
**Creating a golden opportunity for
lawful negotiation of final tenders,
using the competitive procedure
with negotiation**

Competitive dialogue

- Regulation 26(4)
 - cannot be met without adaptation of readily available solutions
 - complexity of the legal / financial make-up
- Regulation 30(17) - final tenders “clarified, specified and optimised”

Clarification v negotiation

- CJ case of Slovensko:

“once...tenders have been submitted...those tenders can no longer be amended [at the request of the CA or tenderer]...equal treatment and transparency preclude any negotiation”

Clarification v negotiation

- CJ case of Slovensko:

“[THE Public Sector Directive] does not preclude...mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender”

- *Danninger v Bus Atha Cliath* - use of a “BAFO”?

Competitive Procedure with Negotiation

- Regulation 26(4) - same grounds as for CD
- Regulation 29(13) -
 - negotiations to “improve contents of tenders” (rather than “all aspects of the procurement” under CD)
 - final tenders may not be negotiated

Competitive Procedure with Negotiation

- Regulation 29(15) - CA can “award contracts on the basis of the initial tenders”
- Substitute for Restricted Procedure, rather than a “light touch” CD?

CPWN - “negotiating” final tenders

- Clarification of simple errors
- Regulation 56(4) - “submit, supplement, clarify or complete”
- Just the winning tenderer?
- The “second bid” option
- Negotiations as clarifications

Creating an opportunity...or mitigating the risk

- Regulation 72 - substantial modification
- Just the winner? Improving the CA's position
- Saying what we will do, and doing what we say

Final thoughts

Questions and discussion

Craig Elder

t 0115 9766089

e craig.elder@brownejacobson.com

