Construction
Leadership
Council

Public Sector Procurement Guidance

Potential solutions to common evaluation issues faced by Clients in the Built Environment Sector

24 February 2025

Potential solutions to common evaluation issues faced by Clients in the Built Environment Sector

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Construction Leadership Council

Foreword

Over £385 billion was spent on public procurement in 2022 to 2023, making up almost a third of all public spending. The Procurement Act 2023[1] enables a new approach – simplifying structures and providing more flexibility to those designing procurements. A new National Procurement Policy Statement now sits alongside it, setting out the new administration's national strategic priorities, and acting as a North Star for Contracting Authorities.

A system designed and developed in the UK, to meet our nation's needs, is a great leap forward. For the reforms to truly succeed though, culture and behaviour will have to change too.

Public procurers already had a good deal of discretion in deciding how to design and evaluate procurements; this has increased now the new system is in play. Getting the evaluation stage right is arguably the key to success and, at the moment, there are a number of issues that recur. In many cases, avoidable errors with technical design, fear of challenge, and poor inherited practice, are stopping procurements from achieving all that they might.

In the built environment, these issues can be especially problematic. For that reason, a group of industry experts in the field have come together to share their insights. These are not broad brush strokes; they address ten specific, common instances where procurers can often get it wrong. Although aimed at the construction industry, there are lessons here for other public buyers too.

This publication sets out best practice, points out the potential un-intended consequences of certain approaches, and addresses common misperceptions that may be driving behaviour. It also offers very practical and detailed advice on market engagement, evaluation methodology and ensuring that contractors deliver.

The Working Group which has produced this piece has been formed by the Construction Leadership Council – government, industry and Clients working together to lead a new era of delivery for the built environment. This work supports one of the Council's key workstreams – Business Models and Fair Practices – delivering the procurement guide as promised.

[1] The Procurement Act 2023

We would like to personally thank all the members of the Working Group for giving their time, energy and dedication to this project. Particular thanks are owed to Rebecca Rees for driving this work forward.

If there is a gap between the aspirations for your project, and the outcome of your procurement evaluation, this document is likely to tell you why, and what you might be able to do to fix it. We would urge those with an interest to give it the attention it deserves.

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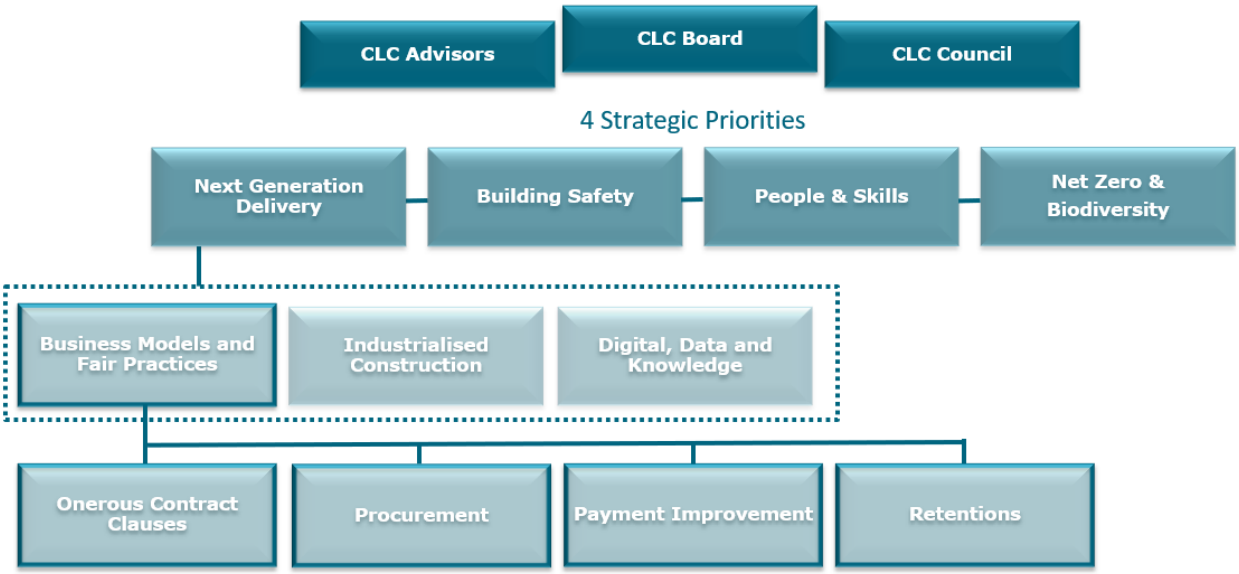
The Construction Leadership Council

The Construction Leadership Council[2] (CLC) brings together all parts of the construction industry and government. Its mission is to provide leadership and coordination to enable the construction sector to improve its performance, benefiting both the private and public sectors. By convening an industry partnership, the CLC provides the means to address short-term and long-term issues that affect our sector.

The Council is co-chaired by Minister Sarah Jones MP (Minister of State for Industry) and Mark Reynolds (Group Executive Chairman, Mace), with Richard Robinson (President, UK and Ireland, AtkinsRéalis) as Deputy Industry Co-Chair. The CLC's four strategic priorities are: Building Safety; Net Zero and Biodiversity; People and Skills; and Next Generation Delivery.



Next Generation Delivery – Business Models and Fair Practices Workstream

Sustainable and productive supply chains are critical for the success of our industry. This workstream is therefore focussed on improving collaboration within supply chains in order to improve project outcomes and profitability.

In the longer term, we believe the industry's business model needs to change. However, to build towards that, and to address current fundamental issues, the focus of this workstream is on improving the fairness of commercial practices. This includes eliminating onerous contractual clauses, improving payment practices (including retentions), and driving better procurement approaches, particularly regarding price evaluation.

[2] The Construction Leadership Council

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1. Overview

1.1. This publication focusses on common evaluation-orientated issues faced in the procurement process and is written in the context of public procurement (although many of the issues and considerations have wider application to private sector procurement as well).

1.2. This publication has been the subject of numerous workshops held between the Working Group members listed in the acknowledgement section. They represent bidders, Clients, central purchasing bodies and interested stakeholders, experts and practitioners. All of the Working Group members have an interest and passion in ensuring evaluation processes and methodologies result in the best outcomes.

1.3. We would encourage practitioners to engage with this publication and the recommendations set out in its pages. It sets out examples of best practice and recommended approaches on key elements of an evaluation process. This guide has been specifically drafted with a focus on the Built Environment and aligns with the UK Construction Playbook[3], the Bid Evaluation Guidance Note[4] (referenced in the Playbook) and BS ISO 10845: Construction Procurement[5] which provides clear, straightforward and practical guidance on construction procurement.

1.4. Content will be reviewed in line with public procurement policy and updated as required.

[3] The Construction Playbook v1.1 September 2022
[4] Bid Evaluation Guidance Note - May 2021
[5] BS ISO 10845-1:2020 Construction Procurement

2. Introduction

2.1. The evaluation stage of a public procurement procedure is the most important one: it is when successful bidders are selected and the Client makes the decision as to which bid most closely matches its requirements. This decision sets the tone and direction of the ensuing contractual and delivery relationship: make the wrong decision and the resulting outcomes are unlikely to deliver the Client's aspirations and requirements.

2.2. In public procurement terms, the successful bid is the one that is identified as the "Most Advantageous Tender" (the "MAT").

2.3. The Procurement Act 2023 (the Procurement Act)[6] (which comes into force on 24 February 2025) provides a certain level of detail as to what evaluation criteria can be used. For example, all criteria need to be linked to the subject matter of the contract; they must be sufficiently clear, measurable and specific, and they must be proportionate as a means of assessing the relevant tender. If there is more than one criterion, their relative importance must be indicated by weightings, ranking or other description.

2.4. Nevertheless, a Client has a relatively wide margin of discretion to select the evaluation criteria, formula(e) and scoring rules it wishes to use in order to select the MAT. This margin of discretion is itself bound by certain rules: e.g. a Client cannot select criteria etc. or evaluate bids in a way that does not identify the MAT or creates irrational or unexpected results. This leaves a significant amount of leeway and flexibility within which a Client can act.

2.5. The fact that evaluation practices and techniques fall within a Client's discretion has resulted in a significant disparity in practice, with judicial scrutiny and guidance sitting around the outside of the issue. Obviously, criteria and weightings differ according to the subject matter of the contract and the importance with which the Client views certain elements of its bid requirements. However, significant differences exist as to how Clients evaluate tenders: how they construct the evaluation process, who they choose to evaluate their bids, the methods by which they seek to investigate the bids in order to allocate scores, and the scoring methodologies themselves.

[6] The Procurement Act 2023

2.6. Bidders are therefore at the mercy of the competence, skill and experience of the individual procurement officer to ensure that the evaluation criteria, weightings and assessment methodologies are capable of identifying the MAT, that they can be fairly and transparently applied and that the process is not vulnerable to distortion or manipulation.

2.7. The resulting patchwork of evaluation practice and approach can be confusing, time-consuming and costly for the bidders to navigate. At their worst, evaluation practices and techniques which fail to identify the best tender can be non-compliant and subject to judicial challenge.

2.8. The margin of discretion in evaluation technique and practice also creates a space in which mythmaking and the defence of poor practice arise: too often we hear the claims, "we have always done it like this", "we haven't been challenged so far", "we know it's not perfect but we have always made it work". Bidders and taxpayers deserve better. A significant amount of money (£295.5 billion across the public sector in 2019/20[7]) is allocated via regulated procurement procedures. We all need to be confident that it is allocated to the MAT as a result of an evaluation process that has been constructed and implemented by a competent, expert and experienced evaluation team.

2.9. The issues addressed in this publication are ones that are common across the public sector experience.

[7] Whole of Government Accounts, 2019-20

Common Evaluation Issues

1	I do not want to risk excluding a bidder for favouritism: so I do not do any pre-market engagement
2	I do not want too many bidders due to cost and time considerations but if one drops out then I may be left with too few
3	I carefully think about my evaluation strategy and detail but often end up with a bidder and a solution I do not want
4	I do not think the right people are evaluating the bids but cannot articulate what I need for any one procurement
5	I do not evaluate lowest price alone and I emphasise quality over price in my bid: why am I still getting bids that focus on price or result in poor quality and unsafe outcomes?
6	I have a bid that I suspect to be abnormally low, but the bidder has said that it is not – can I reject it?
7	I want to adopt a two-stage approach to my project but first I need to procure a Tier 1 contractor – how do I do that in a compliant manner when I am not evaluating a fixed price?
8	I have real problems getting the bidder to deliver its tender promises – particularly those involving social value and other ''extras''
9	I like what the bidder has written in its tender documents, but I am not convinced that the proposed team can deliver it
10	I want to improve capability and capacity in my procurement and delivery teams and ensure we are observing best practice – but I do not want to reinvent the wheel

ISSUE 1: I do not want to risk excluding a bidder for favouritism: so I do not do any pre-market engagement

3. Pre-Market Engagement

Overview

3.1. It should not be underestimated how important the "pre-procurement" stage is in a process. It is essential that, before the Client commences a procurement process, it knows what it wants to procure, any budget requirements, and that the process it adopts (including its structure, evaluation criteria, weighting and evaluation methodology) all work together in order to maximise the level of competence and to produce the required outcome (otherwise known as the identification of the Most Advantageous Tender - MAT).

Benefits of early engagement with the market

3.2. A key element of any procurement process is effective preliminary market engagement with bidders and key stakeholders. Used correctly, an effective pre-market engagement strategy can be used to help a Client to shape the opportunity to be procured and the design of the procurement process itself.

3.3. The outcome of pre-market engagement might demonstrate that a particular contracting approach will yield greater interest from the market (for example, a framework agreement may attract greater competition than a dynamic market), or it might demonstrate that a Client needs to reconsider the scope of the opportunity (such as where the pre-market engagement exercise identifies alternative/additional works, services and supplies to the Client's requirement where their inclusion had not yet been explored). Alternatively, the pre-market engagement might make it clear that SMEs are best-placed to deliver up part of the requirement, which will require a lotting strategy to be considered as part of the design of the procurement process.

Existing recommendations

3.4. The Construction Playbook recognises the importance of early engagement in developing clear, appropriate outcome-based specifications, and highlights the dual role of early engagement with the supply chain – allowing the market to positively inform specifications, whilst also helping to promote upcoming opportunities with potential suppliers.

SEE CONSTRUCTION PLAYBOOK: PREPARATION AND PLANNING (3: Early Engagement) page 22 and the related Market, Supplier & Supply Chain Engagement in Construction Guidance Note[8].

What can we do at the pre-market engagement stage?

3.5. Despite the recognition that pre-market engagement with potential bidders can help yield favourable outcomes, Clients are often nervous about conducting such an exercise, mainly due to the risk of prejudicing a particular bidder or class of bidders in the subsequent competition. As such, there is often confusion about what and how much Clients can ask the market.

3.6. In order for pre-procurement engagement to be effective, where a Client undertakes a pre-market engagement exercise they must be willing to listen to and act upon feedback from the supply chain, and not simply undertake such engagement in order to demonstrate compliance with industry best practice. It is recommended that sufficient time is built into procurement timetables and strategies to allow for pre-market engagement to be undertaken and for feedback to be incorporated into the procurement process.

BS ISO 22058

It is worth bearing in mind the advice in BS ISO 22058, Section 6.2 about the strategic considerations that form a progression of steps to structuring a procurement: packaging strategies relating to frameworks vs one-off projects, contracting strategies relating to specific forms of contract and implementations of the initial marked engagement agreements, targeting strategies that identify policy or secondary objectives, and selection methods that identify both the method of soliciting tenders and evaluating them: run these past the bidders and see what they would respond positively to.

[8] Market, Supplier & Supply Chain Engagement in Construction Guidance Note - September 2022

3.7. Under section 16 of the Procurement Act, Clients are able to engage with suppliers and other persons ahead of publishing a Tender Notice as part of a preliminary market engagement exercise. In particular, section 16 sets out that the preliminary market engagement can cover:

a) Development of the approach to the procurement and the Client's requirements;

b) Designing a procedure, conditions of participation (i.e. selection criteria) or award criteria;

c) Preparing the tender documents;

d) Identifying suppliers who may be able to supply the requirements;

e) Identifying potential contractual terms; and/or

f) Building capacity among suppliers in relation to the contract to be delivered.

BS ISO 22058

The overall approach in the Procurement Act is consistent with the guidance in BS ISO 22058, which provides a robust framework for private and public sector procurers. This guidance will be helpful for those responsible for procurement decisions.

3.8. A Client therefore has broad discretion as to what it can ask as part of its pre-market engagement exercise, and it is possible to ask as much as a Client wants/needs in order to help shape the opportunity and the procurement process itself.

3.9. With that in mind, Clients should consider what would be most beneficial to identify as part of their pre-market engagement strategy. Would it, for example, be helpful to understand the availability of a particular solution in the market, or whether the market generally has the capacity/ability to deliver a project of the type, scale and size to be procured?

3.10. In order to ensure that responses and market feedback are most beneficial to scoping the procurement and the requirements, it will be prudent to ensure that questions are related to the subject matter of what is being procured. Beyond that, it is open to Clients to shape their questions in any way they see fit. In earlier guidance published by the Crown Commercial Service[9], it is suggested that, as a minimum, bidders would expect the following information to be set out as part of any pre-market engagement exercise:

a) The background to the Client's organisation and project;

b) The scope of the pre-market engagement exercise;

c) What the Client is seeking to achieve from the contract;

d) The location of the contract and an indication of timescales/duration; and

e) The date for the conclusion of the pre-market engagement exercise and the submission deadline for any responses/feedback from suppliers.

What format should pre-market engagement take?

3.11. As with the particular questions to be asked, Clients have discretion over how to structure their preliminary market engagement activity, and this can take many forms. The Construction Playbook sets out some examples of how pre-market engagement can be structured in its Market, Supplier & Supply Chain Engagement in Construction Guidance Note[10], including:

One-to-one

One-to-one pre-market engagement might take the form of supplier meetings or interviews with identified suppliers (either through market knowledge, or as a result of an earlier one-to-many or written exercise). This can provide an opportunity for Clients to gain detailed feedback from bidders (who may have been reluctant to provide such feedback under a one-to-many approach). A one-to-one approach will require a greater degree of resources and time, and Clients should prepare accordingly. Whilst it is important to ensure that bidders are all treated equally, it may not be necessary for a Client to invite all those who participated in a one-to-many or written stage to a one-to-one session, and Clients should ensure that they keep an accurate record of how decisions were made regarding participants.

[9] How to carry out early market engagement successfully – Procurement Essentials

[10] https://assets.publishing.service.gov.uk/media/631222ca8fa8f5423d3d542f/20220901-Early-Supply-Chain-Involvement-Guidance-Note.pdf

One-to-many

This could include structuring the exercise as market briefings, workshops or meet the buyer events (either virtually or in person). A benefit is the ability for a Client to communicate key information to a larger number of suppliers in one go, but this may hamper some feedback from suppliers (who may be deterred from giving full and open feedback in front of a larger and open audience).

Written

This could be structured as a questionnaire, setting out specific items for response, or as a general call for feedback from the market. As with the one-to-many approach, this can be set up in a way that is accessible to a large audience and can therefore be useful in obtaining response from a wide cross section of the market.

How do I avoid having to subsequently exclude participants?

3.12. Whilst a Client can ask whatever it wants as part of the pre-market engagement, it will need to ensure that its pre-market activity is carried out in a way which does not confer an unfair advantage on any particular bidder (i.e. it must be carried out in a way which ensures equal treatment).

BS ISO 10845-1:2020

Simple competition may accidentally confer unfair advantages, so the process should be fair, equitable, transparent, competitive and cost-effective as suggested in BS ISO 10845-1:2020.

BS ISO 10845 sees market engagement as an essential step in ensuring that any procurement of construction work is fair, equitable, transparent, competitive and cost-effective and which may, subject to the policies of a Client and any prevailing legislation, include the promotion of other objectives.

3.13. Clients should note that where participation in pre-market engagement confers an unfair advantage on a supplier which cannot be avoided or effectively mitigated, that supplier must be excluded from the subsequent procurement exercise.

3.14. In light of the above, whilst a Client is able to avail itself of market knowledge arising from pre-market engagement, it should design the exercise carefully to ensure that it does not introduce conditions which could ultimately lead to the exclusion of participating bidders (primarily as this may reduce competition in the resulting procurement, but also as this may deter some potential bidders from participating in the pre-market engagement and reduce the efficacy of the market consultation).

3.15. In practice, Clients can mitigate the risk of giving an unfair advantage by ensuring that information provided as part of the pre-market engagement is made available to all bidders in the ensuing procurement (i.e. there is no additional background information/context/data available for those who participated in the market consultation exercise). Additionally, in considering the feedback from the market consultation, Clients should ensure that they do not design a procurement with the aim of favouring a particular bidder based on their responses to the pre-market engagement (for example, by designing a requirement which favours a particular solution that is only available to that bidder).

3.16. Clients should also keep an accurate written record of the decision-making process around how the pre-market engagement was conducted, what has been discussed with individual bidders, as well as how any potential discrimination was avoided or addressed.

What record should I use and keep?

3.17. Good procurement management requires the collection of all notes and actions taken through the process. We would recommend that this is undertaken in accordance with the process previously set out in Regulation 84 of the Public Contracts Regulations 2015[11] i.e. – via a **summary document** that sets out all key procurement decisions along with cross-references/links to **all relevant procurement documents used and received throughout the process**. This was to be kept for 3 years and included all documents used and decisions taken at the pre-market engagement stage of the process too. Under section 98 of the Procurement Act, Clients are required to keep records that they consider sufficient to explain material decisions made for the purpose of awarding or entering into a public contract. Those records must be kept either until the Client publishes a notice to confirm that they have decided not to award the contract, or for three years beginning with the day the contract is entered into (or, if the contract is awarded but not entered into, three years from the date that the contract was awarded).

3.18. Clients should note that the Procurement Act includes certain transparency requirements, and the starting position under section 17 of the Act is that where pre-market activity is conducted, Clients must publish a Preliminary Market Engagement Notice before it publishes the Tender Notice relating to the procurement.

[11] The Public Contracts Regulations 2015

3.19. A **Preliminary Market Engagement Notice** must set out that the Client intends to conduct, or has conducted, preliminary market engagement. The Procurement Regulations 2024 (the "Procurement Regulations")[12] which supplement the Procurement Act, give further detail on the content requirements of notices, and provide that a Preliminary Market Engagement Notice must set out, as a minimum:

a) general information regarding the Client, the procurement and subject matter of the contract;

b) whether the preliminary market engagement has already been concluded, or the date when the Client intends to close the preliminary market engagement; and

c) a description of the process by which the Client proposes to engage, or has already engaged, with suppliers during the preliminary market engagement process (for example, the location/date/time of events, and deadline for submissions of expressions of interest etc.).

3.20. Where a Client does not publish a Preliminary Market Engagement Notice, it must explain its reasons for not doing so in the Tender Notice for the opportunity. The Procurement Act and the Procurement Regulations do not specify what may be considered acceptable reasons for not publishing a Preliminary Market Engagement Notice. However, in its guidance note in relation to preliminary market engagement[13], the Cabinet Office has indicated that this will need to be considered on a fact-specific basis, but may include (for example) circumstances where it was necessary to keep the engagement secret for national security purposes, or where there are extenuating circumstances (for example where there is a high risk of a critical service failure if the procurement does not progress quickly).

[12] The Procurement Regulations 2024
[13] The Procurement Act 2023 Guidance Documents

ISSUE 2: I do not want too many bidders due to cost and time considerations but if one drops out then I may be left with too few

4. Maximising Competition

4.1. At the beginning of any public procurement process, Clients will need to ensure that they design a procurement procedure which encourages competition, in order to maximise the possibility of identifying the Most Advantageous Tender.

4.2. Undertaking a **market health and capability assessment** long before a procurement is under consideration allows the Client to take a strategic view of its potential market-place prior to designing the procurement process that gives it access to that market-place. It allows a Client to understand the capacity of the bidders, barriers to entry, market concentration and any other competition issues that might arise.

SEE CONSTRUCTION PLAYBOOK: PREPARATION AND PLANNING (1: Pipelines, portfolios and longer term contracting) page 17.

4.3. In terms of competition design and how it can impact the competitiveness of the bids and/or the attractiveness of the competition to the bidders, there are a number of key considerations:

Number of bidders: the "Goldilocks" question

4.4. In order to ensure that a suitable number of high-quality bids are received, it is important that a sufficient number of bidders are invited to participate in a procurement exercise.

The public procurement rules previously set out the minimum number of bidders a Client was permitted to shortlist (under Regulation 65 of the Public Contracts Regulations 2015):

a) In the restricted procedure, the minimum number of bidders was 5; and

b) In the competitive dialogue procedure and the competitive procedure with negotiation, the minimum number of bidders was 3.

4.5. Where the number of bidders meeting the minimum requirements for participation was below those numbers, a Client was able to proceed with fewer bidders where the number of bidders was sufficient to ensure genuine competition.

4.6. These provisions ensured a consistent approach to the minimum number of bidders to be invited to bid for public contracts and applied correctly, ensuring genuine competition.

4.7. Under the Procurement Act, there is no corresponding obligation to invite a prescribed minimum number of bidders to participate in a procurement procedure. On that basis, it is technically open to a Client to invite a smaller pool of bidders to bid for a project. However, as set out above, a key step in identifying the Most Advantageous Tender is to ensure that a suitable number of bids are received. This is particularly key where Clients adopt a negotiated procurement procedure (involving stages of dialogue and/or negotiation) in order to keep bidders operating under competitive tension. We would therefore suggest that best practice is to ensure a minimum of three bidders are included from the commencement of the procurement process.

4.8. Nevertheless, the number invited to bid at each stage of the procurement process needs to be "just right": a minimum number of bidders therefore needs to be balanced against the appetite of bidders to participate in a procurement process. The costs of participating in a procurement process vary widely but can include significant cost and resource for bidders. With that in mind, bidders may be deterred from participating in procurement processes which involve significant numbers of bidders (as they may be reluctant to expend time, cost and resource on a bid that has little chance of success).

Iterative stages in a public procurement procedure

4.9. Clients may also want to incorporate iterative or successive stages into their procurement procedures (including the option to shortlist at multiple stages by carrying out intermediate assessments of tenders).

4.10. Iterative stages in a procurement process allow Clients to consider intermediate/initial tenders as part of a process of dialogue/negotiation, and can help to improve the quality of final bids received where bidders are encouraged to develop and improve their proposals as part of this process.

4.11. Additionally, iterative stages may be particularly helpful where a Client is unable to specify in advance a detailed requirement (i.e. where the Client requires a contractor to work up a solution/design through the procurement process). The advantages of this approach are that the bidders are able to discuss requirements and develop solutions/designs as part of the procurement process in a way that a single stage procurement would not allow.

4.12. Nevertheless, bidders may be deterred by a complex and/or drawn-out procurement timetable if there are significant and onerous submission requirements ahead of each stage. Clients should therefore ensure that where iterative stages are used, they do not introduce overly burdensome requirements into the procedure and/or do not prolong the procurement process unnecessarily.

SEE CONSTRUCTION PLAYBOOK: PREPARATION AND PLANNING (6: Effective Contracting) page 48 – Keeping bid costs down.

ISSUE 3: I carefully think about my evaluation strategy and detail but often end up with a bidder and a solution I do not want

5. Designing Effective Evaluation Methodologies

5.1. A critical part of any procurement process is the design of the competition itself, including the design of effective evaluation methodology. The success (or otherwise) of a procurement will often depend on the Client having set appropriate evaluation criteria and adopting a robust evaluation methodology to identify the Most Advantageous Tender (MAT). There are a number of things that Clients can do at the outset of every procurement to ensure that they identify the MAT for their projects, and we have considered some of the key considerations below.

Weightings

5.2. Clients often consider that weightings will send a clear message to the market, highlighting the areas of most importance for the Project. In practice, the price quality split in a procurement is often a fiction given the general approach to both quality and price evaluation (and we have considered this in more detail in Section 8: The interaction between price and quality).

5.3. Notwithstanding the above, Clients should ensure that in setting their evaluation criteria they identify the criteria of most importance to them, and clearly highlight the relevant importance of each criterion to the bidders.

5.4. At the outset of the procurement process, the Client should therefore ensure that key stakeholders and members of the project team consider the proposed evaluation criteria and identify which of those criteria are of the greatest importance for the successful delivery of a project.

5.5. There are a number of ways that a Client might approach this task. Appendix III of the Bid Evaluation Guidance Note at page 30 explains the "MoSCoW" (must have, should have, could have and won't have) method of prioritising criteria, whereby a Client identifies those criteria, which are:

a) **Must haves**: requirements without which the procurement will not proceed;

b) **Should haves**: important requirements which a Client would ideally like, but without which the procurement would still proceed;

c) **Could haves**: requirements which are not critical, but are desirable nonetheless; and

d) **Won't haves**: requirements which are not a priority in the current procurement (which a Client will not pay more for), or which a Client would actively prefer not to have under the contract (if this is the case, this should be clearly set out).

Having used the MoSCoW approach, Clients will then be able to identify which criteria are most important for the procurement and weigh them accordingly. Where a Client identifies a "must have", this should be identified as a minimum requirement, rather than allocated a weighting, in the procurement documents (i.e. it should be scored on a Pass/Fail basis). This clearly denotes that a bid will not proceed without the requirement and likely result in exclusion.

Number of evaluation criteria

5.6. At the same time, Clients should consider the number of quality criteria that they are going to incorporate into their procurement. Whilst a large number of criteria may be useful in testing/exploring a wider number of technical and qualitative aspects, Clients may find that bidders are deterred if submission requirements appear onerous (particularly where there are high word counts/page limits for each question).

5.7. Additionally, where there are a significant number of quality criteria, in practice they are likely to lose their impact. That is to say that where there are a larger number of quality criteria, they will necessarily have reduced weightings, and their relative importance risks being diluted.

BS ISO 10845-1:2020

BS ISO 10845 recommends keeping the number of evaluation criteria small, objective or evidence-based, and simple.

Compiling useful scoring guidance

SEE CONSTRUCTION PLAYBOOK: EVALUATION AND AWARD (9: Evaluating Bids and Contract Award) page 64 – creating the evaluation model.

5.8. Another key consideration at the outset of the procurement is establishing useful scoring guidance.

5.9. In order for bidders to prepare high quality bids that will deliver high quality and good value projects, it is imperative that they understand the basis upon which their bid responses will be evaluated.

5.10. In practice, the way most Clients evaluate quality is by using a scoring matrix (for example, a matrix on a 0 – 5 basis), and for quality responses to be scored by reference to that matrix. As an example, a score of 0 might be awarded where a bidder has failed to meet the Client's requirements, and a score of 4 might be awarded where a bidder has demonstrated that it meets the Client's requirements.

5.11. Clearly, where the matrix is drafted by reference to the Client's "requirements", a bidder needs to know what those requirements are for each of the evaluation criteria in order to prepare a focussed and relevant bid. It is equally important for Clients to know what those requirements are ahead of publishing the tender documents so that they are able to effectively evaluate the bids received. In practice, Clients often struggle to articulate scoring rules in a way that helps bidders understand their requirements.

5.12. With that in mind, Clients should spend time before commencing the procurement to ensure that:

a) They understand their requirements for the project;

b) They are able to clearly articulate those requirements in a way that will help bidders prepare their bids; and

c) The evaluation panel understands the requirements sufficiently to enable them to evaluate bids in accordance with the scoring matrix.

5.13. We would therefore recommend these are articulated and designed as one of the outcomes of early engagement with the market and the compilation of clear specifications. Although primarily part of the evaluation model and scoring guidance, these "requirements" should inform the procurement, contracting strategy and structure, as well as being deeply understood by the Client and its evaluation panel.

SEE CONSTRUCTION PLAYBOOK: PREPARATION AND PLANNING (3: Early engagement and clear specifications) page 26 onwards.

ISSUE 4: I do not think the right people are evaluating the bids but I cannot articulate what I need for any one procurement

6. Convening An Effective Evaluation Panel

SEE CONSTRUCTION PLAYBOOK: EVALUATION AND AWARD (9: Evaluating Bids and Contract Award) page 62.
SEE ALSO BID EVALUATION GUIDANCE NOTE (3: Plan Sufficient Resources) page 7.

6.1. The Construction Playbook provides that "robust evaluation processes and criteria ensure that the Client focuses on achieving the right outcomes and choosing the best option to achieve a better, faster, greener delivery". It assumes that subject matter experts will evaluate the relevant sections of each bid, and that a moderator will be appointed to assist in the finalisation of the scores, but is silent on what comprises an effective evaluation panel. So too is the Procurement Act. Creating an effective evaluation panel is vital to the success of a procurement, as these are the people responsible for identifying the Most Advantageous Tender (MAT).

6.2. Early consideration should be given to the number and type of panel members required.

Number of Evaluators

6.3. The Procurement Act does not require a particular size of evaluation panel. This means that a single person could, subject to the guidance noted below, evaluate an entire bid. That said, evaluating bids properly and thoroughly is an extremely onerous task and as it is the most contentious stage of a procurement, appointing more evaluators to the panel can assist in reducing the workload (where specific questions are evaluated by different groups of bidders, and thereby reducing the chance of mistakes or rushed decision-making), which can address claims of bias and increase accountability amongst panel members.

6.4. The **Bid Evaluation Guidance Note** provides that an effective panel comprises at least two members (and an independent moderator to assist the two members reach a consensus score). A Client may seek to have one overall evaluation panel, or sub-divide a larger overall panel into smaller sub-groups – either of mixed specialisms or subject-matter experts.

6.5. Smaller sub-groups of mixed specialisms tend to bring a balanced perspective to the evaluation of each aspect of the bid. Having a broad evaluation panel minimises bias and can help manage procurement fraud (remember to check for conflicts of interest and update checks regularly through the procurement process). Nevertheless, it is acknowledged that this may incur significant wasted time when those panel members who do not have the required specialty to evaluate a certain aspect of the bid sit to one side and simply observe the others. In such circumstances, panel members that lack the requisite knowledge or experience should not be tempted to try and evaluate an element of the bid that requires such knowledge or experience, and Clients should seek to identify suitable evaluators to be appointed to evaluation panels according to their expertise and competence.

6.6. It should also be noted that membership of the evaluation panel should be consistent throughout the process to ensure full knowledge of the approach and a consistent evaluation approach. If consistency cannot be maintained, a thorough handover should take place between the outgoing and incoming panel member as well as a thorough briefing by the Client (including, for example, a detailed written note setting out the process and approach to evaluation to date).

Subject Matter Experts

6.7. The evaluation panel should be made up of a combination of financial, technical/operational and procurement expertise. Clients may choose to include relevant stakeholders such as contract managers, customers (end users) and other specialists from within their business/external consultants.

6.8. Subject matter experts must be able to evaluate all areas of the bid that need to be evaluated. To this end, subject matter experts must have the relevant expertise, knowledge and experience to carry out the evaluation of all relevant parts of the bid under their review.

The Moderator

6.9. As well as evaluators for each section of the bid, the **Bid Evaluation Guidance Note** recommends that the overall team includes a moderator. The moderator's role is to help guide the consensus scoring process. The moderator will review all of the evaluation scores to seek/ understand any discrepancies, with the aim of gaining a consensus on the scores to be provided. As such the moderator should be impartial, analytical, and possess strong facilitation skills.

6.10. The moderator's role is two-fold:

a) To act as a critical-friend of the evaluation process undertaken by the individual evaluators or evaluation panel, and to review the evaluation information produced thus far and make sure that each evaluator has:

i. applied the scoring guidance and provided reasons for the scores given in a way that can be published or taken forward into assessment summaries;

ii. used appropriate language and/or has avoided making personal remarks;

iii. has only taken into account matters contained within the actual bid;

iv. provided a balanced level of justification/detail of reasons across the bids and proposed scoring; and

v. maintained consistency between the score allocated and the reasons for that score.

b) To act as the chair and moderator at a moderation meeting attended by all evaluators, designed to agree a single consensus score for each criterion/bid. This will involve:

i. leading the evaluators through an explanation of their scores and reasons for those scores;

ii. asking about errors or discrepancies identified in the individual evaluator's scores and whether any adjustments need to be made to the scores/reasons;

iii. leading a discussion between evaluators with divergent scores in order to arrive at an agreed single justifiable consensus score;

iv. ensuring that a clear and consistent record of all discussions and decisions taken at the moderation meeting is recorded in writing. If any changes have been made to the scores as a result of the discussions at the meeting, a clear written record as to the exact reasons for those changes needs to be recorded; and

v. Ensuring that the moderation meeting(s) result in a suite of agreed scores across all evaluators that are in line with the evaluation criteria, bid requirements and assessment methodology.

vi. The use of consensus scoring via moderation is reflective of recent guidance from the Courts (*Bromcom* case[14]) where it was identified that moderation (rather than the use of averages) is the way for a Client to demonstrate that it has met its obligation to give reasons for its scores.

Customers as evaluators

6.11. Customers (or other end-users) may be used to evaluate the bids. Customers often provide a unique perspective on the proposals, and, as well as providing their wider experience/insights, they are able to advise on those areas which keenly affect them. The issues around the use of customers on evaluation panels can include the fact that they do not have the technical expertise to mark all elements of the bid, and it is therefore important that the evaluation panel is structured in line with our earlier comments on technical competence and experience.

6.12. There may also be concerns around sharing confidential data with end-users (such as residents), and a Client may be seen not to be listening to the customer's opinion if the Client eventually selects a bidder other than the one they preferred.

Procurement expert

6.13. To ensure regulatory compliance, it is recommended that one member of the evaluation panel should be well versed in the requirements of the Procurement Act. This may well be the moderator or could be a solicitor or procurement practitioner.

Project sponsor

6.14. To enable success and senior level buy-in within an organisation, we recommend that the project should include a project sponsor who is a senior figure, responsible for the success of the project. The project sponsor is able to provide necessary guidance and resources to the evaluation panel at crucial stages within the process.

[14] Bromcom Computers Plc v United Learning Trust & Anor [2021] EWHC 18 (TCC) (07 January 2021) (bailii.org)

Who will score what?

6.15. Prior to the receipt of bids, Clients should decide who will evaluate each part of the bid return. It is recommended that Clients review the Specification and/or Method Statement requirements to ensure that they have relevant evaluators scoring the correct parts of the bid.

6.16. There tends to be a practice in the UK of separating out the quality evaluation from the price evaluation.

[SEE ALSO BID EVALUATION GUIDANCE NOTE, section 3.3.2, "finance models should be evaluated independently to the technical specification"].

6.17. The rationale behind this separation is that the quality marks (which tend to be viewed as more subjective and therefore, the argument goes, more likely to be manipulated) can be awarded without the evaluators being influenced by the price of the bid. Even though the evaluation of the price should, itself, be carried out by the specialist price evaluator, there is no legal reason why the price should not also be available to the quality evaluators who can then see whether the price and quality proposals are appropriate/aligned. This may lead to a more accurate score which reflects the deliverability of the proposed technical/quality solution, or which identifies whether a technical proposal is unrealistic in light of the proposed price. If a bid contains significant additional value or social value and remains the lowest price, has the bidder: missed something? misunderstood the bid? any intention of delivering its bid promises?

6.18. If a Client does not want the evaluators of the quality/technical proposals to see the price, it is recommended that another panel member undertakes a reconciliation process as a further step in the evaluation process to ensure that the quality and price scores are not out of kilter with each other and together represent MAT.

6.19. Whether the quality evaluators see the price or not, it is important that all scores are subject to a moderation process, and good practice ensures that the veracity (and deliverability) of the overall proposal is reviewed and (where necessary) interrogated and/or moderated.

Conflicts of interest

SEE BID EVALUATION GUIDANCE NOTE, section 3: "right at the start".

6.20. To ensure fairness and avoid bias (or the appearance of bias), Clients should ensure that members of the evaluation panel have completed and returned a conflict of interest statement, stating that they are not conflicted within the process and/or by those suppliers who are bidding.

6.21. A conflict of interest statement must be provided prior to being accepted onto the evaluation panel, and, where conflicts exist, that evaluator must be excluded from the evaluation panel. Of note, under the Procurement Act Clients will now be required to include within their Tender Notices confirmation that a conflict of interest assessment has been undertaken, including details of conflicts or potential conflicts, and any steps that the Client has taken or will take in respect of its duty to mitigate conflicts under section 82 of the Procurement Act.

Training

6.22. Taking part in an evaluation process is often a step away from the evaluator's day job. Providing appropriate training and guidance from the outset will help ensure a successful outcome. The training should be delivered as standard (and/or be a requirement for being selected onto an evaluation panel) and may include topics such as:

a) **Fairness:** each bid requires equal treatment and evaluation scores should be applied consistently.

b) **Confidentiality:** bids are confidential and should not be discussed with any person not involved in the evaluation process and must be stored securely.

c) **Evaluation:** ensure the evaluators understand the evaluation process – for example, bids may only be assessed against the published criteria, and/or based on the information provided with the submission.

d) **Scoring:** explain the scoring model and review the Specification and Method Statement requirements to ensure a common understanding.

e) **Feedback**: be explicit in terms of the expectation on the level of feedback required – for example, positive and negative feedback is clear e.g. "a small team" is not a useful comment as may be meant in a positive or negative manner. Under the Procurement Regulations 2024, evaluation feedback in Assessment Summaries will also need to explain the reasons for a bidder's score. With that in mind, it is clear that the feedback needs to be tightly drawn and clearly and explicitly linked to the evaluation criteria. Feedback provided at this stage will also be important in forming the agenda for moderation meetings and agreeing the consensus score to be awarded to a particular bidder.

f) **Legislative landscape and additional guidance:** knowledge of the Procurement Act and how this applies to the evaluation of bids, as well as the Bid Evaluation Guidance Note and the Construction Playbook.

SEE BID EVALUATION GUIDANCE NOTE, SECTION 3.3.5: PLAN SUFFICIENT RESOURCES

Specialist External Evaluation Teams

6.23. Where Clients do not have sufficient expertise or resource internally they may seek to use external expertise.

ISO 9001 / BS 99001

Where quality is being evaluated, why not use ISO 9001 certified suppliers and contractors? BS 99001 shows how to implement ISO 9001 in the construction sector.

External certification of the quality of these firms can greatly reduce the information demands in a tendering process.

6.24. This has the benefit of allowing a Clients' business to focus on core activities and lead to Clients gaining from the external specialists' knowledge, skills and wider market reach, whilst ensuring delivery of the procurement requirements.

6.25. Conversely, use of an external team may create a disconnect in terms of service delivery and/or the buy-in of "hearts and minds" from those that need to work with the winner. Other considerations are the cost, confidentiality, security and over-reliance on the provision of those procurement services and the ensuing distance it puts between the Client and the ultimate decision.

Ensuring an objective process

6.26. Where Clients are able to simplify the evaluation process, it may reduce the margin for error and the need for a substantial level of support. There may be some areas of the tender that are able to be evaluated on a "tick-box" basis – for example, where the criteria set out minimum criteria that the bidder needs to comply with/attain. In this scenario, the evaluator will simply tick the relevant input to confirm whether they have attained the requirement or not. Where they have not met the requirement, the evaluator must state how/why they have not. This explanation can then be a reason for a reduced score/form feedback or form a question for interview/further evaluation stage/s.

Allowing sufficient time

6.27. Sufficient time and notice should be provided to the evaluation panel to undertake their duties/tasks within the process. The estimated time required should be based on the expected number of bids and the number of questions/quantity of material they will be expected to evaluate, mindful of the capacity and availability of the evaluation panel. Evaluators have "day jobs" alongside their evaluation responsibilities, and this will need to be reflected in allocating time for evaluation.

6.28. For example, time should be agreed, and booked into diaries with the evaluators, to ensure that they are able to accomplish the required tasks and provide each bid response sufficient attention.

Model answers

6.29. Working through model answers to the Method Statements together with the evaluation panel (or other elements of the bid) enables the evaluation panel to understand the key elements required and makes it easier for the evaluators to assess the strengths and weaknesses of a bid return.

6.30. Preparing model answers together with the evaluation panel additionally leads to a review of the requirements that are expected from a Method Statement response and may lead to revision of the question contents at the outset. Clients must ensure that the model answers do not contain any undisclosed award criteria.

ISSUE 5: I do not evaluate lowest price alone and I emphasise quality over price in my bid: why am I getting bids that focus on price or result in poor quality and unsafe outcomes?

7. Interaction Between Price and Quality

7.1. A Client has the discretion to select the evaluation formula it wishes to use in order to select the Most Advantageous Tender (MAT) for its contract. As part of that evaluation formula, Clients will need to establish how they intend to evaluate both price and quality submissions.

Price evaluation

7.2. There are two different approaches to evaluating price as part of an overall bid submission that tend to dominate the UK Built Environment sector. The first is a "relative" approach. This approach uses prices from one or more bids as the basis for evaluating each individual bid (e.g. the lowest price). The second is an "absolute" or "modular" approach. This approach either uses a pre-established price (calculated via the use of a Should Cost Model) (SEE CONSTRUCTION PLAYBOOK: PREPARATION AND PLANNING (5: Delivery Model Assessments) page 42) set by the Client as the basis for evaluating each bid price, or it uses the price and quality of the individual bid itself, without reference to other bids submitted.

7.3. In the experience of the Working Group, the most common price evaluation methodology across the sector is a relative price evaluation model, whereby one price is evaluated against another (for example: a lowest bid model where the lowest price is awarded the highest price marks while other, more expensive bids, receive scores relative to the difference between their prices and the lowest price).

7.4. Notwithstanding its popularity, relative price evaluation models have been criticised by practitioners, academics and bidders alike for producing irrational or unexpected results. Additionally, the Government (SEE BID EVALUATION GUIDANCE NOTE, at section 7.2.1: relative price scoring) has noted that relative pricing models "should be treated with caution" and only used where there is "a specific business reason".

7.5. It should be noted that where a relative price evaluation model (e.g. the lowest bid model) is used, this does not necessarily require a single lump sum figure but could instead be applied individually to pricing sub-criteria (for example basket rates, schedule of rates, hourly rates etc.). Using multiple pricing sub-criteria may reduce the "race to the bottom" impact of a lowest bid model, although Clients will need to ensure that they carry out upfront work to ensure that the sub-weightings allocated to each of the sub-criteria are relevant and proportionate to the contract requirement/outcome desired.

7.6. Some Clients also evaluate by reference to the mean average of price submissions received, but there is a school of thought that this evaluation method does not identify MAT. Of note, the Court of Justice of the European Union (CJEU) in its judgment in *Kingdom of Spain* found that a price evaluation methodology which identified the Most Economically Advantageous Tender on the basis of the price closest to the average of all tendered prices did not comply with the MEAT criterion[15]. That said, it is understood from anecdotal experience that this remains a popular method of identifying MEAT in UK procurement practice.

7.7. Criticisms of relative price evaluation models include:

a) The results cannot be predicted prior to the actual evaluation being carried out as they depend on an undisclosed criterion – e.g. the lowest or mean average price, as appropriate;

b) The relative nature of the model therefore offends the overriding principle of transparency on the basis that the price award criterion is only established once all of the bids have been opened and the relevant price evaluand ascertained; and

c) Ranking paradox: the evaluation results are affected by the absence or presence of every bid, so the exclusion of a bid for (e.g.) being abnormally low, or the inclusion of a low-priced/non-compliant bid can affect the overall results in ways that cannot be identified ahead of the actual price and its evaluation score being ascertained and allocated. In practice, this may impact the overall scores awarded (for example, a bid that is deliberately low-priced can result in the other bidders receiving lower overall scores) and may skew the final scores in a disproportionate manner.

[15] Kingdom of Spain v European Commission (Case T-402/06)

Evaluating "quality" criteria

7.8. Whilst price is one side of the evaluation picture, a Client may evaluate non-price criteria (such as running costs or life cycle costs) and/or other delivery criteria (referred to commonly as "quality" criteria). How Clients treat "quality" criteria at the evaluation stage is equally important to the success of the overall award decision.

7.9. Practice in the built environment sector often treats quality criteria as individual exam questions, asking bidders to provide a prose answer to the question posed. The quality side of the bid is often prepared by professional bid writing teams or practitioners who are skilled at crafting responses to common tender questions. What is often lost in such prose is the ability to drill down into the competency and technical delivery requirements of the contract. It is therefore important that Clients craft suitable quality questions which evaluate technical deliverables robustly and in detail (i.e. by requiring bidders to identify the link between how they will resource the contract, and how they will actually deliver the specification).

The interplay between price and quality

SEE CONSTRUCTION PLAYBOOK: EVALUATION AND AWARD (9: Evaluating Bids and Contract Award)

7.10. Clients need to consider and confirm their specific objectives and outcomes from the procurement (for both price and quality considerations) before the procurement process starts, including their particular requirements for each of the award criteria set out in the procurement documents. The specific objectives may be guided and shaped by the outcomes of pre-market engagement (both with the market and with key stakeholders) and Clients should consider how best to engage with relevant parties to best structure the procurement.

7.11. In the light of those objectives, the Construction Playbook recommends that Clients consider:

a) Engaging early with the market – Clients should be ready to demonstrate in their business case that proposals have been informed by both market health and capability assessments, and feedback from potential suppliers (including SMEs and VCSEs – Voluntary, Community or Social Enterprise organisations);

b) Focusing on value rather than cost alone (although we would recommend that even where the Client consider value, the price/cost element of "value" should not always be assumed to be the lowest price/cost. "Value" encompasses a vast array of considerations, and what is considered best value for a Client may not necessarily be the lowest capital expenditure);

c) Consider the whole life value of a project (and make use of benchmarks and Should Cost Models); and

d) Referring low-cost bids (anything more than 10% lower than the average of all bids received or the Should Cost Model should be referred to the Cabinet Office before accepting) (although reference to the Cabinet Office will only be relevant for central government projects).

Bidder behaviour

7.12. Clients will need to make a number of key decisions about how to structure the evaluation process and design the scoring rules which are likely to determine how a bidder approaches its bid submission, including:

a) Which cost model ensures the salient points of pricing information are evaluated;

b) What price/quality split best reflects the priorities for the contract;

c) If setting minimum quality thresholds, ensuring that they are clear (and, wherever possible, objective and quantifiable), and the requirement appropriate; and

d) How the scoring rules can prevent bunched scoring and differentiate between bids offering minimum quality and those offering added value.

7.13. All of the above decisions are key to the outcome of the procurement process and are likely to determine how a bidder approaches its bid submission.

7.14. The choice of the evaluation methodology (including the price formula) provides a clear indication to the bidder as to:

a) How it needs to treat price to win the bid;

b) How the Client views price in relation to quality in terms of importance; and

c) Whether the Client has a coherent approach to its procurement objectives.

7.15. To focus on the first point above i.e. the selection of a relative pricing model whereby lowest price equals highest marks, risks encouraging poor bidder behaviour by asking bidders to provide a price that they think is going to be low enough to win the contract, and may result in price submissions which do not represent a realistic price for the contract requirement to be performed.

7.16. If a contractor bids on the basis of what it thinks its competitor will bid, the bid price may have no bearing on the actual cost it will take it to perform the contract. The contractor will then seek to make up the money it lost to win the contract by submitting claims for extra variations and, at worst, this could create disputes. Put another way, because the relationship has been established on a fiction, the result of the procurement can lead to mistrust and frustration between the parties, poor payment practices and poor quality and safety outcomes. The risks outlined above may be mitigated by a thorough pre-market engagement exercise coupled with a rigorous procurement exercise (for example, by incorporating appropriately targeted scoring methodologies which focus on project specifics, by ensuring experts are included in the evaluation panels, and by requiring bidders to demonstrate and provide analogous/benchmarked data to corroborate price submissions). Clients should also ensure that they interrogate prices received and investigate pricing submissions which appear to be abnormally low.

7.17. How price interplays with quality can also mean that, despite overall weightings, price remains the distinguishing factor in MAT procurements.

7.18. High quality does not necessarily equate to high cost. Indeed, with good design and high-quality materials, construction can be more cost effective and more economic to carry out. Good quality is not an excuse for more money, but should be incorporated into the specification and the project control systems set up to monitor the work, with Clients only paying for work that is compliant with a comprehensive specification.

Unintentional price preferences

7.19. Price will clearly be the distinguishing factor if it is allocated a significant/higher weighting over quality criteria (e.g. a price/quality weighting split of 60/40%). However, less known are the evaluation practices that can have the effect of preferring price, even if the quality weighting seems to give a preference to the non-price criteria. For example:

a) The flat scoring of quality (e.g. scoring bids on a 1-5 scale with 5 only being awarded for responses that exceed requirements and 2 being unsatisfactory, leading to acceptable, good quality bids being scored a 3 or 4 score); or

b) Providing a "floor" (minimum score) for quality elements (e.g. requiring a minimum of 3 on a 1-5 scale for each quality criterion).

7.20. In the example above, on the basis of a price/quality split of 60/40 weightings, this means that the acceptable quality scores range from 3 (minimum) – 5 (maximum), resulting in a maximum difference of 2 points per question/sub-criterion. At 60% weight, the maximum difference in the final score will be 24 points.

7.21. Compare price where, if scored on a relative basis, the relevant scoring range is from 0-100. At 40% weight, this translates to a maximum difference of 40 points, which is more than double the number of points available for the quality score and, potentially, a significant differentiator between bids (despite the apparent preference for quality indicated by the greater quality weighting).

ISSUE 6: I have a bid that I suspect to be abnormally low but the bidder has said it is not - can I reject it?

Abnormally Low Bids (ALBs)

SEE BID EVALUATION GUIDANCE NOTE, at section 7.5: Low Cost Bids

8.1. No procurement process is predictable and, in certain circumstances, Clients find themselves considering a bid with a price that seems too good to be true. The public procurement rules contain mechanisms to guard against abnormally low bids (ALBs) which might otherwise be based on technically, economically, or legally unsound assumptions or practices.

8.2. Section 19 of the Procurement Act allows Clients to disregard any bid that offers a price that is abnormally low for the performance of the contract being procured. Before disregarding a bid for being abnormally low, section 19 also obliges Clients to notify bidders that the price is considered abnormally low, and to give the bidder a reasonable opportunity to demonstrate that it will be able to perform the contract for the price offered. The Procurement Act lacks some of the detail that could be taken into account when considering abnormally low bids under the Public Contracts Regulations 2015, but Clients may wish to have regard to some of those considerations as a benchmark when assessing whether a bid is abnormally low, for example:

a) The economics of the manufacturing process;

b) The technical solution chosen;

c) The originality of the works, supplies or services; and/or

d) The possibility of the bidder obtaining state aid.

8.3. Clients must consider the evidence provided by bidders and may only reject a bid where that evidence does not satisfactorily account for the low price or cost.

8.4. That does not mean that a Client has to automatically accept the evidence the bidder has presented and it is always open to the Client to undertake a vigorous and robust investigation and rely on any opposing opinion offered by their professional (in-house or external) financial advisors or project team members.

8.5. Additionally, the Procurement Regulations place an obligation on Clients to investigate a bid where it has established that the bid is abnormally low as a result of its non-compliance with obligations in the fields of environmental, social and labour laws.

8.6. Notwithstanding the above, the Courts have demonstrated that Clients have a discretion as to whether they investigate ALBs, and it has been held that there is only a duty to investigate an ALB where the Client is considering rejecting the bid in question. The Courts have also held that Clients have a discretion to reject an ALB (i.e. there is no obligation to reject an ALB), and that the concept of abnormally low must be determined on the basis of the contract that is being tendered.

8.7. Of interest, the Court of Justice of the European Union (CJEU) has recently signalled a change in approach and has held that the investigation of ALBs is not discretionary. Instead, where a Client suspects that a bid is abnormally low, the CJEU held that it is required to check and determine whether it is abnormally low, taking into account all the relevant elements of the tender documents and the specification. Whilst judgments of the CJEU are no longer binding in the United Kingdom, this judgment may be of persuasive influence in the United Kingdom, and at the very least signals a difference in approach to the investigation of ALBs in the European Union.

8.8. In terms of identifying ALBs, the Government (in the Construction Playbook and the appended Bid Evaluation Guidance Note) suggests that any bid that is more than 10% below the average of all bids, or the "Should Cost Model" should be referred to the Cabinet Office for central assurance and scrutiny (again, the referral to the Cabinet Office is only relevant to central government departments).

8.9. However, there is a risk in identifying abnormally low bids by reference to the bids received, as lower priced bids may be based on how a specification has been drafted and understood by the bidders. In practice, we would therefore suggest some caution with identifying abnormally low bids by reference to the other bids received, and instead suggest that abnormally low bids should be considered by reference to the Should Cost Model (where a Should Cost Model has been prepared), the results of pre-market engagement, and by reference to the context of the contract being procured. Clients may also wish to appoint expert advisors/consultants to advise (by reference to transparent benchmarking data) where bids appear abnormally low.

ISSUE 7: I want to adopt a two-stage approach to my project but first I need to procure a tier 1 contractor – how do I do that in a compliant manner when I am not evaluating a fixed price?

How to compliantly procure a two-stage construction contract

What is a two-stage construction contract?

9.1. Simply put, a two-stage construction contract is one which covers both some or all of the pre-construction and the construction phases of a project , as well as establishing the parameters for the working relationship for the whole of the project from the outset. The pre-construction phase usually covers design and may also cover limited works (for example enabling works). It also allows for the parties to work together at an early stage to, for example, develop and apply for Planning permissions or other consents or conduct pre-construction site surveys.

What are the benefits of using a two-stage construction contract?

9.2. Use of two-stage contracts and two-stage tendering is becoming increasingly popular in the UK construction market. There are many benefits, including enlisting the specialist expertise of contractors and suppliers at an early stage for the benefit of the project, and the potential to achieve greater value for money as a consequence.

9.3. The Construction Playbook recommends the use of early supply chain involvement (ESI). [SEE CONSTRUCTION PLAYBOOK: PREPARATION AND PLANNING (3: Early Engagement) page 28] It states that investing time in ESI can lead to more effective designs, reducing changes and potential cost increases downstream, resulting in faster delivery when construction starts.

9.4. ESI is defined as formally engaging with the tier 1 contractor together with their specialist supply-chain sub-contractors in the pre-construction phase to help inform the design and delivery of a project or programme (including the use of standards for products and interfaces), costing, risk management, logistics, programming, sequencing, access and construction methodologies. Note therefore that this goes further than two-stage contracting between the Client and contractor (tier 1) alone and includes elements of partnering by bringing together the Client, contractor, sub-contractors and suppliers at the pre-construction phase. Contractually, this could be achieved by multiple two-party contracts between the Client and the supply chain, or by way of a multi-party contract which implements two-stage contracting.

9.5. Getting the contractor on board early on in any project leads to benefits arising from the contractor and its specialist supply-chain being able to input into the design development earlier than would otherwise be the case. It also generally leads to greater cost and programme certainty and accuracy as the contractor has a detailed understanding of the project having been involved in the pre-construction phase. This usually leads to better cost certainty, reduced risks, and often added value.

How does a two-stage contract work?

9.6. In the simplest terms, a two-stage contract is entered into at the earliest opportunity in the project. The parties then work to the terms of the contract during the pre-construction phase to undertake the pre-construction activities as set out in the contract. One of these activities will be costing the works based upon the detailed design which is prepared during this initial phase. Once those activities are completed and the prices agreed, the Client will give notice to permit the construction stage to commence. Certain clauses will only be operable during one of the stages, whilst others will be applicable for the whole of the contract.

How can I evaluate a tender for a two-stage construction contract compliantly?

9.7. As set out previously, the Procurement Act requires Clients to base the award of public contracts on the 'Most Advantageous Tender' (MAT) assessed from the point of view of the Client.

9.8. What constitutes the MAT is usually evaluated on the basis of price and quality, at a ratio set by the Client. Price does not have to take the form of a fixed price. Quality evaluation can include a wide range of elements provided they are linked to the subject matter of the contract in question.

9.9. Clients often struggle with the concept of procuring a two-stage construction contract. This is primarily due to the fact that the exact price (or contract sum) is unknown at the time of the tender.

9.10. It is important to remember that no tendered price is certain; even 'fixed price' or 'lump sum' contracts have the capacity for price changes, whether this be by way of additional money for unforeseen events, additional or alternative Client instructions, or value engineering exercises.

9.11. There is also no requirement under the Procurement Act that every element of a project brief or a sample project brief must be fully priced prior to selection (nor will this be possible if the procurement is conducted at a stage prior to all elements of a project being fully designed and specified, which is often the case in the first stage of a two-stage tender). There is no prohibition of the early conditional selection of the contractor to undertake pre-construction phase activities, nor a requirement that evaluation criteria for the most advantageous tender should include a fixed price for the project.

9.12. Nevertheless, restrictions on post-award negotiation have historically caused concern where Clients see early contractor involvement as deferring completion of full pricing in a way that involves subsequent post-award negotiation. This has been considered by the domestic Courts in the case of *Henry Bros*, where it was held that a contract awarded solely on the basis of fee percentages did not represent enough information to comprise the "price" where the intention was for the Client to enter into discussions with the contractor to arrive at a final price. However, a selection process for early contractor appointments under a two-stage contract can avoid negotiation and can comply with the Procurement Act if public sector Clients ensure that they:

a) Request sufficient pricing information during the competition to select the contractor for the purpose of stage one; and

b) Include a prescriptive and clear pricing mechanism in the contract, which will be applied in order to determine the price for the purpose of stage two (i.e. the price of the construction works).

In order to be compliant, the second stage pricing mechanism should:

a) Be a contractual process clearly set out in the contract and led by the contractor;

b) Not increase the contractor's quoted profit, overheads and risk contingencies; and

c) Not affect the agreed responsibility of the main contractor for delivering the project within the budget stated by the Client prior to the contractor's selection.

So what pricing information for a two-stage process could be evaluated?

9.13. As set out above, the price of a two-stage contract is developed, finalised and agreed during the pre-construction phase around parameters which are set out in the contract itself including a budget which is included as the outset of the contract.

9.14. On the basis that the prices received at tender stage can be developed into the contract sum via a robust contractual process, what should a Client ask for and evaluate during the procurement process at stage one?

9.15. Suggestions include:

The bidder's budget/outline cost for the project. This would comprise an overall breakdown of the contract sum, supported by a form of pricing framework which includes the contractor's prices for activities, people rates, equipment etc (e.g. preliminaries). Each of these individual prices could be verified and/or evaluated during a procurement process and then used as a cap or a benchmark in the ensuing price development process. For example, such pricing element could include:

a) Profit, overheads and fees;

b) identifiable costs in respect of site overheads/preliminaries and risk contingencies;

c) Full costing of pre-designed items;

d) Demonstration by the team members of their ability to deliver the project in accordance with the Client's brief and within the pre-determined project budget; and

e) A Whole-Life Should-Cost model could be used for a framework agreement or individual projects. Bidders would be asked to provide their pricing information by reference to the should cost model or demonstrate evidence to show their ability to deliver the project within the scope of the should cost model.

9.16. Given this, in order for the Client and all bidders to have confidence in the veracity of prices submitted at the tender stage, the pre-construction (but post-award) development and finalisation of price needs to be contractually underpinned by a robust, enforceable and transparent process. It is this contractual process that provides a bridge between the tender price and the contract sum. If the contract sum is developed in accordance with the contractual process and remains within the priced parameters submitted at the tender stage, then the outcomes established as part of the procurement process should be preserved.

9.17. To this end, Clients may also consider including a tender question (as part of the price/commercial submission) that allows the Client to scrutinise/evaluate the bidders' approaches to two-stage procurement and open-book pricing and provides as a minimum bid requirement that the bidder agrees to sign up to the pre-construction development of prices in accordance with the procedure set out in the relevant form of contract.

Overview of a compliant tender process for a two-stage process

9.18. As noted above, it is entirely possible to structure a two-stage selection process that is compliant with the Procurement Act. The new Competitive Flexible Procedure could be adopted by the Client and shaped along the lines of the following sequence:

a) Selection/short-listing of bidders, taking into account the complexity of the project, inclusion in the tender documents of all available specifications and other data as part of the project brief;

b) Invitation for bidders to submit their proposed profit, overheads and risk contingencies, plus fixed or maximum prices for those elements of the brief for the project that are capable of pricing;

c) Invitation for bidders also to submit qualitative proposals that demonstrate their suitability to be appointed – these could be tested in a dialogue session or some other sort of demonstration by the contractor;

d) Evaluation of those prices and proposals according to a matrix and weightings selected by the Client and its advisers in establishing the most advantageous tender; and

e) Specification in the contract of the process by which the remainder of the price will be determined for the project.

How can I ensure that the contract does not fall foul of the Procurement Act after contract award?

9.19. The unique nature of a two-stage contract is that the price is finalised after the contract award is made in accordance with the procurement rules (on the basis that the design and delivery aspects of a project will not have been fully worked-up at the initial tender stage, and it is the collaborative engagement between parties that positively informs the design and delivery outcomes). In the context of a procurement undertaken under the Procurement Act this could be an issue if the difference between the initial budget/prices at award and the outturn contract sum was significant. However, this is no different from any other fixed price or lump sum construction contracts.

9.20. Given the need for a robustly articulated link between the outcome under the contract and the procurement result, any two-stage process should include a clear pricing mechanism to be applied in order to determine the price for the purpose of stage two. Alongside the tendered prices and financial information submitted by the bidder, the operation of the prescribed pricing mechanism should mean that the price development and finalisation under the two-stage contract falls within a permitted safe harbour under Schedule 8 of the Procurement Act (i.e. one of the permitted routes to modify a public contract during its term).

Alternative methods to incorporate a two-stage approach into a procurement process

9.21. Clients may also consider adopting a "hybrid" two stage model, and the experience of the working group is that models such as this have been used successfully in practice.

9.22. For example, a procurement could adopt a two-stage open book model, with the Client taking forward two contractors from Stage 1 to Stage 2. Both contractors are then required to work up detailed pricing at the second stage, with a fee paid to the ultimate unsuccessful contractor (for example, the bid costs for Stage 2). This encourages all the parties to continue to work with the Client in a collaborative manner, whilst ensuring that the second stage pricing is worked up under competitive tension. This also presents a benefit to the unsuccessful party, as they will at least be able to recover their abortive costs in pricing at Stage 2.

9.23. Alternatively, the working group discussed anecdotal use of a "part priced" approach to tendering, which focussed on providing cost certainty for essential and/or already identified work packages, whilst not committing contractors to the time and expense of a full tender. It was identified that this was particularly useful at an early design stage, where there may be insufficient development of the design and/or specification for contractors to accurately tender. A key benefit in this approach is that it may mitigate the risk of pricing assumptions and risk being priced into a tender.

ISSUE 8: I have real problems getting the bidder to deliver its tender promises – particularly those involving social value and other "extras"

"Contractualising" tender promises

10.1. An essential stage of any tender process is ensuring that the successful contractor's tender promises are formalised in the contract documents. After the tender exercise completes, the contract becomes the sole and legally binding record of the parties' commitments, so it is essential that the contract accurately reflects what has been agreed and promised during the tender process.

10.2. In practice, this exercise is not always undertaken carefully by UK Clients. While considerable time and effort may be given to drafting tender questions in respect of deliverables like social value, the same care is often not applied to translating those proposals into contractually binding commitments. The competing pressures of concluding a tender process within a tight timescale, coupled with a lack of integration between procurement and contract management teams, often results in a contract that delivers less than was promised at tender stage.

10.3. Much of this problem stems from the way in which many UK Clients assess quality measures. Typically, topics like social value are assessed via exam questions, where bidders are asked to provide a written response to an open-ended question, within a stated word limit. Depending on how the questions are worded, bidders' responses to quality measures can often be vague, expressing aspirations that sound impressive and earn marks from the assessment team but don't offer concrete deliverables.

10.4. There are a number of approaches Clients can take to ensure that their own objectives and their selected contractor's tender promises are formalised in the delivery contract.

Best practice considerations

10.5. **Ensure integration between procurement and contract management teams:** Frequently, tender exercises are designed and run by procurement teams and external consultants who will have little or no involvement in the actual delivery of the contract. In terms of the tender process, this can result in a tender evaluation that is compliant with public procurement law and delivered on time but does not fully reflect the requirements of the contract delivery team. With this in mind, it is essential that procurement teams engage with and include delivery teams in all stages of the tender exercise, particularly around formulating tender questions and setting minimum requirements that bidders must achieve.

10.6. **Contract management training:** Clients should implement training for contract managers and the delivery teams to ensure that contracts are subsequently managed effectively during their term. Performance measures should be monitored and recorded appropriately (and reported on where required under the Procurement Act) and this should encourage bidders to deliver on contractualised tender promises.

10.7. **Set minimum requirements in the tender exercise:** There is a widespread tendency in UK procurement practice to avoid setting minimum requirements in respect of the delivery of the relevant contract. This partially comes from the wish to make tender exercises inclusive and attractive to potential bidders, and to not stifle competition and innovation with too many restrictions. Frequently, this approach also reflects a Client who isn't sure about their own objectives and desired outcomes from their project and wants the market to define what can be delivered within a stated budget. While this approach makes commercial sense, it can often lead to vague and imprecise evaluation questions, which produce equally vague and imprecise responses from bidders.

10.8. Bidders can only respond to what has been asked, and evaluators can only score what has been provided, so if a quality question lacks specifics about expected outcomes or minimum targets, a bidder is unlikely to offer anything more than what is required to score full marks for that question. Too often, this results in tender responses that describe a bidder's commitment to, or aspirations in respect of, a particular quality measure, but don't promise any tangible deliverables. To prevent this type of response, Clients should state in the tender documents what its minimum requirements are in respect of social value (e.g. technical deliverables, levels of competency, stating requirements or productivity levels), and identify specific goals or measures that bidders must deliver if they are awarded the contract.

10.9. **Include contractor's tender proposals in contract documents:** The tender process should be specifically designed with a view that a successful bidder's price and quality responses should be incorporated into the contract documents, making it clear that the content of the bid will form part of the successful bidder's contractual obligations. Clients should check that their contract terms and conditions contain an express requirement that the contractor must undertake the contract in accordance with the Client's requirements and its own tender response. Care should be taken that these two sets of documents are consistent and do not provide conflicting terms. Contracts should also set out an order of priority for its constituent documents in the event of conflicts or inconsistencies (for example, between the specification and the successful bidder's quality proposals), and/or provide a means of resolving any disputes around interpretation. However, the effectiveness of this approach depends on tender responses - how accurately they are written, whether they hold aspirational statements or whether they are precise, timed and expressed in absolute rather than conditional terms. Instead, we would recommend that a further process is undertaken ahead of signing the contract as noted below.

10.10. **Refine the contract terms and conditions to reflect key deliverables:** The inclusion of tender proposals in the delivery contract may not be sufficient to ensure that a bidder's tender promises will be delivered. Tender proposals, particularly those produced in response to a competitive tender exercise, are written to win points, and so may not form a complete or clear picture of how the contract will actually be delivered. With this in mind, the Client and the successful bidder may need to develop and re-write/re-phrase the tender submissions into a clear set of unconditional deliverables that the contractor is obliged to undertake.

ISSUE 9: I like what the bidder has written in its tender documents but I am not convinced that the proposed team can deliver it

Behavioural and Competency Assessments

11.1. Evaluating a bidder's capability and competence to collaborate on the delivery of a contract via 'behavioural assessment' can play a key part in the evaluation of the "MAT" in UK procurements due to the increase in collaborative contracts and what its proponents suggest is its higher reliability in evaluating a bidder's capability compared to the use of traditional written submissions.

11.2. Many approaches now assess *both* the behavioural competence of key bidder personnel to collaborate *and* the capability of organisational approaches to support collaborative working i.e. the robustness of systems, processes and structures (usually linked to best practice within the collaboration standard ISO 44001:2017[16]). Such Behavioural and Collaboration Assessments (**BCA**) select from a range of assessment methods which can be used alone, or which can be integrated to significantly maximise the reliability of evaluation results and to better match the specific areas for bidder evaluation.

What is BCA in Procurement?

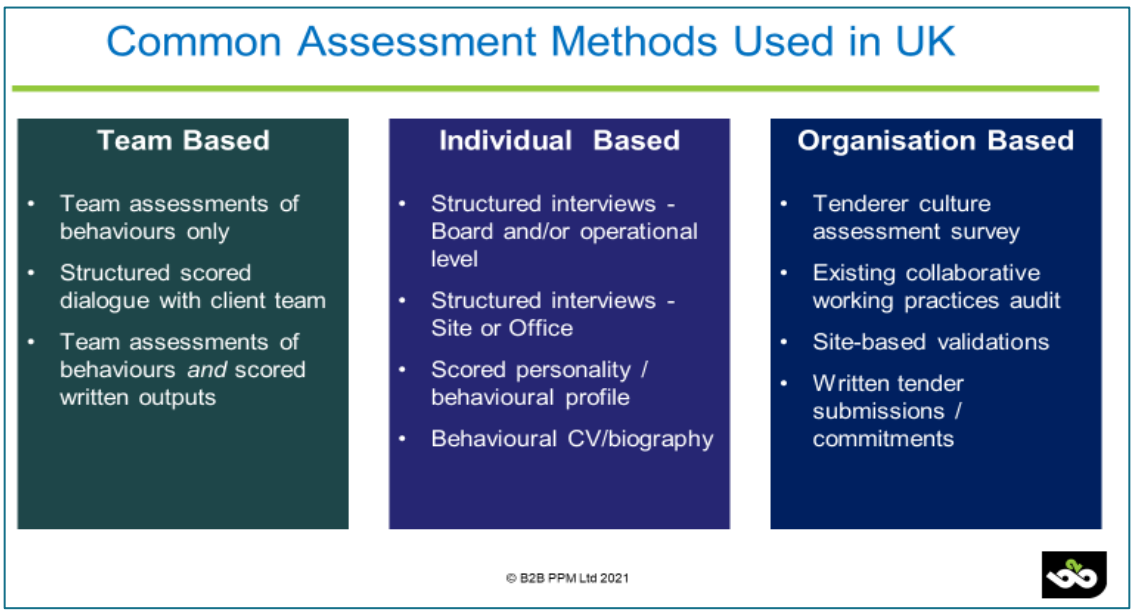
11.3. BCA should be a disciplined, systematic and auditable assessment of the capabilities of organisations and their key people to work together and/or with others, where the ability to collaborate is a critical success factor for contract delivery. Best practice should also ensure the design and delivery of the BCA is compliant with the international standard for behavioural assessment ISO10667-2:2020[17].

11.4. BCA is not new and the first known and published account of an assessment in a regulated procurement was in 2006 undertaken by the UK Ministry of Defence[18]. This involved bringing together several key named personnel from the bidder team and requiring them to work with a comparable set of Client-side personnel to address a set of contract-related problem-solving exercises. This required bidders to demonstrate high levels of collaborative behaviours (which were of significant importance to effective contract delivery).

[16] ISO 44001:2017 – Collaborative business relationship management systems – Requirements and framework
[17] ISO 10667-2:2020 – Assessment service delivery – Procedures and methods to assess people in work and organizational settings
[18] Building Collaboration: A Tool Kit Based on Experience. Defence Estates MoD/ITS 2006. Review of Behavioural Assessment Practice 2000-2005

11.5. The assessment involved recording the frequency of effective and ineffective behaviours associated with the published criteria and sub criteria, and whether these were consistently demonstrated across the team. The exercise was undertaken primarily by independent and qualified behavioural assessors, working with trained Client team members. The BCA scores were integrated into the overall score model for the contract award.

11.6. Since 2010, a range of different assessment methods have been deployed in order to assess behavioural competence at multiple levels within a bidder's organisation, including the assessment of the quality of proposed outputs, as well as the underlying organisational capability to manage a collaborative relationship by reference to previous examples on similar projects. Assessments increasingly validate the claims made in Invitation To Tender (ITT) submissions and interviews via site-based validation audits or assessments at corporate headquarters. The diagram below demonstrates how BCA can be applied in different ways:



Establishing if a Business Case Exists for BCA

11.7. Despite its efficacy for evaluating 'subjective' factors when compared to traditional procurement evaluation methods, BCA can be costly and time consuming within the procurement timetable. As such, deciding whether to assess a bidder's collaboration capabilities in a procurement process is a critical decision, along with determining the size and scope of the BCA. Current best practice suggests that BCA may be justified where the following conditions are satisfied:

a) There is clear objective evidence, from informed stakeholders, that behaviours and structured relationship management are critical success factors for contract delivery; and

b) It is feasible to conduct compliantly and in accordance with recognised quality standards. Factors to consider include:

i. Technical competences to design and deliver the BCA;

ii. Economic and Value for Money considerations;

iii. Allowing sufficient time to obtain legal advice on the BCA methodology ahead of issuing tender documents;

iv. Operational capacity to support it; and

v. Sufficient time within the procurement timetable.

11.8. Strategic Supply-Chain Relationship Management (SSRM) approaches and UK Government guidance on the acquisition of key partners are clear that business case decisions should be taken via a highly structured, auditable and evidence-led approach, based upon classifying or 'segmenting' the type of contract using a range of decision-making factors. This approach was trialled successfully by HS2 in a well-documented procurement case study in 2021[19], and it is recommended that Clients make business case decisions by reference to objective considerations.

[SEE CONSTRUCTION PLAYBOOK: CONTRACT AND IMPLEMENTATION (11: Successful Relationships) page 72]

[19] **Focussing on Investment in Collaborative Relationships**. Doyle J.J. (2022). Institute for Collaborative Working Journal – The Partner May 2022

Potential limitations of BCA

11.9. As with all evaluation methods there are limitations, and these are considered in the table below:

Limitations	Remedies
Bidders propose personnel who are not 'key' to delivery of the contract	Invitation To Tender (ITT) requires compliance to the provision of named bidder personnel with enforceable change requirements
Loss over contract time of the originally assessed personnel makes the BCA less reliable	This is comparable to any other requirement that assesses based on named individuals e.g. CVs. The key remedy is a requirement on the bidder for on-going provision of comparably competent personnel and a clear on-going behavioural competence assessment and development process
BCA only tests a sample of the bidder organisation	Highly targeted bidder personnel with critical responsibility for the delivery of the works and high influence over the wider personnel involved in delivery Extension of the BCA to include validation of culture and standard operating procedures at operational sites
Bidders may attempt to 'game' the results	Aiming to present the best possible picture is standard practice e.g. expert writers of ITT submissions may not reflect true organisational know how. A range of so-called 'gaming' tactics are available in BCA. A detailed risk mitigation strategy is good practice
BCA assesses behaviours in an un-real environment and does not reflect 'reality'	A BCA is a controlled exercise and consequently is not actuality. A key mitigation is to create questions and exercises that are explicitly germane to the contract delivery requirements which require a combination of behavioural competence and specific contract insight to generate a competent solution matched to the real challenges in the contract delivery

Limitations	Remedies
It cannot guarantee behavioural performance in delivery	BCA is a risk assessment exercise and doesn't explicitly aim to develop people. Given the range of scored factors, (cost, technical etc), and the weighting assigned to BCA, it is infrequent that those who are successful are not without scope for development. The key and only mitigations are to re-use the BCA results and outputs as part of a collaboration/behavioural development and risk management exercise with the successful bidder
It tests only 50% of the collaboration equation between bidder and Client i.e. the bidder only	Evaluate the Client-side team either in advance or concurrently with the BCA and inject results into development as per above. Client-side results could be included in the procurement and evaluation process itself if related to the subject-matter of the contract
It can be claimed to be 'subjective' and open to greater challenge	Following the best practice in ISO10667:2 Behavioural Assessment Standard will maximise objectivity in the development of robust criteria, sub-criteria and scoring. Adherence will ensure competence via training of assessors in advance

When to use BCA

11.10. BCA is most often used as part of the evaluation of bids. BCA can also be used ahead of the submission of final bids, either for practical timetabling reasons, or to support the development of better quality submissions by exposing bidders to exercises related to key Client team issues and concerns.

11.11. BCA may also be used in the selection stage, where bidder behaviours and collaboration is of high priority in the shortlisting of bidders to be invited to tender.

Key features for compliance and quality

a) Ensure a robust approach to the business case exploration and decision;

b) Definition of contract-specific assessment criteria and any scored sub-criteria;

c) Assurance that questions and exercises clearly map to the published criteria;

d) Transparency in the procurement documents on the scoring model and avoidance of hidden scored sub-criteria;

e) Training and briefing for all involved to ensure rigour, consistency and management of unconscious bias;

f) Audit trail evidence leading to scores and documentation of any amendments to scores; and

g) Objective reporting back-to-back with the published assessment methodology.

Beyond BCA evaluation

11.12. A critical aspect is the need to view the assessment results as an input to post-award relationship development and behavioural risk management with the successful bidder and the prior planning for such to take place as soon as practical following appointment.

ISSUE 10: I want to improve capability and capacity in my procurement and delivery teams and ensure we are observing best practice – but I don't want to reinvent the wheel

The role of standards in a well-run procurement

Introduction

12.1. British Standards are published by the British Standards Institution (BSI)[20]. Standards are the result of a collaborative process involving different groups of experts and are not written by BSI itself. These experts are experienced practitioners in specific areas relevant to different sectors. The BSI establishes sector boards consisting of several technical committees that work on specific standards. The technical committees are responsible for developing and approving a British Standard.

12.2. Standards help us to carry out work in a consistent and reliable way, and they are helpful in understanding and agreeing on best practice and quality criteria for different products, services and processes. The benefits of standards include:

a) Improving efficiency and productivity;

b) Reducing costs and waste;

c) Enhancing innovation and competitiveness;

d) Ensuring safety and reliability;

e) Protecting the environment and health;

f) Supporting trade and market access; and

g) Building trust and confidence.

12.3. As BSI state on their website, British and international standards are used by businesses, consumers, governments, and other stakeholders to ensure quality, performance, and trust. While they are not legal requirements in their own right, they can help the sector to comply with laws and regulations, and are sometimes cited in legislation.

[20] This section is drawn from the BSI website at https://www.bsigroup.com/en-GB/standards/

Specific features of the construction sector

12.4. When specifying needs and requirements months or years before a construction project is delivered, it is certain that the specification, the price, and the schedule will change. A contract for construction work requires clarity on requirements and timing, but any such contract in this context must be capable of dealing with changing circumstances, both in relation to requirements and supply-side issues. This is the case in all industry sectors, but the long durations and large scale of construction work amplifies the impact of changes.

12.5. These issues are part of the explanation about why carrying out complex work in a sector like construction is beset with problems. In theory, the procurement of construction seems simple. A Client explains what is needed, and a design team develops requirements to a specification. A contractor with a vast and complex supply chain of labour and materials then delivers the project according to agreed timescales, pricing and specification. For all but the quick and simple projects, this ideal cannot be achieved as information is inevitably incomplete and always uncertain because the context of a project is not static.

12.6. In this kind of situation, standard ways of working seem to be doomed to failure. If we cannot rely on developing routine ways of working, then what are we standardising? Usually, this requires standardising at a more abstract level rather than explaining what has to be done. Instead, standards in this area tend to deal with the kind of questions to be asked, the aspects to be taken into account and advice about how to manage and document specific issues, depending on the perspective of each standard.

12.7. As of yet, there is no easy answer to the problem of remaining up to date across every new kind of demand and restriction placed on businesses, whether in buying or supplying construction work. However, since many of the issues affect all businesses in all sectors, much has already been achieved in providing standards and guidance to enable people and organisations to understand what they need to do.

12.8. The construction sector is not excluded from those standards that do not specifically mention the sector. It should also be noted that it is not the standards themselves that impose needs and restrictions on business activity in the construction sector. On the contrary, these needs and restrictions already exist, and standards have been developed by industry experts to help organisations to respond effectively and productively to the constraints and challenges faced by all business in the sector.

Context and policy issues

12.9. Standards help to frame context and policy issues by providing frameworks of explicit questions to consider when setting policy and understanding context. The context within which projects are carried out is increasingly important for various reasons.

12.10. The list of relevant standards is extensive, and the issues covered by these standards typically respond to requirements (legal or otherwise) for all organisations involved in procuring or supplying construction work. The purpose of the standards is to help all those involved in commerce of this kind to avoid having to figure out everything from first principles or through expensive trial and error. While it may seem demanding, all of these requirements are imposed on all of our activities. The standards have been produced to help all organisations respond consistently and effectively to these requirements.

Relevant standards

12.11. The standards applicable to the construction sector reveals a staggering array of important standards. The aim of the standards is to disseminate best practices in order to develop consistent and reliable approaches to complex issues. This consistency helps in reducing the information requirements when buying and selling, especially in complex procurements like construction and buildings.

12.12. Without the use of these standards, the cost of doing business may be increased as organisations try to solve problems for the first time that have already been solved, and as they work through how to establish and communicate processes that have already been established at a broader scale for all organisations or for the sector.

12.13. Where possible, throughout this guide we have identified relevant standards that Clients may want to consider incorporating into their procurement procedures.

12.14. Additionally, appended to this publication (at **Appendix A**) is a list of standards that may be relevant to projects in the Built Environment sector. This is not an exhaustive list, but Clients may consider making use of some of these standards in future projects.

Appendix A - Relevant Standards for the Built Environment

We have set out below some example standards that will be relevant to the built environment sector (although this is not an exhaustive list of relevant standards):

BS ISO 37000:2021 - Governance of organisations – Guidance
BS ISO 37000 helps those who govern any form of organisation to perform effectively while behaving ethically and responsibly. It includes principles such as defining the organisation's purpose and values, making sure that the strategy matches the intent, creating value for all relevant stakeholders, interacting with stakeholders, dealing with risk, ensuring oversight, accountability, transparency and decision-making. It applies to all organisations no matter what type, size, location, structure or purpose they have.
BS ISO 37301:2021 - Compliance management systems – Requirements with guidance for use
A compliance management system involves actions, structures and processes that an organisation establishes to make sure that it obeys the rules and laws that affect it. It enables an organisation to avoid or discover violations, lower the risk of negative outcomes, and enhance its compliance performance. It also enables an organisation to match its compliance policies with the principles of good governance, proportionality, transparency and sustainability. At the project level, it would be a system that matches the compliance policies of both Clients and contractors/suppliers.
BS 95009:2019 - Public sector procurement – Generic requirements for organisations providing products and services
BS 95009:2019 provides generic requirements for organisations that provide products and services to the public sector. It specifies how an organisation can demonstrate its suitability and ability to meet the requirements of a Client. It applies regardless of firm type, size or the nature of activities being carried out. It helps organisations to show their trustworthiness, transparency and ethical practice in public sector procurement. It also helps procuring bodies to assess bidders more easily and accurately.

BS EN ISO 26000:2020 - Guidance on social responsibility

Social responsibility is defined as "the legal and voluntary duty to consider the social and environmental impact of decisions and activities". This standard helps organisations to contribute to sustainable development, engage with stakeholders and behave ethically. This covers a broad range of topics related to social responsibility, such as human rights, labour practices, consumer issues and community involvement.

BS ISO 14100:2022 - Guidance on environmental criteria for projects, assets and activities to support the development of green finance

BS ISO 14100:2022 gives guidance on how to identify environmental criteria for projects, assets and activities that seek finance. Much of the work of the construction sector requires finance at some point in the procurement. This standard helps to guide users through assessing risks and opportunities that arise from applying environmental criteria to their work, whether bidding or procuring.

BS ISO 15392:2019 - Sustainability in buildings and civil engineering works – General principles

Covering all types of construction activity, this standard deals with the contribution of this activity to sustainable development. It covers the whole life cycle of construction works, including materials, products, services and processes from inception to end-of-life. The standard deals with general principle and does not provide benchmarks for performance or any basis for assessment of organisations or other stakeholders. It acknowledges the importance of different roles in the context of contributing to sustainable development by construction works. Sustainable development is a complex area, and there is an extensive list of standards that applies to the generic theme which we have not reproduced in this guidance.

BS ISO 21505:2017 - Project, programme and portfolio management – Guidance on governance

BS ISO 21505:2017 is a standard that gives guidance on how to govern projects, programmes and portfolios. It describes the context in which the governance of these activities is done and provides guidelines for the governance function. It is intended to be used for assessing, assuring or verifying the governance function for projects, programmes and portfolios. It is intended for governing bodies and executive and senior management who influence, impact or make decisions regarding the governance of their organisation.

The relationship between BS ISO 37301 and BS ISO 21505 is that the former focuses on management systems for ensuring compliance, whereas the latter focuses on the purpose of the management system. They can be used together or separately, depending on the needs of the organisation.

Organisation and procurement of construction work

In using contracts to allocate work to different firms in the design and construction supply chains, there is a growing body of advice for procurers. The development of collaborative business relationships, the organisation of the procurement and tendering processes, and the techniques for making decisions about selection of suppliers are some of the issues that are dealt with. The following standards are examples which Clients may find useful to consider in their procurement activity:

BS ISO 44001:2017 - Collaborative business relationship management systems. Requirements and framework
This standard deals with the requirements for identifying, developing and managing collaborative business relationships within and between organisations. Although it was not created in the construction sector, it has particular resonance in construction given the multiple supply chains and networks in every project. A series of related standards deal with implementation.
BS ISO 22058:2022 - Construction procurement – Guidance on strategy and tactics
BS ISO 22058:2022 provides guidance for meeting the Client's needs relating to new or refurbished construction works and establishing procurement strategies and tactics. It covers options for engaging the market, developing procurement objectives, conducting spend, organisational, market and stakeholder analysis, packaging strategy, contracting strategy, targeting strategy, selection methods and documenting a procurement strategy. It also provides guidance on tactics such as publicity, procurement planning and sequencing, and setting up of procurement document. It is applicable to the private sector, public sector or community organisations.
ISO 19208:2016 - Framework for specifying performance in buildings
BS ISO 19208:2016 provides the framework and principles to describe the performance of a building in order to meet user requirements and societal expectations. It also gives guidance on how to prepare performance specifications. It applies to any type of building works.

BS ISO 10845 - Parts 1-8 Construction procurement
BS ISO 10845 is a series of standards that provide guidance on construction procurement, which is the process of acquiring goods, services and construction works for a construction project. The purpose is to help procuring organisations develop generic procurement systems and organise tendering processes that are fair, equitable, transparent, competitive and cost-effective, which can be used to promote objectives additional to those associated with the immediate objective of the procurement itself.
BSI Flex 390 v2.0:2023-03 - Built environment – Value-based decision making – Specification
The purpose of BSI Flex 390 is to specify requirements for implementing a consistent approach to value-based decision-making in the processes undertaken in the management of a built environment project and throughout the lifecycle of an asset. It is intended for use by those with responsibility for planning and developing investments in assets which constitute the built environment. It also aims to drive better social, environmental and economic outcomes by providing a clear, modern approach to how value in the built environment can be defined, created, delivered and measured.

Managing projects

The management of project work is a regular part of most industry sectors and expertise in this area is not confined to the construction sector. The standards applying to project management are intended for projects in any sector, and include:

BS ISO 21500:2021 - Guidance on project management
The guidance on project management is extensive and comprehensive. It applies to projects in all sectors, not just in the built environment. It is relevant to all kinds of organisation, regardless of size or type. The focus is on implementing processes and best practices to improve project management performance.
ISO 22263:2008 - Organisation of information about construction works – Framework for management of project information
ISO 22263 provides a structure for organising information about projects (both processes and products) in the construction sector. It aims to make it easier to control, share, find and use relevant information about the project. It applies to all stages of the construction process, from the start to the end, as well as the final product. The purpose of this standard is to help organisations meet various management goals, such as satisfying customer needs, legal obligations, health and safety standards, environmental and social responsibilities, as well as achieving corporate goals on continuous improvement of quality, efficiency, knowledge, staff satisfaction.
BS EN ISO 19650-1:2018 - Organisation and digitisation of information about buildings and civil engineering works, including building information modelling (BIM) – Information management
The purpose of this standard is to help organisations implement an effective information management strategy and to address the concepts and principles for information management using BIM. It also provides recommendations for a framework to manage information including exchanging, recording, versioning and organising for all actors. The standard covers topics including the delivery and operational phase of the assets, information exchange, and a security minded approach to information management.

Control of projects

As work is carried out, progress is compared to the plan. Corrective action may be focussed on changing the resources in some way to bring the work into conformance with the plan, but it can be more effective to change the plan to suit new circumstances. If the work being carried out bears no resemblance to the plan, then the control system breaks down. Many aspects of control are evident in standards, including:

BS EN 12973:2020 - Value management
BS EN 12973 Value Management is a general standard that covers the underlying concept and practice of value management, based on value and function-orientated thinking, behaviour and methods. It applies to all types of organisations and sectors, not only the built environment.
BS EN ISO 9001:2015 - Quality management systems – Requirements
As one of the most important standards in the array of guidance documents, the purpose of this standard is to help organisations implement an effective quality management strategy and to address the challenges of meeting customer expectations and regulatory requirements. This is applicable to all kinds of organisation in all industry sectors. Indeed, there are sector-specific implementations, including specific requirements for the built environment sector and guidelines for quality management in projects. In addition to management of time and cost, the specification is an essential element in controlling the work that is being carried out. As well as mechanisms for managing work, such as quality management systems, the need for a clear specification is paramount, if a control system is to be effective.
BS 7000-4:2013 - Design management systems – Guide to managing design in construction
BS 7000-4:2013 is a standard that provides guidance on management of the construction design process at all levels, for all organisations and for all types of construction project.
BS 8000 - Workmanship on construction sites
This extensive standard establishes the general principles for the BS 8000 series of standards covering workmanship in the execution of certain works on construction sites. It looks at issues such as tolerance, accuracy, fit, preparation of materials, interdependencies between trades and draws attention to health and safety issues. It is a multi-part document that sets out codes of practice for a vast array of building practices, including (amongst others) concrete work; masonry; carpentry and joinery; roofing and cladding; and water and drainage services.

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