
White Paper 2024 Mastering Negotiation Opportunities

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Mastering Negotiation Opportunities

How do you get negotiation right under the Procurement Act and so secure the best outcome for your contract and gain an advantage for your organisation?

Negotiation now and then

- Public Contracts Regulations 2015
 - Reg 29 Competitive Procedure with Negotiation
 - Reg 30 Competitive Dialogue
 - Reg 32 Negotiated Procedure without prior publication
- Procurement Act 2023
 - ?

New Procedures

- Two competitive procedures proposed (section 20(2)):
 - Single-stage tendering procedure without a restriction on who can submit tenders (Open Procedure)
 - Such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract (competitive flexible procedure)
- No default procedure, but choice of procedure must be proportionate
- No justification required for competitive flexible procedure

Can we negotiate under the Procurement Act?

- Yes!
- “Such other competitive tendering procedure ***as the contracting authority considers appropriate*** for the purpose of awarding the public contract”
- So can we negotiate every contract?
 - No – Open Procedure is essentially the same as now
 - In CFP, generally yes, but subject to the rules and principles governing the procedure
 - If you wish to negotiate then you must use CFP, even if minimal recourse or a fallback position only

What are the rules governing it?

- *“Implicitly this will operate within the bounds of the provisions of the [Act] (such as procurement principles, publication and other requirement applicable to a competitive procedure) but can be designed around what would work best for the specific procurement”* – Explanatory Notes to the Bill
- Proportionality appears to apply both to the choice between open and “other” and to the process designed for the “other” form of procurement
- Proportionality assessed by reference to the nature, complexity and cost of the contract

***Key Issue* – Compliance with principles rather than detailed rules**

- In the absence of a detailed set of rules, adherence to principles will be the touchstone of the competitive flexible procedure
- Challenge to award decisions in competitive flexible procedure are likely to be based around adherence to principles
- What are those principles?
 - EU freedoms no longer relevant
 - No equivalent to Regulation 18

Procurement Objectives (clause 12)

- Must have regard to the importance of:
 - delivering value for money
 - maximising public benefit
 - sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions
 - acting, and being seen to act, with integrity
- In carrying out a procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment
- If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage
- Removal or reduction of barriers to participation for SMEs

Boundaries and scope

- Must ensure that the procedure is not designed in a manner that is unnecessarily complex or burdensome for suppliers, considering the nature, complexity and cost of the contract requirement
- Allows the design of a multi-stage procedure to include a limited number of participants in any of the stages
- Award criteria can also be refined in the course of the procedure (within the parameters set out in the Act)

Possible guidance from the old LTR (PCR 2015 - Regulation 76)

- Procedures shall be at least sufficient to ensure compliance with the principles of transparency and equal treatment
- Obligation to conduct the procurement in conformity with the published proposals – but possible to depart from the script if this doesn't amount to breach of the aforesaid principles
- Time limits simply required to be reasonable and proportionate
- May conduct in a way corresponding to other procedures

How is “new” LTR different from the competitive flexible procedure?

- Award of contracts to be exempted from the general requirements (i.e. open or “competitive flexible”)
- What does “exempted” mean? Not same as direct award provisions – still a procedure to be followed
- More latitude in evaluation – rule that criteria shall be limited to the subject matter of the contract amended to allow for both proximity and the views of receivers of services to be taken into account
- More flexibility on award from frameworks
- More scope to modify a procurement and a contract
- But no clarity on exactly what the procedure will look like – seems to be an even lighter touch regime

Keeping it simple or going large?

- Flexibility doesn't necessarily mean complexity
- 2 tender notice options:
 - inviting suppliers to submit a request to participate in the procedure, or
 - *where no such invitation is made*, inviting suppliers to submit their first, or only, tender as part of the procedure
- Second option looks similar to open procedure procedurally, but with built in flexibility
- CFP would allow negotiation where currently it could not be done without adopting CD or CPN
- Use of negotiations shouldn't be a proxy for preparing comprehensive and clear procurement and contractual documents

Successive Stages

- Opting for successive stages – should be clear in the procurement documents
- Allows for reduction in numbers of bidders
- Enables more focused engagement as the procurement progresses
- No minimum number of bidders required initially
- Intermediate Assessment of Tenders
 - Reduction must be by application of the evaluation criteria
 - Refining award criteria
- Making the most of negotiation in the procedure

Preparing for negotiation

- Thorough preparation is essential
- Define the scope and the process
- Identify what you want to negotiate
- Work out your goals, aims and objectives, priorities and fall back positions
- Set clear objectives to be achieved
- Do your homework e.g. market position, supplier capabilities, reasonable risk allocation
- Is it proportionate?

Structure of Negotiations

- Don't stumble into negotiations
- Plan meticulously
- Ensure you have the right venue and use of technology
- Ensure both parties bring the right people to the negotiation
- Agenda setting and timetabling
- Timetable different meetings for different themes
- Fairness between bidders

Building Relationships

- Important to build rapport with the bidders
- Seek to align your objectives with those of the bidder
- Look beyond the procurement to the basis for a successful contractor relationship
- Communicate effectively:
 - Active listening
 - Ask open-ended questions
 - Always clarify if not satisfied with an answer

Content of Negotiation

- Feedback on initial bid
- Highlight strengths and weaknesses
- Ask for presentation on key negotiation areas
- Use breakouts
- Give feedback

Making best use of the negotiation

- Capture action points but not detailed minutes
- Agree with the bidder what has been negotiated
- Revise documents as necessary
- Seek final tenders
- Negotiate after final tender?

Importance of preparation and documentation

- Without clear process driven rules, contracting authority and bidders may not be sure about what is going to happen
- Clarity needed in documenting the proposed process
- Be clear in advance about where your flexibility lies
- Use any flexibility to change course with caution
- Make the most of preliminary market engagement
- Flexibility doesn't mean making it up as you go along

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