

White Paper

# Getting procurement criteria right in the public sector

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Executive summary

Commerce Decisions' Structured Criteria Definition (SCD) methodology enables the creation of robust, fit for purpose, defensible award criteria for use on procurement projects of any size, complexity and for any recognised procurement process.

SCD is primarily focused on the definition of goals, the analysis of dependencies and the identification of assurance criteria. In addition to these three objectives, it enables the involvement of all key project stakeholders. This method has been developed in response to award criteria coming under increasing scrutiny, both from a legal perspective and from their obvious relationship to the success of a project.

The use of SCD will substantially reduce the risk of successful legal challenge and reduce the risk of failure to deliver the required project outcomes following contract award.

This White Paper discusses the issues associated with both criteria definition and the enablers that need to surround it. It also provides an overview of the SCD methodology and concludes with an explanation of how the resulting criteria can be used successfully within an evaluation and enhanced with the use of AWARD.

This paper and the use of CDL methodology and services will be of value to procurement project leaders and key stakeholders in both the public and private sectors.

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## What is a successful procurement project?

### **Consider the following procurement project outcomes:**

- an optimised solution that delivers the required goals/benefits to time and cost
- buy-in and common understanding across all project stakeholders
- a clearly justified decision with no challenges or grey areas
- an open and auditable evaluation process that runs to time
- effective and efficient use of resources (human/facilities etc.)

Many projects struggle to achieve all or some of these outcomes for a number of reasons normally as a result of a lack of time, appropriately skilled resources and methodology. Problems that can result from this are not being able to confirm or agree on the real objectives of the project, an ineffective or inefficient evaluation scheme and not being able to meet the evolving legal requirements.

A major recent change to the Public Contract Regulations (the EU Remedies Directive) further enhances the need to get these factors right due to the greater implications of poor process and debrief.

Delivering an effective and efficient evaluation scheme and decision strategy does not guarantee the required project outcomes. However, a lack of an effective strategy will almost certainly result in the failure to deliver the project outcomes.

## Decision strategies and criteria definition

### **Procurement objectives**

Before considering running a procurement competition, the objectives that reflect the needs of the people for whom the competition is being run need to be defined. Without a clear set of objectives, the project team members are unlikely to be successful, and are also unlikely to be able to assess whether they have been successful or not.

Stakeholder agreement and buy-in on exactly what is being bought, how success will be measured and a clear and transparent decision-making process are vital to ensure a competition that delivers the right result in a way that mitigates the risk of challenge. Confusion during a competition, or at its close, is not acceptable, as it creates a loss of confidence in the decision and increases the possibility of a successful challenge.

### **The purchase**

Understanding exactly what is being bought is vital within the buying organisation, and is not simply academic. A surprisingly high proportion of procurements are undertaken without clear stakeholder agreement on exactly what is being bought. This may appear to be only a subtle difference in interpretation but this will have a bearing on the choice of evaluation criteria and therefore on the decision about who is awarded the contract.

Compare the situation with a homeowner who wishes to extend his house and who is trying to choose a builder. If they think they are buying the physical extension, it is likely the evaluation criteria will be all about the materials and plans. If, however, they realise that they are buying the services of a builder to construct an extension (according to the plans and materials specified by the architect), then the criteria are more likely to focus on the quality of the service being provided. This might result in criteria that include start and end dates, disruption and noise.

There is always a risk that key aspects of the requirement are not investigated as part of the assessment. This is commonly found where a capability is assessed but an enabler of that capability is either omitted or not given the importance that is required. There are many examples where a project team has procured a capability but has failed to investigate some of the support, documentation, intellectual property rights and training elements that enable that capability.

Within a project team, momentum builds up and very quickly paths are laid down to follow and key assumptions are made. Without a structured approach, the correct routes are not always taken, criteria are missed or not given the necessary attention, and overall buy-in to the procurement can become fractured.

“Stakeholder agreement and buy-in on what is being bought, how success will be measured and a clear decision-making process are vital.”

### **Increasingly challenging legal environment**

For many years, project teams have been able to work on elements of the decision-making process (e.g. criteria, scoring mechanism, threshold scoring levels etc.) and resolve issues as the evaluation has progressed and still got to contract. The quality of the resulting contract may or may not have been deemed successful but the procurement project team has reached that end point nonetheless. However, following a growing number of challenges from unsuccessful bidders and a number of high profile court cases, procurement legislation has tightened.

From a legal perspective, in order to comply with legislation, a clearly defined criteria set and decision-making mechanism are now required at the outset and these cannot be changed during the evaluation. An open and auditable process is also required.

Failure to comply can result in suspension of competition (if still running), suspension or cancellation of awarded contracts (if post-contract award), enforced re-competition and/or a heavy financial penalty.

An example of this is the action taken against the London Borough of Newham following an Invitation to Tender in March 2007 where decision-critical criteria were deemed to have been hidden from the bidders. This eventually led to the court issuing an injunction.

The following text has been extracted from Case summaries available in the public domain:

With regard to the rulings of the ECJ, the council’s failure to publish the criteria by which it would assess compliance with the contract specifications raises a serious issue about the lawfulness of the tender process. It is arguable that the five sub-criteria used by the council were not simply used as a guide for the assessment of compliance (as argued by the council) but were treated as additional formal criteria...

An additional interesting fact about this case is that the court still decided in favour of the bidder, regardless of their likelihood of winning:

In this case the Court of Appeal did not accept that it was necessary to show that the bidder would have been successful in order for it to have a cause of action. It placed weight on the “loss of opportunity” of the bidder participating in a fair procedure and concluded that “the loss of a significant chance of obtaining the contract is enough to found a claim.”

Although these developments are generally interpreted as greater protection for the bidder, if a robust approach to criteria definition is adopted, this can also result in a huge benefit to the buying organisation.

By investing time up front to lay out clearly the evaluation approach and measurements of success (i.e. what is being sought and what will give you confidence that it will be achieved), this will:

- enable bidders to understand what is required of them and optimise their solutions and supporting evidence to meet the buyer’s aims
- reduce the risk of challenge to the decision, as most challenges will arise from confusion about what was required and how the decision was reached
- save time and money on the evaluation process, as bidders are less likely to participate if they cannot compete effectively against the clearly defined success criteria.

## Decision-making process – agreement from the outset

Legislation aside, most projects would strive to ensure that all elements of the decision-making process were agreed at the outset, before the evaluation commenced. One reason that this has not always been the case is that it is not easy to finalise the complete criteria up front with full guidance.

### Here are some pitfalls:

#### Decision-making

Key stakeholders must agree on the decision process at the outset of a competition. Difficult and important decisions may need to be made early, whereas once they may have been deferred.

#### Time

In most cases, the procurement project is planned backwards from the delivery or in-service date. The project momentum discussed earlier drives a project to advertise and engage with the marketplace as soon as possible. Engaging with the marketplace before your criteria and scoring mechanism are completed can lead to a number of problems. For example, communication with potential bidders could inadvertently influence potential criteria in a negative way or, worse, it could potentially qualify certain companies for competition based on the latest version, only to find that they are not fully qualified to deliver the completed criteria.

#### Geography/communications

Project teams are rarely all situated together and the time constraints along with the multi-faceted elements of a project can mean that decisions are taken without full communication, stakeholder input or buy-in.

### **Technical constraints/issues**

Issues such as version control, consistency of formatting, allocation of responsibility, lack of a controlled review process, progress monitoring, audit trail, centralisation of information and security are common.

### **Quality assurance**

Those immersed in the project will often miss key evaluation criteria or requirements for evidence as they automatically assume that knowledge about the requirement is held within the bidder organisation or they will subconsciously assume capability based on previous relationships with the bidders. The volume of criteria is also often too large as there is a natural inclination to seek answers to all possible issues associated with the procurement.

### **Prioritisation/weighting**

Applying weights requires sound methods and analysis as it can have a massive bearing on how the winning solution is reached. Often a similar approach to that adopted for requirement prioritisation is used for weighting but this can lead to problems. For example, simply looking at the impact of not having the capability will lead you to a large weight association. However, if the chance of this capability not being delivered is extremely unlikely, then it could be that it carries no weight as such in the evaluation decision, and a simple statement of compliance is all that is required to ensure that it will be delivered.

In summary, a structured approach can assist the buyer in ensuring that these pitfalls do not materialise and that the attributes of success that were described at the start of this document will exist in their procurement, namely:

- an optimised solution that delivers the required goals/benefits to time and cost
- buy-in and common understanding across all project stakeholders
- a clearly justified decision with no challenges or grey areas
- an open and auditable evaluation process that runs to time
- effective and efficient use of resources (human/facilities etc.)

“A structured approach can help the buyer avoid the many pitfalls in decision-making.”

## QinetiQ Commerce Decisions' approach

### Step 1. Confirm your objectives

The needs, or goals, that are being sought will provide benefits either directly or indirectly when and if the project is delivered. These benefits will also be underpinned by some project constraints. Identification of all of these is required to ensure that the eventual criteria address them all. The benefits that are required may have been used to initiate the project at the outset but this is not always the case because they may have been assumed.

For example, a refresh of an existing capability appears to be straightforward and the benefits are deemed obvious and clearly understood. The benefits may have been incorporated accurately into requirements, although this is not always the case. Requirements will not usually cover all of the benefits sought and will not naturally cover constraints or project issues as they rightly focus on the capabilities and outputs that are ultimately required.

### Step 2. Analyse and validate

What needs to be evaluated? The natural inclination of a project team is to ask everything that can possibly be asked to ensure that there are no gaps and that all bases are covered. This approach, although appropriate in some cases, could dilute the critical success factors and spread both the buyer and bidder effort to areas of little value. The effect of this can be managed by the criteria weighting to some extent, but it is better to have an efficient set of criteria before weighting.

The key is to identify the factors that will ensure that the needs will be achieved. These are essentially the goal 'dependencies'. This requires careful thinking and will often result in a broad set of topics that will require further refinement or validation.

For example, a buyer might initially believe that he needs confirmation that an extensive detailed technical requirement will be delivered. This will usually lead to a large set of requirement-focused criteria and the need for a large amount of evidence from a potential supplier. The evaluation timescale and burden on small and medium-sized companies can become untenable as well as the results becoming misleading. Validation is required in order to challenge initial thinking and ensure the evaluation is efficient.

This validation approach does not encourage taking anything critical for granted. However, it could be that there is something essential that has to be confirmed but not necessarily scored and attributed to the weighting. If something is vital to the service but could easily be done by the buyer at little cost or effort and perhaps more efficiently, then it could either be omitted from the evaluation or weighted accordingly. Likewise, if something could easily be provided by any bidder and there is no differentiation required in how it is delivered, it could simply be specified in the contract.

Criteria analysis can also uncover needs that appear simple but ultimately can prove difficult to deliver and thus create potential risk. Take, for example, the need to paint something a particular colour. If the paint is easy to source, industry standard and easy to apply, it could be that the criterion is simply specified in the contract or weighted accordingly. If, however, the paint is difficult to source, unique and can only be applied in certain facilities or conditions, then the evaluation will need to know more to be confident that the needs will be met by the solution.

If the procurement strategy being adopted requires pre-selection, then your criteria will also need to be analysed and clearly identified as either 'selections' or 'award' criteria. Failure to establish this distinction at the outset is common and can result in legal challenge from a bidder. An example of this type of challenge can be found with Case C-532/06, Emm G Lianakis AE and Others v Dimos Alexandroupolis and Others.

**The following text has been extracted from the Summary of Judgement, which is available in the public domain:**

In a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36(1) of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, as amended by Directive 97/52, from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment and their ability to perform the contract by the anticipated deadline.

While that directive does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules. The suitability of tenderers is to be checked in accordance with the criteria of economic and financial standing and of technical capability referred to in Articles 31 and 32 of the directive, whereas the award of contracts is to be based on the criteria set out in Article 36(1), namely, the lowest price or the economically most advantageous tender.

If the analysis and validation process are applied correctly, the answers to the following questions become clearer:

- What are the evaluation criteria to use?
- At what stage of the process should they be used?
- Are we in line with legislation?

### Step 3. Design the evaluation

To enable an evaluation, criteria must seek some form of evidence. A 'production' solution is ideal from an evidence point of view in that it already exists and has a track record.

A 'proposed' solution is more difficult from an evidence perspective but could ultimately provide a better fit. Where there is the possibility of needing to compare both production ('off the shelf') solutions with proposed ('vapourware') solutions, designing generic criteria and especially outlining the evidence required can become a difficult task. The criteria, scoring mechanism and guidance should seek to ensure that evaluators are presented with information that enables them to ascertain, with a level of confidence, that their needs will be met, whether this is via a production or proposed solution.

The aim of any particular criterion is fairly straightforward in that it should always be very precise and clear but not restrict the potential solution. The evidence requested to support the responses is considerably more challenging.

In some cases, a buyer may want to be very detailed in what they are seeking in terms of response from a bidder, and in other cases they may want to leave some interpretation to the bidder as part of the examination process. This should be driven by the selected evaluation technique but is often driven by the level of detail that the buyer has (or thinks they have) to draw from on that particular evaluation topic.

For example, if a criterion requires proof of a specific qualification, the buyer may specify that a copy of a certificate is the only permissible evidence. Alternatively, if the buyer simply wants to know how their needs will be delivered, they could ask for supporting evidence and leave this at the discretion of the bidder. A step further would be to ask for supporting evidence that 'includes' or is provided 'in the form of'. Each criterion could be treated in a variety of ways depending on what the buyer is seeking to assess in that instance.

Depending on the procurement procedure in place, criteria may need to be used for more than one stage of a competition. Where this occurs, the evaluation framework must be able to cope with the changes required at each stage.

#### **For example, the following transitions may need to be supported:**

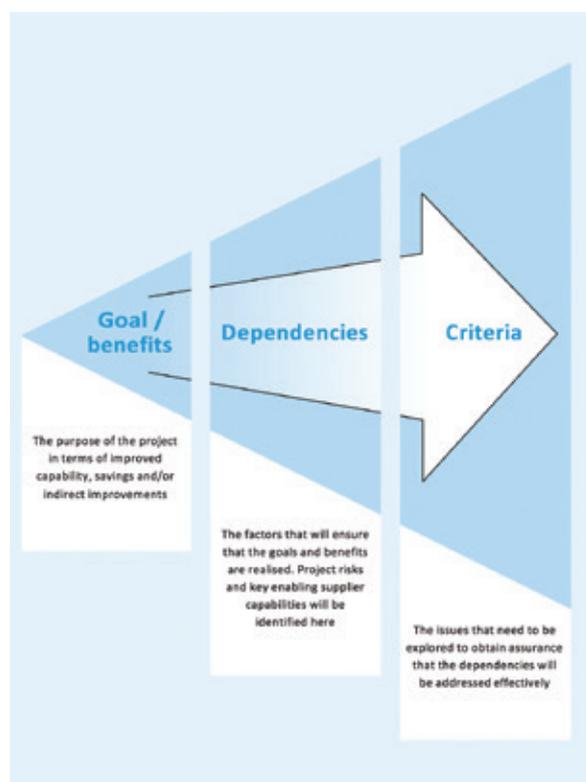
- outline written response to prototype
- prototype to trial
- trial to final proposal

Although changes are required in what needs to be seen or asked, at the same time – from the legal perspective – the basis for the decision (i.e. 'the criteria') must not be seen to have changed at all from the outset. Once again, failure to get this correct could mean confusion among the evaluation team and/or a misleading assessment and, worse still, legal challenge.

Evaluator-scoring guidance should be established at the design stage as any evaluator who is not involved in the criteria definition (usually a high proportion) will need clear guidance on how to treat responses.

A common problem with constructing scoring guidance is that the project team will subconsciously have a preconceived idea of what the solution will look like and this can filter into the guidance. If this occurs, the bidder may shape their proposal to achieve the desired score rather than focusing on delivering the need specified in the best possible way from what could be their more qualified perspective. It is important to have an idea of what elements a good response will contain, but there is a balance to be made with possible 'solutionising' within your guidance.

**Figure 1. Structured Criteria Definition**



## Structured Criteria Definition and AWARD

Structured Criteria Definition (SCD) is a methodology created and deployed by Commerce Decisions that addresses the issues and questions raised in this paper.

This paper outlines some of the major principles of the methodology and the reasons for its development; it is not the method itself. The method enables the creation of robust criteria for proposal evaluation and procurement decision-making. Although each evaluation task and the associated criteria will vary to some extent, the SCD methodology remains the same.

The SCD approach enables effective engagement by stakeholders and subject matter experts and also provides a valuable scrutiny and review from Commerce Decisions' specialists who are able to draw on their substantial and varied procurement project experience. Both the SCD process and the evaluation that follows can be underpinned by the use of the internationally renowned web-based decision-support application AWARD.

## Summary

Commerce Decisions' SCD methodology enables effective and efficient assessment processes by focusing on the key success factors and goals of a project, carefully arranged and described such that all stakeholders can engage with it in an open and transparent way.

This methodology, used in conjunction with the AWARD software, has been proven on many substantial projects with a combined value totalling in excess of £100 billion.

AWARD is also deployed to evaluate the continued performance of the awarded contract. This can be carried out with an extension of the selection criteria used for the competition as well as any additional key performance indicators that are agreed and contracted against.

## About Mike Ross

Mike Ross is an experienced consultant and requirements analyst with 22 years of IT-based consultancy experience. He joined Commerce Decisions in 2007, having worked previously as a freelance consultant with major consultancy firms such as PWC, IBM and directly for the Ministry of Defence.

With Commerce Decisions, Mike has had extensive experience in the deployment of AWARD and the creation and implementation of a wide variety of decision-making schemes. He has enabled the delivery of all types of procurement processes within numerous projects and has delivered Competitive Dialogue process advice and support.

Mike is a practitioner of the Commerce Decisions' proprietary Structured Criteria Development decision-making methodology.

## About Commerce Decisions

Commerce Decisions has been supporting strategic, high-risk procurements globally since 2001, and is at the forefront of best practice procurement. With a unique focus on complex evaluation, we have unrivalled experience in supplier evaluation and are a trusted provider of procurement services to the public and private sectors.

We deliver a robust and defensible procurement process to our clients, proven time and time again across many sectors including construction, transport, education, health, defence and facilities management procurements – to date, we have supported over 13,000 strategic projects, collectively worth over \$400billion. This enviable experience and in-depth knowledge has enabled us to develop proven methodologies, supporting clients to deliver the best possible outcome on strategic and complex procurement projects.

Headquartered in Oxfordshire, UK, and with offices in Canberra, Australia, and Ottawa, Canada, Commerce Decisions provides software and services to support the procurement and post contract review processes for both buyers and suppliers. For buyers we improve the efficiency and effectiveness of the evaluation process to make the best buying decision based on all the relevant criteria, underpinned by our AWARD® software. For bidders we improve the quality and timeliness of proposals to best meet the needs of the potential buyer and thereby give them the best chance of securing the contract, underpinned by our ADVANCE™ software.

## About QinetiQ

QinetiQ is a leading international provider of technology-based services and solutions to the defence, security and related markets. We develop and deliver services and solutions for government organisations, predominantly in the UK and US, including defence departments, intelligence services and security agencies.

In addition, we provide technology insertion and consultancy services to commercial and industrial customers around the world.







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