions of participation in relation to the award of a public contract under section 19 only if it is satisfied that the conditions are a proportionate means of ensuring that suppliers have —
 - (a) the legal and financial capacity to perform the contract, or
 - (b) the technical ability to perform the contract.
- (2) A “condition of participation” is a condition that a supplier must satisfy if the supplier is to be awarded the public contract.

“Conditions of Participation” – policy background

- “Supplier selection” or “qualification” has always been an essential part of the procurement process.
- As a basic principle, the purpose of supplier selection is to ensure that you are only considering tenders from suppliers that are capable, reputable, and likely to meet your needs.
- Another common term used to be “Pre-Qualification”; this is now less commonly used.
- The **Procurement Act 2023** uses new terminology of “**Conditions of Participation**” in S.22 of the Act.

“Conditions of Participation” – policy background

- “**Conditions of Participation**” refer to conditions which a supplier must meet, in order to be awarded the contract.
- However, the stage at which you apply the Conditions of Participation may vary, depending on the Competitive *Tendering Procedure* you are using:
 - If you are using the **Competitive Flexible Procedure**, you may include a stage where you assess compliance with your Conditions of Participation, *before* inviting tenders from suppliers who meet them (and therefore disqualifying suppliers who don’t).

“Conditions of Participation” – policy background

- “**Conditions of Participation**” refer to conditions which a supplier must meet, in order to be awarded the contract.
- However, the stage at which you apply the Conditions of Participation may vary, depending on the *Competitive Tendering Procedure* you are using:

- If you are using the **Open Procedure**, or if you are running a **Below-Threshold** procurement, you must use a single-stage process:
 - You are allowed to set Conditions of Participation in these procedures. However, your process must allow suppliers to respond to the Conditions of Participation as part of a single-stage submission, at the same time as their Tender submission.

“Conditions of Participation” – policy background

- “**Conditions of Participation**” will generally be **binary** in nature. They should operate on a **Pass or Fail** basis.
- They are therefore separate from quality-based **shortlisting**, which may also form part of a Competitive Flexible Procedure.

“Conditions of Participation” – policy background

- “**Conditions of Participation**” will generally be **binary** in nature. They should operate on a **Pass or Fail** basis.
- They are therefore separate from quality-based **shortlisting**, which may also form part of a Competitive Flexible Procedure.

Conditions of Participation

- Pass or Fail criteria
- Any procurement procedure

Shortlisting

- Qualitative criteria
- Only in a CFP

Conditions of Participation in PA 23

So, Conditions of Participation can include things like:

- References and previous experience
- Standards and certification (where necessary)
- Disclosure and Barring or other vetting and safeguarding requirements
- Financial Standing
- Insurance
- Other project-specific experience or capabilities.

Evaluating Conditions of Participation

- You should generally assess Conditions of Participation at the earliest stage in the procurement process that you can – this is generally the best way to allocate your resources.
- If any supplier declares they cannot meet any of your pass / fail requirements, their tender should be **disqualified** at this point. *(And then, there is no need to evaluate any scored questions, for that supplier).*
- For example, if they do not meet any Conditions relating to **financial standing**, and cannot provide a **guarantee**, then they should go no further in the process, as soon as you are able to establish this.
- You are advised to **inform** the supplier of their disqualification, and the reason(s), as promptly as possible.

Step 1 – Pass or Fail

- Pass or Fail criteria can include things like:
 - ✓ *Financial Standing*
 - ✓ Grounds for Exclusion
 - ✓ Insurance
 - ✓ Modern Slavery...

*In an **above-threshold** tender, the **Procurement Specific Questionnaire** should be used.*

Step 1 – Pass or Fail

- The nature of your particular requirement may call for additional Conditions of Participation.
- For example, in Government ICT contracts involving personal data, suppliers are now required to have **Cyber Essentials** certification, “or equivalent”.
- The Government currently only recognises one “equivalent” route, which is the relevant **ISO** standard.
- Therefore, if this is checked at CoP stage, any supplier failing to demonstrate Cyber Essentials (or equivalent) will be de-selected.

Step 1 – Pass or Fail

8.4	ICT Security and Cyber Essentials (or equivalent)
	As the required services will involve the collection of sensitive personal data, your organisation must hold Cyber Essentials Scheme certification - unless an exemption is sought because your organisation conforms to the ISO27001 standard where the Cyber Essentials requirements, at either Basic or Plus levels, have been included in the scope, and verified as such. In these circumstances you will be regarded as holding an equivalent standard to Cyber Essentials, provided that the certification body carrying out this verification is approved to issue a Cyber Essentials certificate by one of the accreditation bodies. Please self-certify whether you hold Cyber Essentials Scheme certification, or equivalent ISO27001 certification.
	Yes – Cyber Essentials ☐ Yes – ISO27001 ☐ No ☐

Evaluation Criteria for 8.4

Organisation confirms they hold Cyber Essentials Scheme certification or equivalent level ISO27001 certification.

PASS

Organisation does not hold Cyber Essentials Scheme certification or equivalent level ISO27001 certification.

FAIL

Step 1 – Pass or Fail

- Pass or Fail criteria should be evaluated first – this is generally the best way to allocate your resources.
- If any supplier declares they cannot meet any of your pass / fail requirements, their tender should be **disqualified** at this point.
- Simple Pass / Fail criteria may be evaluated by the Procurement Officer alone. For some more complex criteria, even though no scoring is required, you may wish to convene a small **panel** incorporating subject matter expertise.
- Suppliers declaring they fail any of the mandatory or discretionary grounds for exclusion may attempt to “**self-cleanse**”. (This wording is no longer used in the Procurement Act, but the procedure itself remains).
- You have discretion and may still disqualify them – but if so, they must be given a clear **statement of reasons**.

Evaluation at different stages

- Evaluation may occur at different stages of the process, depending on the type of procedure you have selected.
- There are also three different types of Evaluation Criteria:
 - **Selection Criteria of the Shortlisting type.**
 - Used to form a shortlist, in the ***Competitive Flexible Procedure***.
 - Aims at reducing the number of *otherwise qualified* suppliers (i.e. those not disqualified) in order to form a manageable shortlist of the most suitable firms.
 - Evaluated on a scored basis; highest-scorers are shortlisted.
 - Should be entirely **backward looking** – not aspirational.
 - There is considerable flexibility on the criteria which may be used.

Evaluation at different stages

- Evaluation may occur at different stages of the process, depending on the type of procedure you have selected.
- There are also three different types of Evaluation Criteria:
 - **Award Criteria:**
 - Used to determine which of the *suitable* Suppliers has presented the **most advantageous tender**.
 - May use price-only, or a balance of price and quality – weightings between these must be transparent.

Evaluation at different stages

- Evaluation may occur at different stages of the process, depending on the type of procedure you have selected.
- There are also three different types of Evaluation Criteria:
 - **Selection Criteria** as “**Conditions of Participation**”.
 - May feature in any procurement procedure. Should be evaluated first.
 - **Selection Criteria** of the **Shortlisting** type.
 - May only be used in a CFP where shortlisting is permitted. Unlawful sub-threshold.
 - **Award Criteria.**
 - Must be present in all procurements.

Step 2 - Scoring

- The weightings given to scored questions should have been disclosed to suppliers, in the PSQ or Associated Tender Documents:

Question Number	Question Subject	Percentage Weighting
1.	References	20%
2.	Examples of Completed Projects	25%
3.	Supply Chain Management	25%
4.	Creating Opportunities	15%
5.	Experience in CO2 Reduction	15%

Step 2 - Scoring

- Good practice goes beyond this and provides transparent **evaluation criteria** for **each question**.
- Many public sector PSQs and ITTs fail to do this and are at risk of being seen as non-transparent.
- Let's look at an example...

Step 2 - Scoring

Question 4: Social Value - Creating Opportunities (Weighting: 15%)

Provide **one example** of your experience of creating positive economic and social outcomes through employment and training opportunities, making reference to at least one of the following:

- Targeting recruitment at those not in employment, education or training
- Creating apprenticeships and other training opportunities (e.g. NVQs and or work experiences)
- Targeting opportunities at those in typically disadvantaged employment categories, e.g. the long-term unemployed, people with disabilities
- Working with relevant public sector bodies and voluntary & community sector organisations (VCOs) to target those most in need of employment and training opportunities within specific communities

Step 2 - Scoring

Question 4: Social Value - Creating Opportunities (Weighting: 15%)

Scoring: This question has a weighting of **15%**

*Please write your response **here**: maximum of 1,000 words*

Step 2 - Scoring

Question 4: Social Value - Creating Opportunities (Weighting: 15%)

Scoring: This question has a weighting of **15%**

*Please write your response **here**: maximum of 1,000 words*

Is this sufficient?

Is it transparent?

Evaluation at the *Award stage*

- Evaluation at the award stage should be largely **forward-looking** – especially where there has been a shortlisting/ CoP exercise already.
- The critical point is to ensure the scores assigned reflect how well the tender responds to the **award criteria**. Never lose sight of the award criterion you are assessing.
- The same overall approach to scoring applies as for any scored **shortlisting** questions. We will examine this as we move on.
- Again, a good practice tender will be transparent not only about what the award criteria are, and how they are weighted – but how they will be evaluated.

Evaluation at the *Award stage*

- Alongside any qualitative criteria, the other award criterion is **price**.
- Price is often evaluated by the Procurement Officer alone. However, it is highly recommended to have a fellow procurement professional check the calculations.
- Take care in dealing with any *abnormally low* bids. If you decide to disqualify them it is better to do so before the evaluation takes place, if possible.
- It is good practice for the evaluation panel to receive **no** information about the Supplier's prices, until after the quality evaluation has been completed.

Do you agree? Why might this be good practice?



What can go wrong?

The evaluation process can go wrong due to a number of factors:

- ✗ Mistakes in forming the evaluation panel.
- ✗ Seeking “unfettered right of choice” – failure to apply the stated criteria.
- ✗ Conflict of interest (real or perceived).
- ✗ Improper conduct by Suppliers.
- ✗ Poor record-keeping.
- ✗ Inadequate feedback.
- ✗ *Other failings in the procedure, which make effective evaluation impossible – including biased or unclear criteria, misleading or incomplete specifications, lack of transparency, etc.*

(These fall largely outside today's learning)

What can go wrong?

The potential results of these failings may include:

- ✗ Legal challenge
- ✗ Legal and administrative costs
- ✗ Resource implications – having to re-run procurements if challenged
- ✗ Reputational damage
- ✗ Failure to achieve value for money
- ✗ Poor quality of goods or services.

Risks and routes of challenge

- Where a Supplier thinks that its rights under the public procurement rules have been infringed, they could pursue legal action in the High Court against a Contracting Authority, and/or complain to the Cabinet Office Public Procurement Review Service.
- Remedies available in the event of a challenge include:
- Pre-contractual remedies:
 - Setting aside the contract award decision;
 - Amend unlawful tender documentation (e.g. discriminatory specification, unlawful selection or award criteria);
 - Damages
- Post-contractual remedies:
 - Damages;
 - Contract set aside (i.e. Cancelling the contract, plus fine and damages)

Risks and routes of challenge

- Not all challenges are marked “challenge”!
- Not all claims brought as a result of alleged breaches of the procurement rules actually get heard at the High Court
- It’s important to seek specialist advice early on in a tender process to mitigate future risk of challenge; follow the process you have set out; and comply with the PA23.

Case law – the *Milton Keynes* case



- The case of *Woods Building Services v Milton Keynes Council* chronicles a catalogue of errors in **tender evaluation**, as well as an allegation of **conflict of interest**.
- This case concerned an above-threshold contract for asbestos removal and related works (value around £8,000,000). Award criteria 60% price, 40% quality.
- *Woods Building Services* was the incumbent supplier, hoping to retain the Council's business.
- *Woods* submitted the lowest-priced bid. However, a competing bid from *European Asbestos Services* (EAS) scored highest for quality, and this gave EAS the highest overall score.
- Milton Keynes Council issued **standstill letters** to inform Suppliers of the outcome.

Case law – the *Milton Keynes* case



Woods made a challenge, on a number of grounds:

- They alleged manifest errors in the **scoring process** – arguing they should have received higher marks for quality, and EAS (the winner) should have scored 0 for some criteria in which they scored high marks, as their responses were **non-compliant**.
- They also alleged that there was a **conflict of interest** because one of the council officers, who was part of the **evaluation panel**, was a former Woods employee and may have been *biased* against them.
- Finally they complained that one of EAS's bid-writing team was another former Woods employee, and this person had taken confidential information with them when they left, and used this to inform EAS's bid. Woods felt that EAS should therefore be disqualified on the basis of a **breach of commercial confidence**.

Case law – the *Milton Keynes* case



Complaint 1 – errors in scoring:

- It has been the tradition of the courts to say that judges will not usually “*step into the shoes of evaluators exercising their professional judgement*”.
- *Woods* is one of a small number of recent cases in which the High Court has departed from this principle – the judge was willing did look at whether the scoring was reasonable, to some extent.
- It emerged that managers at Milton Keynes Council had been aware that the presence of a *Woods* employee on the evaluation panel could be seen as a conflict of interest.
- A second evaluation, prior to notifying suppliers, had therefore been ordered by management.

Case law – the *Milton Keynes* case



Complaint 1 – errors in scoring:

- However, this second evaluation was not a fresh evaluation. Instead, an additional officer was brought in, to look at the scores given by the original panel, and comment on whether they were reasonable.
- This officer met the original panel. At this meeting they agreed to give *Woods* additional points for certain criteria.
- However, overall, this still left EAS with the highest score.
- No records were kept of the original evaluation process (other than the scores awarded). The records of the re-evaluation were also quite limited. In many cases, the “reason” for the assigned score was just a verbatim repeat of the published scoring criteria. The judge was highly critical of this.

Case law – the *Milton Keynes* case



Complaint 1 – errors in scoring:

- Examining the tenders, the judge agreed with Woods that EAS's answers to three particular questions, for which they were given high marks, actually failed to meet the requirements of the question and *should have scored 0 marks*.
- The Council's key witness, under cross-examination, could not provide a "rational explanation" of these apparently generous scores.
- The judge determined that EAS's bid, on this basis, should have scored less than it did, and that if the scoring had been correctly carried out, *Woods* should have been the winner.

Case law – the *Milton Keynes* case



Complaint 2 – conflict of interest:

- The judge accepted the complaint that having a former Woods employee on the evaluation panel was a conflict of interest – this officer was not an impartial evaluator.
- This problem might have been resolved by the Council conducting a re-evaluation – but only if this had proceeded from scratch without sight of the marks given by the potentially biased panel.
- The Council had attempted a re-evaluation but it was not to this standard and the record-keeping in relation to this process was poor.

Case law – the *Milton Keynes* case



Complaint 3 – breach of commercial confidentiality:

- At last, a crumb of comfort for Milton Keynes Council...
- The judge agreed it was likely that the former Woods employee, now working for EAS's bidding team, had probably acted unlawfully in using commercially sensitive information he had obtained while employed by Woods.
- However, he ruled that this was not the Council's fault – this Council was not obliged to disqualify EAS's bid on this basis.
- Instead, the unlawful act potentially gave rise to separate legal proceedings between Woods and EAS, but this was not a matter for the Council to address.

Case law – the *Milton Keynes* case



The Remedy:

- Having upheld the challenge, the court discussed whether or not to force the Council to award the contract directly to *Woods*, which was the remedy demanded by Woods' lawyers.
- Despite the fact that the judge agreed Woods ought to have been the winner, he ruled that forcing the Council to contract with them would be an exceptional remedy and not directly provided for in the Public Contracts Regulations.
- Instead, the judge ruled that the Council must pay damages to Woods, and must also re-run the procurement process, from scratch.

The Bromcom case

- SIMS/ MIS market.
- What happened in the case?
 - Contract notice issued 31 October 2019.
 - Supply of a cloud-based Management Information System (£2 Million).
 - 57 Schools (23 primary schools/ 34 secondary).
 - Competitive dialogue procedure under PCR15.
 - ITPD deadline 29 January 2020 3 Suppliers.
 - 21 February 2020, ULT released ITCD document - Arbor and Bromcom were shortlisted.
 - Product demonstration/ conference calls part of the process.
 - ITCD response deadline was 20 March - no particular time of day stipulated.
 - Close of business was “fine” and that there was “no time on this one”.
 - ITCD set out a number of rules – last date for Suppliers to seek clarification 16 March.
 - Between 4 and 10 March ULT issued additional documents to the Suppliers.
 - Bromcom tender sent by email at 5:55pm with password protected zip file - password sent by separate email at 6.01pm.
 - Arbor sent an email at 3:26pm saying that “You can download our final ITCD submissions at this link ... drop-box was hosted by Arbor, and at all times accessible by it.
 - ULT noticed Arbor’s March Clarification Response was not there.
 - Following a telephone call on 23 March, further (March) Clarification Request response and Uptime Statistics” sheet was sent by email



Put your calculator away!

13 Evaluators

Average score for
each evaluator
across the 4
elements was
calculated

Then, an average
was taken of all of
those averages

To illustrate:
Arbor scored average of
4.12 out of 5
Bromcom scored 4.08

Price - 240 marks -
40%
Quality - 600 marks-
60%

Arbor scored 874
Bromcom scored 865

Final scores later
changed to 874 and
862

I am sorry, you have not been successful!

Correspondence	Comments
30 March, ULT emailed Bromcom to say that it had not been successful	Not common practice
31 March, ULT sent a letter, showing that Arbor scored 878 and Bromcom 862	Not a compliant ADN
1 & 3 April - 2 feedback calls and email explaining methodology used and weightings applied	Suggests CA started to panic
14 April, Bromcom's solicitors sought clarification from ULT on a number of matters	Trouble for CA – get chequebook out!
16 April, Bromcom conducted internal review meeting to review outcome	Common practice
22 April, ULT sent further formal letter to Bromcom in place of 31 March letter, and comply with Regulation 86 of the PCR 15	When did the clock start?
23 April, ULT provided answers to particular points for clarification which had been raised by Bromcom on 14 April	Suggests disclosure still taking place
Lawyers sent letters 24 and 28 April, and on 1, 7, 12, 13, and 15 May.	Expect massive legal costs
18 May 2020, Bromcom issued the Claim Form against ULT and Particulars of Claim followed on 22 May	Note date!



Key lessons

Drop-box

Receipt of further
documents after the
deadline

Price score
breaches

Averaging,
weighting and
rounding of scores

Use of calculator

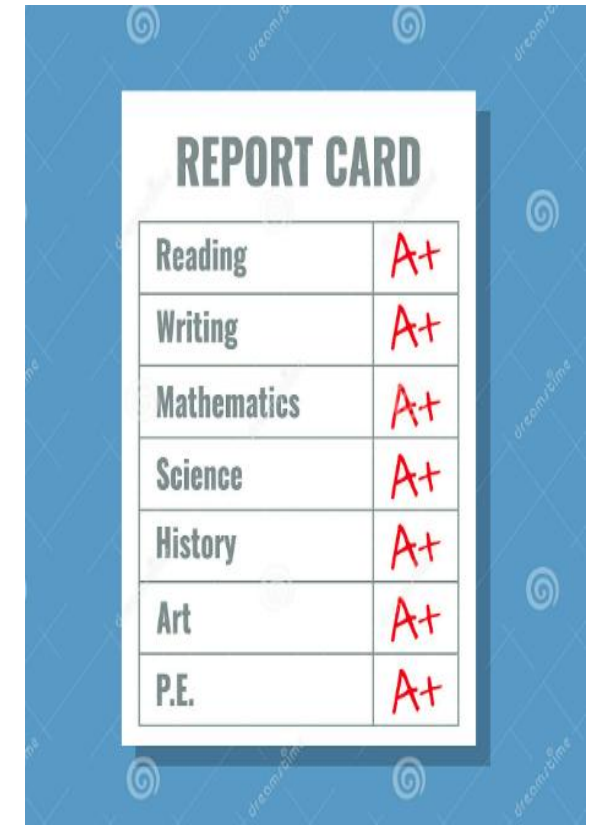
Moderation Meeting

Rebate on another
contract

Incumbent
advantage

What we need to do better in the future?

- Procurement not exact science
- Be aware of the importance of procurement principles/ Objectives
- Stick to the process/ criteria set out in the ITT
- Build moderation process into the procurement
- Clarify, rather than guess
- Late receipt of tender documents
- Importance of training evaluators



Reading	A+
Writing	A+
Mathematics	A+
Science	A+
History	A+
Art	A+
P.E.	A+

Conditions of Participation in PA 23



22 (1):

- (a) the **legal and financial capacity** to perform the contract, or
- (b) the **technical ability** to perform the contract.

Other than **financial standing**, what other Conditions of Participations might a contracting authority commonly apply?

Poll 2

Which of the following is not an appropriate Condition of Participation?

1. References or Examples of Previous Experience
2. Cyber Essentials Certification
3. Price

The Evaluation Panel

The role of the Evaluation Panel

- The evaluation panel is a group whose task is to evaluate and score suppliers responses at a particular stage of the tender process.
- Usually the panel members will all be officers of the Contracting Authority. In some cases, other stakeholders may also participate.
- As noted before, panel evaluations may take place at both Participation Stage, if you are using CFP, and the Invitation to Tender (ITT) stage.
- The Evaluation Team's role:
 - Evaluate submissions
 - Identify areas for clarification
 - Attend and participate in the Moderation meeting
 - Ensure the Authority runs a successful and compliant procurement process
- It is essential that issues are raised early to ensure they can be dealt with efficiently and effectively
- The entire purpose of the procurement exercise is to select the best bids, based on the stated requirements and evaluation criteria

Who is on the panel?

- The panel should always include the officer identified as **Procurement Officer** or procurement agent for the procurement exercise. The other panel members should be drawn from appropriate departmental representatives and technical **subject matter experts**.
- In some cases, representatives of other stakeholder groups may also sit on the panel. These may include:
 - **School Governors** – for major school building projects, for example,
 - **Representatives of *other* public bodies** – for collaborative procurements,
 - **Service User** representatives – for certain social or community services.
 - **(Any others?)**
- In such cases special care needs to be taken to ensure that these individuals understand their role and the protocols to be followed.

Panel roles

- Within the panel there are two particular roles, the moderator and the evaluators. The moderator and evaluator roles may be defined as:
- **Moderator** - the moderator acts as chair for the evaluation panel. They are responsible for explaining the protocols the panel is expected to follow, and to maintain order to protect the integrity of the evaluation process. In some cases the moderator is also an evaluator.
- **Evaluator** - the evaluators' role is to appraise each Supplier's submission against the pre-determined evaluation criteria published in the tender documents.
- Using the evaluation criteria, each evaluator should determine an appropriate score to the Supplier's response.
- Collectively, as a panel chaired by the moderator, the evaluators will then agree a single consensus score (the panel's "moderated score") which in the view of the whole panel, best reflects the submission.

Selection of the Evaluation Team

In the event of a procurement challenge, it is possible that a member of the evaluation team may be cross-examined in court. It is extremely important that those selected are:

- **Impartial** – no conflicts of interest in relation to the procurement
- **Competent** – evaluation team members must understand the subject matter they are evaluating
- **Consistent** – evaluators must evaluate responses against the relevant scoring provisions, and not measure Tenderers' responses against each other

Individual or collective scoring?

There are two possible approaches to assigning and recording the scores:

- A. Carry out **individual scoring** independently, before the panel meets. Then discuss the individual scores and seek to move to a **consensus**.

Or

- B. Evaluated as a **collective only** – without first assigning individual scores.

Individual or collective scoring?

There are two possible approaches to assigning and recording the scores:

- A. Carry out **individual scoring** independently, before the panel meets. Then discuss the individual scores and seek to move to a **consensus**.

Or

- B. Evaluated as a **collective only** – without first assigning individual scores.

Poll 1

Which approach does your authority use?

1. **Individual scoring, then consensus**
2. **Collective scoring only**
3. **We do something else**

An independent chair?

- A consideration for major projects.
- Appoint a person with no vested interest.
- Responsible for strong governance - exercise remains disciplined, objective and compliant.
- This could be an external partner or an internal colleague with no direct stake in the procurement project.



An independent chair?

Protocols to follow:

- Appointee should not score tenders / have casting vote.
- Manage moderation process / provide technical support.
- Needs to be familiar with tender responses.
- Helps panel to develop debate for any scoring variations and enable panel to arrive at an agreed consensus score.
- Ensure evaluators act in a **non-discriminatory** manner.

Panel roles

- In most procurements, where there is no independent chair, it is essential that the Procurement Officer / procurement agent assumes the role of moderator. Above all this is the person who needs to have **ownership** of the evaluation process.
- The Procurement Officer may also act as an evaluator, if they possess enough category-specific knowledge to usefully contribute to the scoring.
- In circumstances where, in the professional opinion of the Procurement Officer, the nature of the contract is so technically specialised or complex that they lack the technical knowledge or understanding to helpfully contribute to the scoring process, the Procurement Officer should act as moderator only.
- This should be clearly recorded.

Making up the panel

- The size of the evaluation panel should be proportionate to the scale and the complexity of the procurement.
- However, it should always consist of at least two *evaluators* as a bare minimum. Thus, where the Procurement Officer is only acting as moderator, there should be two other people on the panel, to act as evaluators. Otherwise, the evaluation represents the opinion of a single person, which may lead to a biased outcome.
- Avoid temptation or pressure to include **too many** people on the panel. This can make it very difficult to reach coherent decisions and can bog down the process in very lengthy discussions.
- Ideally for any given question, a panel of between **three** and **five** evaluators is usually the right number.

Making up the panel

- There are two possible approaches to forming an evaluation panel and determining who will be on it.
- The same panel can evaluate all the questions:



Question One



Question Two



Question Three

Making up the panel

- There are two possible approaches to forming an evaluation panel and determining who will be on it.
- Or, a different panel can score each question – bringing in specific **subject matter experts** only for questions relevant to their expertise:



Question One



Question Two



Question Three

Making up the panel

- There are two possible approaches to forming an evaluation panel and determining who will be on it.
- However, for any given question, the same panel members must score all of the responses to that question.

Making up the panel

- There are two possible approaches to forming an evaluation panel and determining who will be on it.
- However, for any given question, the same panel members must score all of the responses to that question.



Supplier One Evaluation



Supplier Two Evaluation



Supplier Three Evaluation

Making up the panel

- There are two possible approaches to forming an evaluation panel and determining who will be on it.
- However, for any given question, the same panel members must score all of the responses to that question.



Does the panel understand their role?

- The procurement lead should ascertain, before the evaluation of tenders begins, if panel members need training or guidance on the protocols they are expected to uphold throughout the evaluation.
- Take a few moments to chat to each of the panel members, in advance of the evaluation itself.
- Have they taken part in a tender evaluation before?
- Are they familiar with the key **principles** of procurement? In particular:
 - Equal Treatment – the duty to treat all Suppliers equitably,
 - Transparency – Suppliers will be entitled to a clear explanation of the result.
- The panel must also understand that **records** will be kept – and **detailed feedback** provided to suppliers.
- Pay particular attention to any colleagues who have recently joined from the private sector – where the environment is very different!

Does the panel understand their role?

Key points to get across to panel members **before** you begin:

- Evaluators must avoid **communicating** with any person connected to any of the supplier organisations, until notified by the procurement lead that such communications are permitted.
- This is in order to ensure that Suppliers do not receive any feedback regarding their response, or any indication as to whether or not they have been successful, until they are formally notified of the outcome of the evaluation.
- Even well after the process is complete, panel members outside the procurement team should avoid conversations, about the tender process, with any of the losing suppliers.

Does the panel understand their role?

Key points to get across to panel members **before** you begin:

- Tenders must be evaluated *only* against the stated evaluation criteria and not against each other. Each bid should be scored entirely on its own merits, as these relate to the evaluation criteria, and not on the basis of its *comparative* merits in the context of any other bid.
- The only sense in which one tender should be “better” or “worse” than another, is in terms of being better or worse *at satisfying the evaluation criteria*.

Does the panel understand their role?

Key points to get across to panel members **before** you begin:

- The use of any outside information, not mentioned in a supplier's response, should generally be avoided – especially where this outside information would give additional credit. Tenders must be scored on the basis of the information they contain.
- If a supplier has failed to mention vital information, but an evaluator knows this information from other contact with the supplier, this information *must be ignored* as it does not form part of the tender which the Supplier has submitted.
- This is particularly the case in terms of any backward-looking information about experience, track record, etc.

(We will explore this point in more detail later)

Any Questions?



Getting your Award Criteria, Weightings and Sub-Weightings in order

Award Criteria – Price and Quality

The **Procurement Act 2023 (and Public Contracts Regulations)** both tell us that the Award Criteria may either be based on:

- Price Only (100% price)
- or
- A balance of Price and Quality

The rest of today's training assumes we are using the latter approach.

Award Criteria – Price and Quality

- Price evaluation may be based on a single bottom line price, on a milestone basis, based on a schedule or rates, basket of goods, or a variety of other elements.
- We will not be examining price evaluation in detail today.
(We have training available on price evaluation if required!)

Award Criteria – Price and Quality

- Qualitative award criteria must be ***linked to the subject-matter of the contract***.
- This means we should not ask questions that are irrelevant to the contract.
- However, this may be relatively broadly interpreted.
- It does include, for example, “social value” criteria relating to environmental, social benefits, etc.

Award Criteria – Price and Quality

- Quality Award Criteria may also cover, depending on the nature of the contract:
 - ✓ Technical quality
 - ✓ Functional characteristics, design, aesthetics
 - ✓ Plans for delivery and completion of the requirement
 - ✓ The qualifications, experience, organisation and management of the Supplier's staff, and sub-contractors
 - ✓ After-sales or post-completion support, technical assistance, warranties
 - ✓ Social or environmental factors.

Method Statements and Marking Schemes

- Supplier responses to these criteria may take the form of a written narrative, in some cases supported by technical drawings, mobilisation plans, etc.
- In works and construction contracting these written responses are often referred to as “**Method Statements**”, although this nomenclature is not universal.
- Essentially a Method Statement approach asks the Supplier to write out a plan explaining their approach to delivering various tasks – which you will then evaluate based on a pre-determined methodology. This is known as the **Marking Scheme**.

Applying Weightings

- The relative **weightings** applied to the Award Criteria must be set out in advance.

Award Criteria #	Award Criteria	Percentage Weighting
1.	Price	40%
2.	Pre-Construction Phase Plan	10%
3.	Construction Phase Plan	25%
4.	Communication Plan	7.5%
5.	Sub-Contractor and Supply Chain Management	7.5%
6.	Social Value: • Employment & Training • CO2 reduction and Net Zero	10%

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	Construction Phase Plan	25%
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	Sub-Contractor and Supply Chain Management	7.5%
6.	Social Value: • Employment & Training • CO2 reduction and Net Zero	10%

It is important to avoid undisclosed sub-criteria

If an Award Criterion appears to be made up of multiple elements, it will be assumed that these have equal weight.

Applying Weightings

- The relative **weightings** applied to the Award Criteria must be set out in advance.

Award Criteria #	Award Criteria	Percentage Weighting
1.	Price	40%
2.	Pre-Construction Phase Plan	10%
3.	Construction Phase Plan	25%
4.	Communication Plan	7.5%
5.	Sub-Contractor and Supply Chain Management	7.5%
6.	Social Value: Employment & Training	6%
7.	Social Value: CO2 Reduction and Net Zero	4%

If they don't – you need to make it clear.

The clearest way is to treat them as separate criteria.

The Marking Scheme

The Marking Scheme

Earlier we observed that the relative **weightings** applied to the Award Criteria must be set out in advance.

Award Criteria #	Award Criteria	Percentage Weighting
1.	Price	40%
2.	Pre-Construction Phase Plan	10%
3.	Construction Phase Plan	25%
4.	Communication Plan	7.5%
5.	Sub-Contractor and Supply Chain Management	7.5%
6.	Social Value: Employment & Training	6%
7.	Social Value: CO2 Reduction and Net Zero	4%

The Marking Scheme

- Earlier we observed that the relative **weightings** applied to the Award Criteria must be set out in advance.

Award Criteria #	Award Criteria	Percentage Weighting
1.	Price	40%
2.	Pre-Construction Phase Plan	10%
3.	Construction Phase Plan	25%
4.	C	7.5%
5.	S	7.5%
6.	S	6%
7.	Social Value: CO2 Reduction and Net Zero	4%

Is this sufficient?

Is it transparent?

The Marking Scheme

- A well constructed tender document will be transparent not only about what the award criteria are, and how they are weighted – *but how they will be evaluated*.
- A clear and proportionate **marking scheme** helps Suppliers understand how they will be scored, and it provides a focus for the Evaluation Panel to ensure they follow a clear methodology.
- Some marking schemes are extremely vague and provide no useful guidance.
- Some marking schemes are so rigid and complex that they are hard to apply – or which make it very hard to score high marks.
- It is important to strike a **balance**.

How not to do it:

Score	Commentary
0 Marks	No answer
1 Mark	Very Poor
2 Marks	Poor
3 Marks	Fair
4 Marks	Satisfactory
5 Marks	Above Average
6 Marks	Good
7 Marks	Very Good
8 Marks	Excellent

How not to do it:

There is no clarity about what these arbitrary levels of poorness, satisfactoriness or goodness actually equate to.

Score	Commentary
0 Marks	No answer
1 Mark	Very Poor
2 Marks	Poor
3 Marks	Fair
4 Marks	Satisfactory
5 Marks	Above Average
6 Marks	Good
7 Marks	Very Good
8 Marks	Excellent

How not to do it:

This is slightly better but is wordy and over-engineered.

Assuming the question had a lot of “elements”, it would be very easy for the score to drop to 1 mark.

Marking Scheme:

The following marking scheme will be used to assess the response provided

5 marks (10%)	A very good response across <u>ALL</u> the elements set out in the question, which overall provides confidence that the elements and relevant Authority's requirements will be achieved to a good standard. The response may lack detail in some aspects of its deliverability and/or quality which is overall nonetheless acceptable.
4 marks (8%)	A good response across <u>ALL</u> the elements set out in the question, which overall provides confidence that the elements and relevant Authority's requirements will be achieved to a good standard. The response may lack detail in some aspects of its deliverability and/or quality which is overall nonetheless acceptable.
3 marks (6%)	An overall reasonable response across <u>ALL</u> the elements set out in the question, considering the relevant Authority's requirements as referred to in the question, which overall provides confidence that the elements and relevant Authority's requirements will be achieved to a reasonable standard. The response may lack detail in some aspects of its deliverability and/or quality which is overall nonetheless acceptable.
2 marks (4%)	An overall minimum acceptable response across <u>ALL</u> the elements set out in the question, considering the relevant Authority's requirements as referred to in the question, which overall provides confidence that the elements and relevant Authority's requirements will be achieved to a minimum acceptable standard. The response may lack detail in some aspects of its deliverability and/or quality which is overall nonetheless acceptable.
1 - FAIL	A response which insufficiently addresses, or may not address all of the elements set out in the question and the relevant Authority's requirements as referred to in the question, which overall provides little confidence that a significant portion of the elements and relevant Authority's requirements will be achieved to an acceptable standard. The response lacks detail in aspects of its deliverability and/or quality which causes concern.
0 - FAIL	No response provided.

Note that Suppliers scoring less than 2 marks for this question will be disqualified from the procurement process.

How not to do it:

Marking Scheme:

The following marking scheme will be used to assess the response provided

5 marks (10%)	A very good response across <u>ALL</u> the elements set out in the question, which overall provides confidence that the elements and relevant Authority's requirements will be achieved to a good standard. The response may lack detail in some aspects of its deliverability and/or quality which is overall nonetheless acceptable.
4 marks (8%)	A good response across <u>ALL</u> the elements set out in the question, which overall provides confidence that the elements and relevant Authority's requirements will be achieved to a good standard. The response may lack detail in some aspects of its deliverability and/or quality which is overall nonetheless acceptable.
3 marks (6%)	An overall reasonable response across <u>ALL</u> the elements set out in the question, considering the relevant Authority's requirements as referred to in the question, which overall provides confidence that the elements and relevant Authority's requirements will be achieved to a reasonable standard. The response may lack detail in some aspects of its deliverability and/or quality which is overall nonetheless acceptable.
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0 - FAIL	No response provided.

Note this Marking Scheme is using a "failure threshold".

This is permitted, but it should be used carefully – coupled with a very strict marking scheme these can cause a lot of failures!

Note that Suppliers scoring less than 2 marks for this question will be disqualified from the procurement process.

A better balance:

Marking Scheme:

The following marking scheme will be used to assess the response provided to this question:

5 marks (10%)	A very good overall response to the question, considering the relevant Authority requirements as referred to in the question, which provides a high level of confidence that overall the elements and relevant requirements will be achieved to an excellent standard.
4 marks (8%)	A good overall response to the question, considering the relevant Authority requirements as referred to in the question, which provides confidence that overall the elements and relevant requirements will be achieved to a good standard. The response may lack detail in minor elements of its deliverability and/or quality, but is overall nonetheless acceptable.
3 marks (6%)	A reasonable overall response to the question, considering the relevant Authority requirements as referred to in the question, which provides confidence that overall the elements and relevant requirements will be achieved to a reasonable standard. The response may lack detail in some aspects of its deliverability and/or quality, but is overall nonetheless acceptable.
2 marks (4%)	A minimum acceptable response to the question, considering the relevant Authority requirements as referred to in the question, which provides confidence that overall the elements and relevant requirements will be achieved to a minimum acceptable standard. The response may lack detail in some aspects of its deliverability and/or quality, but is overall nonetheless acceptable.
1 - FAIL	A response which overall provides little confidence that a significant portion of the elements and relevant Authority requirements will be achieved to an acceptable standard. The response lacks detail in aspects of its deliverability and/or quality which causes concern.
0 - FAIL	No response provided.

Note that Suppliers scoring less than 2 marks for this question will be disqualified from the procurement process.

Reaching Consensus, Record Keeping, and Feedback

What exactly are you reaching
consensus on?

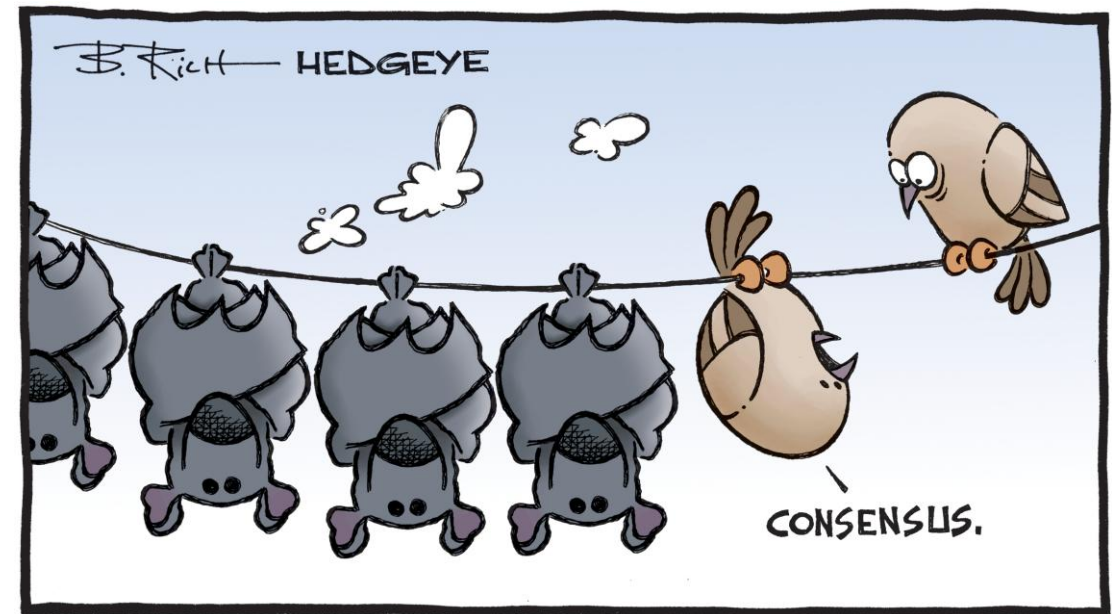
What exactly are you reaching consensus on?

What if we agree the score but do not agree on the reasons for that score? Is that consensus?

Tender Evaluation – Reaching Consensus

Meeting of the minds (also referred to as mutual agreement, mutual assent, or *consensus ad idem*)

- The law treats the evaluation decisions of a contracting authority as *the actions of a single entity* – not the work of a group of individuals.
- This is why consensus in evaluation is very important. The evaluators need to come to a single view.
- The moderation process must result in the contracting authority coming to its own reasons for the scores awarded, which are separate from the reasons of the evaluators.



Moderated Approach

- Courts have criticised joint evaluation approaches. Each evaluator should score their relevant sections independently
- Afterwards, an evaluation team will then come together to discuss any differences in the scoring and to 'weed out' any misunderstandings
- The Evaluation Team should ensure the integrity of the procurement process
- The Evaluation Team should form a consensus of both the score and the reasons and rationale for the score (always relative to the evaluation characteristics)
- Good practice would be to formally conclude the consensus meeting by recording the score awarded and the reasons and rationale for the score, citing specific examples from the Tenderer's response

Confidentiality

- During the procurement, all documentation must be treated as confidential
- Evaluation team shall not share or disclose*:
 - the procurement documents
 - responses provided by Suppliers
 - Tenderer's technical information or trade secrets
 - scores awarded to Suppliers
 - membership of the Evaluation Team
 - * *except with other Evaluation Team members during the evaluation process or as instructed by the Authority*
- It is the Evaluator's individual responsibility to maintain confidentiality of any documentation / information when in their possession

Conducting the evaluation meeting(s)

- Once the panel members have been selected, it's time to let them see the PSQ or tender responses, and to come together as a panel to decide the final scores.
- There are a number of potential approaches. Let's consider some of them...

Initial Review

- Each individual member of the Evaluation Team is to carry out an initial review of the Tender response relevant to their assigned criterion
- Evaluators are not required to score at this Initial Review stage, however it can be beneficial to have an initial score going into the moderation meeting. In this event, the rationale for any change of score should be recorded
- During the initial review each evaluator will make personal notes;
 - Notes **must** be based on the stated evaluation criteria
 - Notes **must not** compare tender responses from other Suppliers

Key Outcomes from the Initial Review

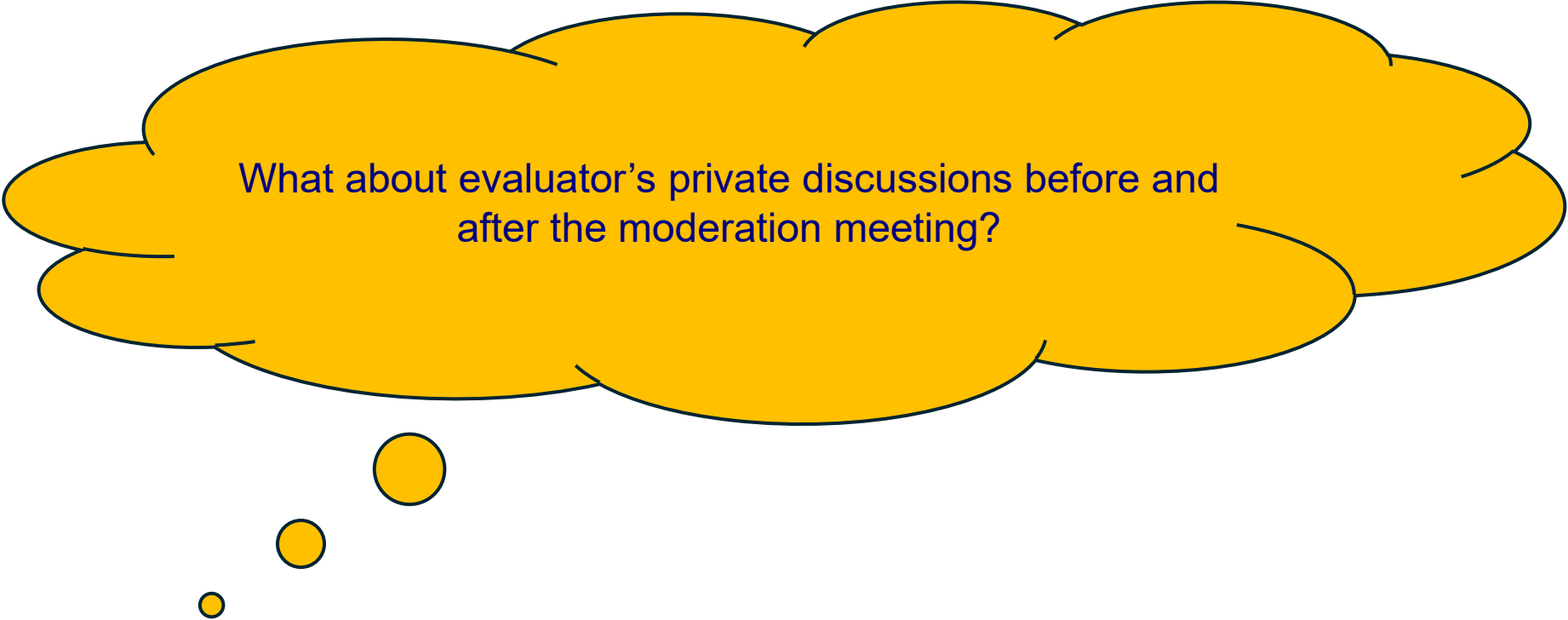
- Evaluators need to familiarise themselves with the content of the Suppliers response and formulate their own individual views on the response in preparation for discussion at the Moderation meeting
- Evaluators raise potential areas for clarification through the Procurement Department for issue to Suppliers
- Responses to these clarifications will then be discussed at the Moderation meeting

Individual evaluation

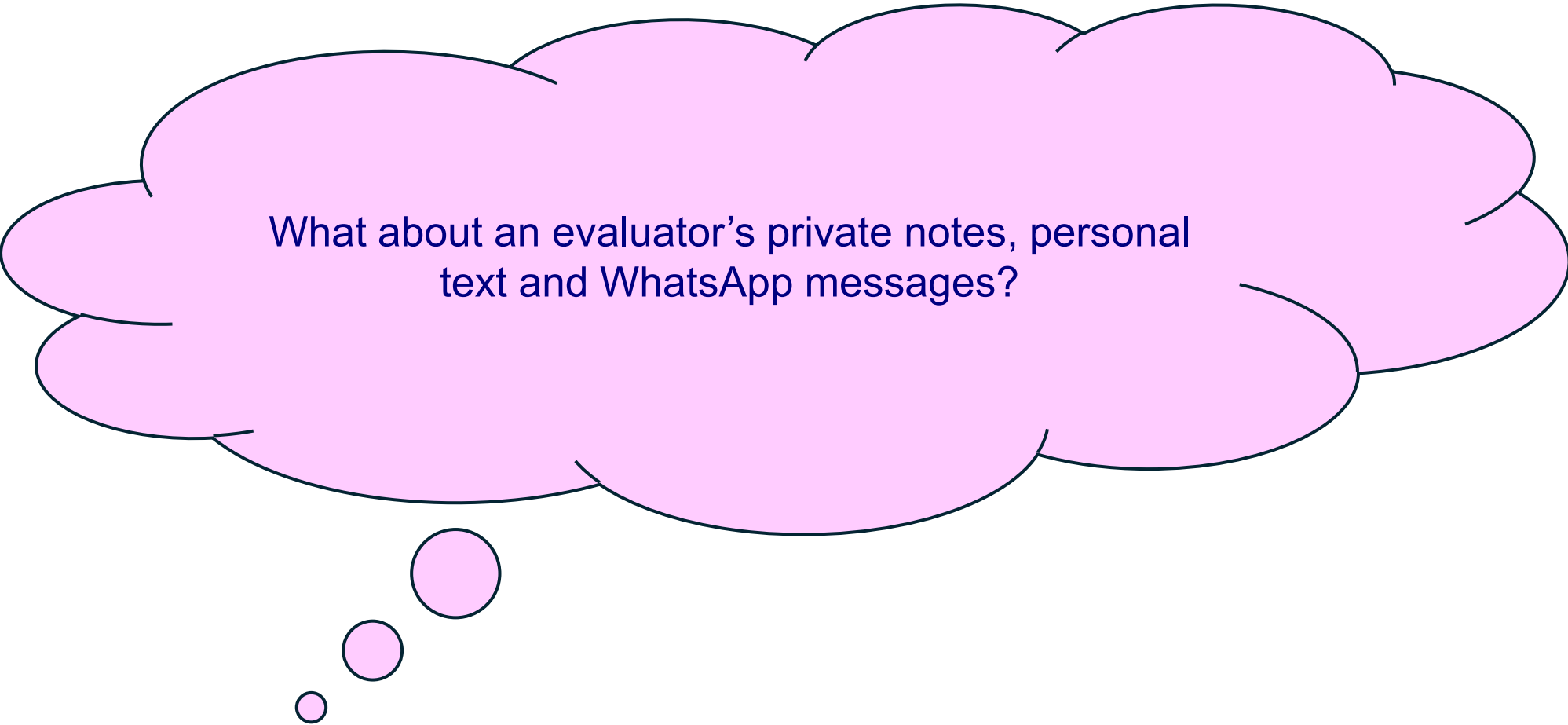
- Evaluation criteria and scoring methodology are published to Suppliers in the procurement documentation
- Evaluators **must** consider the tender responses independently against the pre-defined evaluation criteria
- Each evaluator must provide a detailed explanation of why they considered the response met or failed to meet each criteria along with the merits/demerits of the proposal, as this is likely to form the basis of the standstill letters and debriefing that Authorities are required to provide the Supplier on their submission
- Whilst the individual evaluators are not required to individually score the submissions, a full justification of evaluation rationale is especially important where a bid has failed to meet the evaluation criteria to at least a 'satisfactory' level

Evaluator Records / Notebooks

- Important that all contemporaneous notes / records made by Evaluators throughout the evaluation period are kept and maintained
- All notes taken by panel members either individually or in a group before or during the Group Evaluation must be passed to the Procurement Lead at the end of the Evaluation process
- If the Procurement process is legally challenged, any notes taken may be requested as evidence and used in legal proceedings
- As good practice, Evaluators may be provided with their own personal notebooks for the purposes of recording notes, etc. during the evaluation process
- Following completion of the evaluation, all records should be filed to be maintained by the Authority



What about evaluator's private discussions before and after the moderation meeting?



What about an evaluator's private notes, personal text and WhatsApp messages?

Evaluating in Isolation

- Do not confer with other Evaluators prior to the Moderation scoring meeting
- Make sure that you use the same standard to evaluate all of the responses from each of the Suppliers (i.e. against the stated evaluation criteria, not in comparison to other tenders)
- Ensure that you have the Tender Instructions with you when you are evaluating submissions
- Where something is unclear and requires clarification, this must be documented in your notes. For example, "...refers to supporting information, but can't see this attached. Query: raise as possible clarification"
- Evaluators shouldn't feel rushed. If you are unclear or have queries, these must be raised. Don't feel pressurised to reach a conclusion simply to adhere to timetable! **(Caution!)**

Conducting the evaluation meeting(s)



Allow each panel member to **individually** score each response, and then, for each question, average the panel scores to give a final score for each question.

Supplier #1			
Evaluator	Question 1	Question 2	Question 3
J. Smith	4	2	4
D. Evans	10	8	4
B. Spence	7	8	6
AVG. SCORE	7	6	4.66

Discussion point: Is this a good approach?

Conducting the evaluation meeting(s)

Allow each panel member to **individually** score each response, and then, hold a panel discussion to debate the scores assigned, and, as a panel, agree final **consensus** scores.

Supplier #1			
Evaluator	Question 1	Question 2	Question 3
J. Smith	4	2	4
D. Evans	10	8	4
B. Spence	7	8	6
MODERATED SCORE	4	8	4



Discussion point: What about this approach?

Conducting the evaluation meeting(s)

- Allow each panel member to **individually** score each response, and then, hold a panel discussion to debate the scores assigned, and, as a panel, agree final **consensus** scores.
 - This approach is lawful and commonly used. However, it is prone to some problems.
 - Having already decided their scores, some panel members may be defensive of the decision they feel they have already made, making consensus difficult to achieve.
 - In a **challenge**, a disgruntled supplier may discover that the **individual** scores of some panel members varied significantly. Their lawyers may use this to suggest that the panel was confused, or that the evaluation criteria were not clear. **This happened in the *Lancashire* case.**
 - To address this, very careful record keeping is needed.

Conducting the evaluation meeting(s)

- Allow the panel some reading time at the start of the meeting or prior to it.
- Do not record or report individual scores. Debate the quality of the responses **as a panel**, and agree a **consensus score** only.

Supplier #1			
Evaluation Panel: J. Smith, D. Evans, B. Spence			
	Question 1	Question 2	Question 3
Panel's Verdict	6	8	4



Discussion point: What about this approach?

Conducting the evaluation meeting(s)

Allow the panel some reading time at the start of the meeting or prior to it. Do not record or report individual scores. Debate the quality of the responses **as a panel**, and agree a **consensus score** only.

- Also lawful, but less commonly used.
- The panel members are reaching their scoring decision together, in unison, rather than starting out from potentially differing positions and attempting to reconcile them.
- An individual's score will not be affected by error, or misunderstanding of some technical aspect of the question or response – since that can be discussed during the reading and scoring (instead of after it).
- The outcome of the evaluation – and what is recorded – is the *singular verdict of the contracting authority*.

Taking notes

- Permissible (and understandable) different evaluators, (initial scoring in isolation), have different scores and rationale without either of them being in error.
- Where draft scores and reasoning are only initial steps along the way, it should matter less if records of these interim stages are more skeletal.
- The point at which detailed and transparent record keeping is most vital is therefore in the final consensus scores and rationale.
- Transparency does not require verbatim notes or tape recording of the moderation leading to the consensus rationale and score.
- Amount of detail required for an Authority to meet its obligations of transparency will vary on a case-by-case basis and take account of “proportionality” and a “sensible balance”.

When scoring...

- When scoring responses to a question, **DO** consider the following:
 - ✓ Does it directly address **the question** that was asked, or does it go **off-topic** or discuss **irrelevant** issues?
 - ✓ Are any claims regarding experience, or outcomes, adequately supported by **measurable evidence** – specific facts and figures to support the claims?
 - ✓ If you are scoring a **shortlisting** stage, does the answer rely on aspirational, forward-looking claims that should be discarded?
 - ✓ Does it stay within the **word/page count**?

Moderation Meeting – Who is involved?

- All Evaluators for each question
- Moderator
- (Optional) Independent Note Taker
 - It is generally recommended as good practice to have an Independent Note Taker record the discussion, deliberation and any movement in scoring from any initial evaluation
 - Records notes of the discussions and conclusions between Evaluators
 - Allows the Moderator to focus on the discussion rather than record keeping

Moderation Scoring

- Evaluators are expected to use their professional judgement when assessing scored submissions
- The courts will generally only intervene if:
 - there has been a breach of the law; or
 - there has been a 'manifest error' of assessment
- Otherwise, the Authority has a margin of discretion as to how it evaluates submissions
- In all instances, the Evaluator must apply the evaluation criteria as stated – care must be taken with Threshold questions!

Measured Scoring & Moderation

- Tenders should be scored by Moderation (even where there is a single Evaluator)
- Each Evaluator must provide a justification against each scored question to provide evidence the Supplier has met or not met the key points within the evaluation criteria and these points will be discussed in detail at the Moderation meetings
- Where there are differences of opinion and or justification, this will be discussed in detail with the aim of agreeing a final position on both score and justification
- Where a consensus of scoring has been met, the note taker must document the agreed position and, if relevant, where an Evaluator's position has shifted from their starting position (ie. Where different from their individual review)
- Moderator (or Note taker) must confirm that all Evaluators agree with the consensus position (score and justification)

Manifest error of assessment

- A 'manifest error' of assessment is where a mistake has clearly been made, e.g.:
 - Undisclosed criteria / weightings
 - Misapplication of criteria
 - Inadequate or poor note taking
- A court will not normally undertake a remarking exercise

...build provision for rebates into our contract. If price levels exceed those anticipated by more than 5%, we will pass a proportion of the rebate on to our clients to offset the cost of any genuinely unavoidable price increases.

If a response exceeds the **word count**, it isn't disqualified entirely...

We have implemented this arrangement with our client, Narnia County Council, producing net savings for them of more than £10,000 per year, despite significant increases in the global price of raw materials in the third and fourth years of that contract.

We propose to offer this buying model, if awarded the contract, to ensure that your organisation achieves value for money from any economies of scale that can be generated, which will mitigate any price rises due to circumstances in the global market that are genuinely unforeseeable and unavoidable. As Cheshire East is a larger authority than Narnia, we would anticipate rebate savings of at least £20,000 per year on this contract.

...build provision for rebates into our levels exceed those anticipated by us, to pass a proportion of the rebate on to the cost of any genuinely unavoidable

We have implemented this arrangement with our client, Narnia County Council, producing net savings for them of more than £10,000 per year, despite significant increases in the global price of raw materials in the third and fourth years of that contract.

We propose to offer this buying model, if awarded the contract, to ensure that your organisation achieves value for money from any economies of scale that can be generated, which will mitigate any price rises due to circumstances in the global market that are genuinely unforeseeable and unavoidable. ~~As Cheshire East is a larger authority than Narnia, we would anticipate rebate savings of at least £20,000 per year on this contract.~~

Count up to the point where the word count ends, and score the response based on the information provided **up to** that point, discounting any information after this point.



When scoring...

- When scoring responses to a question, **DO NOT**:
 - ✗ Use **outside information**, based on your wider knowledge of the bidding organisation. If they don't give the information in their answer, you can't take it into account. Tenders must be evaluated on the merits of *what is contained in the tender submission*.
 - ✗ Give marks for any **aspirational** statements which do not reflect the Supplier's experience or current position, or which do not make a direct **commitment**.
 - ✓ At tender stage (forward looking), if a Supplier is making a clear and specific commitment that can be made contractual, that's ok.
 - ✗ But at selection stage, any forward-looking information is not relevant – and at any stage, *aspirations* which are not being promised to you, should count for nothing.

Referring to outside information:

Let's consider some examples:

1. A supplier provides a **case study** based on a previous project for your authority. The case study says the project was completed successfully, **on time and on budget**. You were on the team when that project took place. You know that it was completed *five months late and 25% over-budget*.
2. A supplier states that their **Data Protection** procedures are fully compliant with the latest Data Protection law and guidance. You know from research online that in 2024 they were fined by the Information Commissioner's Office for a **data protection breach** in which personal data of 50 customers fell into the hands of a fraudster.
3. A supplier states that they were the lead construction contractor for the neighbouring Council's new **leisure complex**, completed two years ago. A member of your team used to work for that council and tells you this supplier was only the **roofing sub-contractor**.

Think!

In which (if any) of these cases could we take this information into account?

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When scoring...

- When scoring responses to a question, **DO NOT**:
 - ✗ **Compare** the suppliers' responses *against* each other. Score each response separately, using the **evaluation criteria**.
 - ✗ Award marks for anything which, however attractive, is not related to the evaluation criteria set down, or the question that you asked.
 - Additional features, special offers, complementary discounts on existing contracts, or other such things may sound nice...
 - But if you did not ask for them, you cannot take them into account – to do so would represent *unequal treatment*.

Reaching a consensus

- Collectively, as a panel chaired by the moderator, the evaluators should agree a **consensus score** (the panel's "moderated" score) which in the view of the whole panel, best reflects the submission.
- The score must be based on the published **evaluation criteria**. It cannot simply be an "average" of the evaluators' opinions.
- Although the moderator chairs the panel, they do not have a casting vote. The whole panel must agree the score.
- The moderator should then record the score agreed, ***and the reasons for that score*** – making reference, where relevant, to the evaluation criteria. If **individual scores** were recorded first, it is also important to record who **changed** their score, and why.
- The record you keep should be sufficient to form the basis for **feedback** to the Suppliers – bear this in mind.

Record Keeping

- Particular care should be taken to record the work of the evaluation panel.
- No need to write a volume, but enough to allow Suppliers to understand and defend their rights, or the Court to exercise its supervisory jurisdiction,
- As we saw, in the *Milton Keynes* case, the judge was critical of the inadequate recording of the decision-making process.
- This meant that when the case came to court, the authority had a hard time defending itself – because it could not adequately *explain how* particular scoring decisions had been made.
- Another key case tore apart an authority's record-keeping practices, and is a cautionary tale...

Case law - the *Lancashire* case



- This high profile procurement case in the UK courts sheds light on the importance of careful record keeping during the evaluation process.
- The case was *Lancashire Care NHS Foundation Trust and Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council*.
- The procurement involved a tender for **public health nursing** services for under-20s, which the Council was required to commission.
- The Council awarded the contract to **Virgin Care**. The two NHS trusts submitted a joint bid, which did not win.

The *Lancashire* case

- The two NHS trusts challenged the contract award, on a number of counts. Most importantly:
 - The Trusts claimed that the reasons given to explain the scores were inadequate – so it was not clear why their bid had scored lower than Virgin's,
 - The Trusts claimed there were errors in the evaluation of both bids.
- A key point of interest is that the judge decided he ***could not tell*** whether the evaluation process was lawful or not, because the **records** kept by the Council were so inadequate that they did not amount to a proper record of the decision-making process.

The *Lancashire* case

- During the court hearings, the individual members of the Council's evaluation panel gave evidence and were cross-examined.
- The judge also examined the records kept by the Procurement Manager during the evaluation meeting, as well as the individual notes made by the panel members.
- The Procurement Manager's final notes recorded the individual scores initially assigned by each panel member, and the consensus score eventually agreed at.
- **But** the final note did not clearly record how that consensus had been arrived at. The notes were conflicting and did not properly explain the final scores.
- There was also evidence that to some degree the final scores had been arrived at by *comparing* the two bids.

The *Lancashire* case

- The judge partly upheld the NHS Trusts' complaint.
- He ruled that there was sufficient evidence that the evaluation process was flawed, because the records (and the evidence of the panel members) were so inadequate that they could not demonstrate that the final scores had been rationally and lawfully arrived at.
- The reasons given for the scores were insufficient in law, and this insufficiency could not be resolved without re-marking the tenders in court – which the court would not do.
- Importantly – the judge did not rule that Virgin should not have been the winner – simply that it was impossible to determine this, because the records of the evaluation were so poor.

The *Lancashire* case

- The result of all this was that the judge ordered the contract award be set aside. The contract could not go ahead with Virgin Care as it could not be demonstrated that it was lawful.
- The Council had to re-start the tender process from the beginning.
- It also had to pay all of the court costs.
- This case underlines the importance of keeping proper, accurate, and lawfully-adequate records during tender evaluation!

Record Keeping

Your evaluation records should very clearly record:

1. The participants

- ✓ Who was on the evaluation panel?
- ✓ Who acted as the **moderator** or **chair**?
(if they only acted as moderator, this should also be recorded)
- ✓ Which questions did each evaluator participate in the scoring of?
- ✓ If there were any **Pass / Fail** questions, who scored those?
- ✓ Did anyone **withdraw** from the panel during the process? Why?
- ✓ Who took the final **decision** to award the contract, and on what **authority**?

Record Keeping

Your evaluation records should very clearly record:

2. Essential (Pass / Fail) Criteria

- ✓ Did all of the suppliers pass all of these?
- ✓ If any supplier(s) failed, and were disqualified, exactly what was the cause of their failure?
- ✓ Did any “self cleansing” need to take place? What was the final decision, who took it, and on what basis?

Record Keeping

- Your evaluation records should very clearly record:

3. Shortlisting Criteria

For each supplier and for **each** of the criteria...

- ✓ What score did the panel agree?
- ✓ Why did they obtain that score?
 - If the score was low, why? What was missing? What was poor?
 - If the score was high, why? What was particularly positive?
- ✓ If you are using an evaluation method based on individual marking, followed by group moderation, did any panel members *change* their score? What persuaded them to move from their initial mark?

Record Keeping

Your evaluation records should very clearly record:

4. Award Criteria

For each supplier and for **each** of the criteria...

- ✓ What score did the panel agree?
- ✓ Why did they obtain that score?
 - If the score was low, why? What was missing? What was poor?
 - If the score was high, why? What was particularly positive?
- ✓ If you are using an evaluation method based on individual marking, followed by group moderation, did any panel members *change* their score? What persuaded them to move from their initial mark?

Evaluator training – routinely asked for evidence of same in challenges

Consider training on how to write reasons:

- justify why the response attracts the score selected; and
- justify why the response does not attract the score above (where applicable);
- form full sentences;
- keep comments concise and factual;
- ensure that vocabulary aligns with the scoring scheme (e.g. if you choose the score “poor”, the comment should not be “the response is overall good”);
- check that your score rationale is consistent with the evaluation criteria and scoring scheme;
- ensure the approach is consistent across questions and across bids;
- don’t score by reference to, or by comparison with, the merits/features of other bids/tenders;
- only consider information provided within the page/word limits prescribed – ignore anything in excess of this;
- don’t make assumptions or take account of material other than the response and clarifications (if applicable);
- don’t make assumptions or take account of personal knowledge when scoring.

What not to do

Type of breach	Example
Transparency	Award scores based on undisclosed criteria / sub-criteria
	Change scores/records after formal evaluation and moderation has completed
	Fail to keep meaningful contemporaneous records of evaluation / moderation
	Not follow the process set out in the ITT
Equal treatment / non-discrimination	Award different scores for similar answers
	Adopt an inconsistent approach with clarifications, or go beyond the remit of permitted clarifications set out in the ITT
	Provide different information or opportunities to selected Suppliers
	Have bias or a conflict of interest (actual or perceived)
Manifest error	Award a score that is obviously wrong or miscalculated (e.g. 0.5 where not possible)
	Award a score that is incapable of explanation (e.g. awarding a 'pass' for a pass/fail question when none of the criteria for a pass are met)

Record Keeping

Your evaluation records should very clearly record:

5. Award Criteria

For each supplier, for **each** of the criteria...

- ✓ What score did the panel agree?
- ✓ Why did they obtain that score?

With specific reference
to the criteria!



- If the score was low, why? What was missing? What was poor?
 - If the score was high, why? What was particularly positive?
- ✓ If you are using an evaluation method based on individual marking, followed by group moderation, did any panel members *change* their score? What persuaded them to move from their initial mark?

Recording of consensus score

- Once a consensus score is agreed, the Authority should (as good practice):
 - record this on a draft evaluation score sheet
 - record evidence / narrative confirming the reasons for the assigned score (always based on the stated evaluation criteria)
- The draft evaluation score sheets should, as good practice, go through a quality assurance check and, where appropriate, a Legal review to ensure consistency, clarity and that the narrative is in accordance with the published evaluation criteria
- Feedback should be checked with the Evaluation Team who will be responsible for considering the feedback and making any subsequent changes that they feel are appropriate
- Any QA / Legal review should not challenge the score, re-score or amend the evaluation score sheets

Scoring sheet

[Supplier Name]					Individual score (0–5). Any scores highlighted in red and in brackets refer to final score of the Panel member where it has been downgraded/upgraded following review						
High Level Criteria	Weighting	Q. No.	Sub criteria	Sub weighting	Mem 1	Mem 2	Mem 3	Mem 4	Mem 5	Final Moderated Score (0-5)	Moderator Comments
State criteria from your evaluation criteria in ITT	Percentage weighting (for e.g. 10%)	1.1	State sub-criteria wording from ITT	100	3	3	4 (3)	3	3	3	One member stated that he was originally undecided between giving a mark of '3' or '4'. After hearing representations from other panel members (in particular, the Supplier had made a number of statements for this question without actually qualifying this with practical examples), that member decided to downgrade the score to a '3' to give full consensus amongst the panel.
Where the Supplier did not score full marks, the reason they did not obtain the score immediately above the mark they achieved (unless full marks)											Please insert
Additional comments: The panel were of the view that the information submitted in the response met the contractual service requirements, but did not evidence added extra value or go beyond the contract requirements to give a score of 4. Although the response evidenced a robust implementation plan, including dates, transition for services users (limited disruption as they were the incumbent provider) and case management (with a 'live' risk register), it was nevertheless considered to go into considerable detail relating to what the Supplier is delivering at the moment (backward looking), rather than forward looking (or being more explicit in their response) and how they would deliver the service requirements to the CA in the future.											

Dealing with Problems

Some Do's and Don'ts

Don't	Do
Attempt to 'read between the lines' or assume what a Supplier 'meant to say'	Read the submission at face value and score only based on the response provided
Evaluate collectively with other evaluators, other than during moderation meetings	Evaluate tender responses independently. Any disagreements will be discussed at the moderation meetings
Reinterpret the evaluation criteria – it says what it says, not what you want it to say!	Request clarifications where the response is unclear
Use outside knowledge of the Supplier to influence your evaluation of the tender – the tender submission is the only element to be evaluated	Document your justification for your evaluation. Detailed feedback will be required for each question
Revisit scores to develop a wider margin between bids if the scores are close. If you are comfortable with your evaluation this should not be an issue	Make written notes of anything procedurally significant within a procurement process including reasons for modifying a score. Make sure the reasons for doing so are consistent with the scoring methodology

Conflicts of Interest

- It is vital to ensure that the evaluation panel does not include any officer, service user, or other representative who may have – or may be perceived as having – a **conflict of interest**.
- The scope for conflict of interest can be broader than you may at first imagine.
- Part 5 of the **Procurement Act 2023** codifies the rules in more detail – let us look at those.



Some protocols to follow – Conflict of Interest

- If you believe you may have an actual, potential *or perceived* conflict of interest involving any Supplier or Candidate, you must notify the Procurement Lead immediately you become aware of this.
- **Actual conflict of interest** involves a conflict between the public duty and private interests of a public official or their close advisors, in which the public official has private-capacity interests which could improperly influence the procurement decision-making process.
 - *e.g. A member of the Project team owns shares in a company. This company is bidding in a procurement, that person is on the evaluation panel.*
- A **potential conflict** arises where a public official has private interests which are such that a conflict of interest could arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future.
 - *e.g. A member of the commercial team's partner is on the Board of a business that has made a take-over offer to acquire another company. That second company is a Supplier in a live procurement.*

Some protocols to follow – Conflict of Interest

- A **perceived conflict** can be said to exist where it could reasonably *appear* that a public official's private interests could improperly influence the procurement decision-making process, but *this has not in fact occurred*.
- *e.g. A senior team member has known connections with a company that is taking part in a procurement process; however, they have no direct involvement in the procurement or influence over the award decision.*

Some protocols to follow – Conflict of Interest

A **perceived conflict** can be said to exist where it could reasonably *appear* that a public official's private interests could improperly influence the procurement decision-making process, but *this has not in fact occurred*.

- *e.g. A senior team member has known connections with a company that is taking part in a procurement process; however, they have no direct involvement in the procurement or influence over the award decision.*
- In any of these three situations, the evaluator or team member is obliged to notify the procurement lead, who should then ensure the correct action is taken.
- **Actual conflicts** will almost always require the officer involved to withdraw from the project
 - at the very least, they must not act as an evaluator.
- **Potential conflicts** require careful monitoring and recording.
- **Perceived conflicts** may not require any action, but should be recorded for the audit trail.



Case law – the *Counted4* case

- Another interesting case which again involved an alleged **conflict of interest** is that of *Counted4 CIC v Sunderland City Council*.
- There was no final verdict in this case, because eventually the parties settled out of court. However, there was a **suspension hearing** at which several interesting points of law were raised.
- The procurement was a re-tender of an existing contract for substance misuse treatment. *Counted4 CIC* was the incumbent supplier.
- Following tender evaluation, Sunderland City Council announced that the local **NHS Trust** had been identified as the winner.

Case law – the *Counted4* case

- Counted4 challenged the contract award, while it was still in the Alcatel standstill period. This activated the automatic suspension, preventing Sunderland Council awarding the contract.
- The challenge alleged that the tenders had been unfairly marked and, more importantly (in the view of the court) that there was a **conflict of interest**, because the existing Contract Manager, with whom Counted4 had recently had a breakdown in relations with, was on the evaluation panel.
- The Council made an urgent application to have the *automatic suspension* lifted.
- The Council claimed there was no conflict of interest because there was no serious issue to be tried – the panel member had no personal interest in the outcome (they largely argued that he had no financial interest).

Case law – the *Counted4* case

- In deciding whether to lift the suspension, the court applied the principles of the *American Cyanamid* case:
 - Is there a serious issue to be tried?
 - If the contract is allowed to go ahead, would damages be an acceptable remedy?
- The court decided that there was a serious issue. The conflict of interest rules in Regulation 24 of the PCRs were new at that time, and had not been tested in court. The possibility for the contract manager to have a personal bias against the supplier for non-pecuniary reasons could not be ruled out.
- The court also decided that damages would not be a sufficient remedy, since Counted4 argued that if they lost the contract they would have to TUPE-transfer several staff to the NHS trust, and they did not want to lose these important members of their team, who they had spent years developing and training.

Case law – the *Counted4* case

- Accepting these arguments, the court ruled that the suspension would stand until the case was fully decided.
- This means that Counted4 were entitled to continue to provide the service while the challenge went through the rest of the court proceedings.
- Another strong example on the importance of avoiding conflicts of interest!

What if evaluators can't agree?

- If the panel cannot reach an agreement on a particular question, you have a number of options to manage this situation:
 - If evaluators disagree about the interpretation of a legal, scientific or technical matter, the evaluation should pause and the Procurement Officer should seek general **clarification** from an appropriate expert source of guidance.
 - The expert advisor should *not* be asked to score the disputed question – only to provide technical guidance in the hope of resolving the issue causing the disagreement.
 - Hopefully the expert insight will provide the panel with sufficient knowledge to resolve the impasse. Evaluation may then continue as normal.

What if evaluators can't agree?

- If the panel cannot reach an agreement on a particular question, you have a number of options to manage this situation:
 - If the disagreement arises because some claim or statement made in the tender is unclear, or needs clarification, this may be possible. (More on this in a moment).
 - If one evaluator is unable, in their professional opinion, to agree with the other evaluators on the panel then they may, as a last resort, withdraw from the panel and be replaced by an alternative officer.
 - *However, in this instance, the panel will need to **re-evaluate** any questions, which that individual had taken part in evaluating.*

Clarifications, Ambiguities, and Errors

- In some cases it may be necessary, or desirable, to seek clarification from Suppliers, if they have forgotten to supply information, or if the information they supply is incomplete or ambiguous.
- Clarification is allowed in principle but is an area of risk.
- Clarification should not serve as an opportunity for suppliers to **alter or improve** their bid – only to clarify what has already been submitted.
- Negotiation with suppliers, during the tender process, is only permitted in the CFP.
- In the Open procedure, no negotiations may take place.

Clarifications, Ambiguities, and Errors

- In some cases it will not be possible to seek clarification without allowing the supplier to choose between two or more options.
- This should generally be avoided as it affords the supplier a chance to change their tender.
- If you cannot seek clarification, what can you do?

Clarifications, Ambiguities, and Errors

- If you cannot seek clarification, what can you do?
 - **Clearly mathematical errors** may, at your own discretion, be corrected. This is not just relevant to price – some other elements of the tender may involve numerical information.
 - In this scenario, the supplier should be offered the opportunity to inspect the correction and given two options:
 - Accept the correction and allow their bid to stand on that basis.
 - Withdraw their tender.

Clarifications, Ambiguities, and Errors

- If you cannot seek clarification, what can you do?
 - For other errors, you can **evaluate the tender as it stands**, which you should do if at all possible.
 - If the panel were deadlocked because one evaluator took a *strict* interpretation of the unclear statement, while another was willing to give the *benefit of the doubt* – this will generally require you to apply the restrictive interpretation.
 - This may cause the supplier to score **fewer** marks, but is better than outright disqualification, if that can be avoided.

False Statements

- A particular concern arises if you encounter a situation in which you suspect a Supplier has made a **false** or *deliberately misleading* statement or claim.
- This may involve things like:
 - Significantly over-playing their role in a previous project when attempting to demonstrate their track record;
 - Otherwise passing off another company's capabilities as their own; or
 - Claiming to possess exclusive rights which are not, in fact, exclusive to them.
- If you have any such suspicions, you should investigate as appropriate.

False Statements

- Making a false statement is a **ground for exclusion** under Ground P23 of Schedule 7 PA23, whether the falsehood arises from intentional deception, or simple negligence.
- If you can verify the statement is false, or misleading in a way which could materially effect your selection or award decisions, you should generally disqualify the supplier.
- Make sure your evidence is reliable and you have a clear record of any investigation you undertook.
- Failing to disqualify in these circumstances could leave you open to challenge from other Suppliers, if they become aware later on that a false statement was made.

Non-compliant tenders / incomplete tenders

- Usually, tenders are ‘non-compliant’ if there are mandatory requirements, in terms of tender submissions, which have not been submitted or complied with
- As a general principle, non-compliant bids should be rejected (tenders tend to say non-compliance will be a ground for rejection)
- ***Dem-Master Demolition Limited v Renfrewshire Council [2016]*** –
- No duty to allow correction of errors after the tender deadline
 - Documents requested after the deadline must predate the deadline and there must be no explicit provision confirming that the tender will be rejected if documents are omitted
 - The reservation of a right to ‘clarify’ information applied to ambiguities but did not extend to seeking late submissions of omitted documents
 - The Council’s tender requirements / explicit warnings which were unequivocal carried decisive weight with the court

Completing the process

- If there was no challenge, and if the winning supplier is able to confirm any conditional information required, you can now go ahead and issue the Assessment Summary, followed by the Contract Award Notice.
- Ensure you get the appropriate signatures promptly.
- Remember to publish your Contract Award Notice within 30/120 days.

Cancel the tender – cancel the challenge?

- It is sometimes suggested that if a procurement is challenged, a safe way to extinguish the challenge is to abandon the process.
- The theory appears to be that if *nobody* is to win the contract, then nobody can argue it was unfair that they lost.
- This concept was debated in the case of *Amey Highways Ltd. vs West Sussex County Council*.
- In 2017 West Sussex County Council undertook a procurement for a major highway maintenance contract.
- The Council announced that Ringway Infrastructure had won, and Amey placed second. Ringway's overall score was **85.51%**, while Amey scored **85.48%**. **0.03% difference!**
- Amey raised a challenge in the High Court and argued manifest errors in the evaluation.

Cancel the tender – cancel the challenge?

- Following the challenge, the Council decided to terminate the award process, and re-start the procurement again, with modified criteria.
- They clearly hoped that this would placate Amey, as Ringway were not being awarded anything, and Amey would get another chance, on the basis of award criteria which had been carefully revised to ensure fairness. Further, the Council apparently hoped to extinguish the claim.
- Amey were not to be placated so easily. They issued a second challenge, alleging that the decision to terminate the procurement process *was itself unlawful*.
- In effect Amey wanted the original procurement to continue – they simply wanted to be the winner of it. They did not want to start again.
- Amey argued that the primary reason for the abandonment decision was to deprive them of a proper settlement of their original claim – and that this in itself was therefore maladministration.

Cancel the tender – cancel the challenge?

- It was accepted in court that if Amey had not made their original challenge, then the Council would have gone ahead and entered into a contract with Ringway.
- Therefore, the Council would not have abandoned the tender process, had it not been for Amey's challenge – it did not have any other pressing motivation for abandoning it.
- The court therefore distilled the second challenge to two issues:
- **First of all:**
- If the abandonment was lawful, does it achieve the Council's aim of nullifying the original procurement challenge?
- **Secondly:**
- Was it lawful to abandon the procurement and start again?

Cancel the tender – cancel the challenge?

- The court first of all declared that if the Council's original tender evaluation had been flawed or unlawful, and if, therefore, Amey ought to have achieved the winning score, then Amey would have a valid damages claim, based on the loss of a contract they should have won.
- In that case, assuming for the sake of argument that Amey was the rightful winner, then Amey would have a valid claim from the moment they were notified that their tender was not the winner.
- The abandonment of the tender process, therefore, does not dispose of Amey's original challenge – they may have been wronged the moment they didn't win a contract; it makes no difference that the contract wasn't awarded at all.
- By the time the procurement was abandoned, the damage to Amey would already have happened.

Cancel the tender – cancel the challenge?

- On the second question, the court ruled that the Council's decision to abandon the procurement process was **lawful** – it was not a manifest error, or maladministration.
- Although abandoning the procurement did not protect the Council from Amey's principal claim for damages, it was still a rational decision because if it had instead entered into the contract with Ringway regardless, the eventual damages due to Amey might have been higher and the effort involved in defending the case not a good use of public resources.
- The take-home message from this case is clear – if faced with a challenge to a tender process, abandoning that tender process will not necessarily make the challenge go away.
- This reinforces the importance of getting strategic tenders right the first time!

Procurement Termination Notice

Occasionally an advertised procurement will be abandoned or will not proceed to the Award Stage.

If this happens, you will now be obliged to publish a **Procurement Termination Notice**, as soon as reasonably practicable, indicating that the procurement procedure was terminated without award.

Assessment Summary

Assessment Summary

- The “Assessment Summary” replaces the Standstill Letter - and has largely the same function.
- But there are some changes.
- Under PCR 2015, as well as information on their scores, a Standstill Letter provided **losing suppliers** with details of the “***characteristics and relative advantages***” of the **winning bid**.
- This is no longer required under the Procurement Act 2023. Instead, the unsuccessful supplier learns about the winning bid in a different way.

Assessment Summary

Instead:

- Each supplier should, **privately**, be sent an Assessment Summary detailing their **Score** against each Award Criteria, and an explanation of their score, *making reference to their own bid only. (NOT comparing it to the winner).*
- In addition, each **unsuccessful supplier** shall also be sent a copy of the Assessment Summary information sent to the winner.
- *These could be combined into one document, or you could separate them.*

Assessment Summary

- There is no obligation under the Act to provide an assessment summary to suppliers who have not submitted an “assessed tender” – i.e:
 - A supplier which did not submit a tender at the final stage, or:
 - A supplier which was disqualified at any stage, and therefore did not have their tender assessed.
- It is best practice for contracting authorities to inform disqualified suppliers in writing, as soon as reasonably possible, that they are not being taken forward or will not be awarded the contract (as appropriate).
- *If you do this in a timely fashion, they should not expect an Assessment Summary.*

Assessment Summary

The idea is that the unsuccessful supplier, reading the two sets of information alongside each other, will be able to ascertain the relative advantages *for themselves*.



Assessment Summaries – Content

Regulation 31 -The Procurement Regulations 2024

In the case of the most advantageous tender, the information is:	
1. Name, address and email of supplier	
2. Unique identifier for the supplier	
3. The award criteria, including the assessment methodology, set out in full, or a summary of the award criteria including: title of each criterion, relative importance of each criterion & how each criterion was to have been assessed by reference to scored and what scored were to have been available for each criterion	
4. If the above is not set out in full, indication of where the full version can be accessed	
5. The score determined for each award criterion; and ▪ an explanation for that score by reference to relevant information in the tender, and ▪ where an award criterion includes sub-criteria for assessment, an explanation of how the tender was assessed by reference to each sub-criterion, and the total score and any sub-total scores	
For unsuccessful supplier, also provide:	
6. The same information as above - to the extent that the tender was assessed against the award criteria.	
7. Any further explanation why public contract is not being awarded to the supplier including reasons for their disqualification (Section 23(3) PA23)	
8. Other relevant information	

Only
reference to
their own
tender/ no
need for
comparison

Must be
provided to
each supplier
at the same
time

Can be
separate
docs or
incorporate
into one
document

Summarising the Award Criteria

- Suppliers will have had access to the award criteria and assessment methodology in the tender notice and Associated Tender Documents.
- Therefore, this information does not need to be repeated in full in the assessment summary. Instead, the assessment summary can include only a summary of the award criteria, plus a clear reference to the place where the full version of the award criteria and assessment methodology can be accessed:

The following table summarises the Award Criteria.

These Criteria and the full Marking Scheme can be found in ITT Document B, pages 12 to 14.

Summarising the Award Criteria

The minimum award criteria information to be provided in the Assessment Summary itself is:

- ✓ The title of each criterion and its relative importance (i.e. the weighting);
 - ✓ How each criterion was to have been assessed (i.e. “in accordance with the marking scheme in Document B, table 4”)
 - ✓ The scores available for each criterion.
- This can generally be set out in a simple table.

Providing Scores

- You must provide each Supplier with the score determined for each award criterion.
- This means providing the score for each criterion including any sub-criteria, as well as the total score.
- In practice and depending on the assessment methodology, this may also include sub-total scores.

Providing Scores - EXAMPLE

Award Criteria - Quality	% Weighting (Maximum weighted score possible)	Marking Range (All qualitative criteria scored out of 4 marks)	Your Mark	Your % Score (Your mark, with the weighting applied)
3.1 Campaign Strategy	15%	4	3	11.25%
3.2 Quality Control	15%	4	2	7.5%
3.3 Team Structure and Mobilisation	10%	4	1	2.5%
3.4 Feedback and Reporting	10%	4	4	10%
3.6 Social Value	10%	4	2	5%
<i>All above Quality Criteria marked in accordance with the Marking Scheme for each question set out in ITT Document B, Pages 12-14</i>				
QUALITY TOTAL	60%	-	-	36.25%
Award Criteria - Price	% Weighting (Maximum weighted score possible)	Your % Score		
4.1 Monthly Service Charge	30%	-	-	24.15%
4.2 Rate Card	10%	-	-	10.00%
PRICE TOTAL	40%	-	-	34.15%
OVERALL TOTAL	100%	-	Your Final Score:	70.40%

How much should you reveal?

- Under the previous regulations there was sometimes a difference of opinion between procurement law experts when it comes to the question of how much written feedback to provide.
- Some feel that there is safety in disclosing the bare minimum allowed by law.
- Some advise that it is better practice to give more comprehensive feedback.

How much should you reveal?

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- Some feel that there is safety in disclosing the bare minimum allowed by law.
- Some advise that it is better practice to give more comprehensive feedback.

Think:

- *Where might these viewpoints come from?*
- *Can you argue either case?*
- *What is your preferred approach?*



How much should you reveal?

- Merely repeating what the criteria and giving the scores against them is not sufficient.
- The purpose of the Assessment Summary is to enable each Supplier to understand the assessment of their bid.
- Consider a summary simply telling a losing Supplier the following:

- Award Criteria 4 was the quality of the proposed training plan.
- Your training plan scored 5% out of a possible 10%.

... Is this sufficient? Does this properly explain the assessment?



PA 2023 Guidance - how much feedback to give

- For each award criterion (including any sub-criteria), the contracting authority must explain why that score was awarded by making reference to 'relevant information in the tender'.
- For example, the award criteria and marking scheme may state that in order to be awarded a particular score, the tender must demonstrate that a number of requirements will be achieved in delivering the contract. If an assessed tender is then awarded that particular score, each of the requirements achieved should be referenced in the explanation.
- In some cases, it might not be possible for a supplier to understand why a particular score was determined without also explaining why a higher score was not achieved. How this is done will depend on the structure of the award criteria and the scoring description.

PA 2023 Guidance - how much feedback to give

Example:

Quality Control (2 out of 4 marks awarded)

There was a generally adequate response to this criterion in terms of the authority's stated requirements for (a) status evaluation, (b) rapid response, and (c) contingency and escalation. Against these elements of the requirement, a generally adequate industry-standard approach was evidenced, providing an adequate level of assurance.

However, the process for addressing requirement (d) "quality review at each stage of development process" was missing, apart from a brief reference to a quarterly satisfaction level meeting; the question clearly asked for this quality assurance process to be explained in greater detail.

Commercially Sensitive Information

- Some elements of a tender may be deemed “commercially sensitive” or would be sensitive for other reasons such as Data Protection.
- This could typically include:
 - Trade secrets or intellectual property;
 - Detailed financial information;
 - Information which would prejudice a Supplier’s commercial interests if disclosed;
 - Personal information about the Supplier’s employees.
- Section 94 of the Act permits authorities not to publish information where it is genuinely sensitive. This also applies to the Assessment Summary.
- This will generally pertain specifically to the **winning tender**, since the unsuccessful supplier’s Assessment Summaries do not need to be disclosed to anyone but that supplier.

Commercially Sensitive Information

- **However**, some not all things which are commercially interesting, are automatically commercially sensitive.
- ***For example:***
 - The **overall** winning tender price, or price score per element;
 - Information that is already generally known to companies in the market (even if not in the public domain);
 - Decisions to utilise particular sub-contractors or off-the-shelf software or widely- available products.

PA 2023 Guidance – sensitive information

“In most cases it should be possible to refer to the content of the tender, in the assessment summary, without needing to divulge sensitive commercial information.

“Not going into such [technical] detail in templates or reports for assessing award criteria will facilitate sharing information in respect of the MAT to unsuccessful suppliers, by minimising or removing the need for redaction.

“Where appropriate, focusing comments on the outcomes the tender will achieve can help”.

Guidance from Information Tribunals

Hartlepool Borough Council vs the Information Commission (2018):

“For example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would, or would be likely to, prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors.

“It would need to demonstrate the link between the specific information in issue and the claimed prejudice. So, for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual.”

Commercially Sensitive Information

Your tender response documents may include a process for suppliers to identify specific items in their bid which they consider highly commercially sensitive.

However, some suppliers may have a tendency to seek to protect an unreasonable amount of information.

Remember that the transparency obligation rests with the Contracting Authority; ultimately you may need to make a professional decision on what information you can disclose.

If in doubt, a useful rule of thumb is to ask:

“If we received an Fol request asking for this information, would we provide it?”

If the answer is “yes”, then the information is likely safe to disclose.

Quiz

- You are running a tender exercise for a **Fleet Management System**.
- The winning tender contains the following section:

Section 3.2 – Route Optimisation Algorithm Design

Our solution uses a proprietary AI-based scheduling engine trained on over 3 million historical journey records. It integrates with local traffic APIs and adapts in real-time using a hybrid reinforcement learning model.

Key differentiators:

- Dynamic rescheduling with <30s latency during high-variance traffic events;
- Exclusive partnership with NavTel for live road condition overlays;
- Predictive maintenance triggers based on anomaly detection in telemetry logs;
- Custom-built microservices that scale based on route complexity and passenger density;
- Use of encrypted real-time communication between driver interface units and central control, with fall-over protocols active under network failure.

N.B. The system is not open source; this information is commercially sensitive. No part of the codebase or architectural framework is in the public domain. Disclosure would materially compromise our competitive position.

Quiz

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N.B. The system is not open source; this information architectural framework is in the public domain. D

Question:

How much of this information can you redact from disclosure?

A: All of it. B: Some of it. C: None of it.

Quiz

- You are running a tender exercise for a **Fleet Management System**.
- The winning bid contains the following section:

Section 3.2 – Route Optimisation Algorithm Design

Our solution uses a proprietary AI-based scheduling engine trained on [REDACTED] historical journey records. [REDACTED]

[REDACTED]

[REDACTED]

N.B. The system is not open source; this information and architectural framework is in the public domain. [REDACTED]

Question:

How much of this information can you redact from disclosure?

A: All of it.

B: Some of it.

C: None of it.

Timing

- Assessment Summaries must be provided at the same time to all suppliers that submitted an assessed tender (regulation 31(4)).
- The Assessment Summaries must be sent before the contract award notice (which triggers the commencement of the standstill period) can be published.
This ensures suppliers have the full standstill period in which to consider the information provided, before the contract is entered into.
- The PA2023 guidance confirms that this can happen on the same day. *(There is no mandatory time gap between sending the summaries and publishing the notice).*



Test your Knowledge

Test your knowledge

- A high-profile procurement exercise is currently taking place at your authority;
- It has reached the evaluation stage.
- A major **construction** project to build a new leisure facility which will also house a Council contact centre.
- A number of problems and inconsistencies have been raised during the evaluation of the tender.
- **Our task: advise the Head of Procurement on these issues.**

Procurement #1 – New leisure facility and contact centre:

- Major procurement exercise with **£45m** budget.
- A new **leisure centre** on a vacant site, already owned by the Authority, two miles outside the town centre, but on a major bus route. To feature a leisure pool, fitness suite, and outdoor all-weather pitches.
- It will also house an **Authority contact centre** to handle various public enquiries.
- The new centre will replace three existing Council facilities:
 - a 1950's-built swimming pool in the town centre, no longer considered fit for purpose, occupying a prime development site;
 - two grass football pitches, under-utilised and susceptible to flooding, adjacent to two new housing developments;
 - Authority customer service office in town centre, considered too cramped, on a prime retail site.
- Your authority intends to sell the three existing sites once the new facility is ready. This is expected to generate income of £50m - £70m, more than repaying the cost of the new facility.
- The new centre has already been designed by a respected firm of architects, the contract for which was procured separately. The architect's contract will run until the end of the build process, to allow the design team to consult with the selected construction firm.

Procurement #1 – New leisure facility and contact centre:

- The Council is using the **Competitive Flexible Procedure** for this procurement process. A total of 12 PSQs were received, a shortlist of 6 suppliers has been selected, and the process is now at the **Invitation To Tender** stage, where the Authority has indicated weightings of **60% for quality** and **40% for price**.



Procurement #1 – The issues:

- One of the shortlisted suppliers, **Innovative Developments Ltd**, submits a tender which appears to address all of the **quality** criteria to a high standard.
- However their tender is accompanied by a covering letter in which they propose, instead of a standard **works** contract, the facility should be delivered as a **concession contract** linked to a **development agreement**.
- They propose that instead of paying them to carry out the construction works, they will undertake these at no up-front cost, in exchange for taking **ownership** of the three surplus sites the Council wishes to dispose of. They propose to build and operate the leisure facility, whilst also redeveloping and then leasing out the three sites. Their **price** submission offers the Council a 20% share of the profits from all of these activities, which is projected at an income of £4m in year 1, rising to £7.5m per year thereafter.
- When senior officers hear about this, they are excited by this proposal.

Procurement #1 – The issues:

- One of the shortlisted suppliers, **Innovative**, has proposed a solution that appears to address all of the **quality** criteria to a high standard.
- However their tender is accompanied by a **works** contract, the facility should be de **agreement**.
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- When senior officers hear about this, they are excited by this proposal.

Poll 2

Can the Authority accept this supplier's offer, and award the contract as a **Concession**?

1. **Yes**
2. **No**

Procurement #1 – The issues:

- Another supplier, **CarillioServe**, answers a question on **site waste reduction and recycling** by indicating that the waste management elements of its approach are fully **sub-contracted** to a sub-contractor, **Enviro Waste Solutions**. The answer to this question, it is clear, has been provided by this sub-contractor.
- The answer is well written and provides a positive response.

Procurement #1 – The issues:

- Another supplier, **CarillioServe**, answers a question on **site waste reduction and recycling** by indicating that the waste management elements of its approach are fully **sub-contracted** to a sub-contractor, **Enviro Waste Solutions**. The answer to this question, it is clear, has been provided by this sub-contractor.
- The answer is well written and provides a positive response.

Poll 3

Is this response acceptable?

1. Yes
2. No

Procurement #1 – The issues:

- While evaluating the tender responses, one of the team notices that both **SuperContracts Plc** and **Mega Builders Ltd** make reference to having been the “lead contractor” on a very successful athletic stadium development for Birmingham City Council.
- Looking back at their PSQ submissions, you realise that they also both relied on this development as a case study, and both claimed to have been the lead contractor. They both scored highly for their case studies as part of the selection criteria. Studying the text of the responses, you are certain that they are referring to the same project.

Procurement #1 – The issues:

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- Looking back at their PSQ submissions, you realise that they also both relied on this development as a case study, and both claimed to have been the lead contractor. They both scored highly for their case studies as part of the selection criteria. Studying the text of the responses, you are certain that they are referring to the same project.

Discussion point:

How would you handle this situation?

Final thoughts & close



Walter Akers



Mohamed Hans

Thank you for
attending

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4.	Assessment Summary Template (successful/ unsuccessful)
5.	Conflicts Assessment
6.	Ethical Walls Agreement/ Non-Disclosure Agreement
7.	Section 98 Record
8.	Compendium Publishing PA23 Notices
9.	Standard Contract (Short version)
10.	Standard Contract Services (Long version)
11.	Standard Contract Goods & Services (Long version)
12.	PO Terms and Conditions
13.	Evaluation Chart
14.	Non-Disclosure Agreement (1-way)
15.	Non-Disclosure Agreement (2-way)
16.	Guidance on Tender Evaluation For Evaluators

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For details of benefits and pricing contact:

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