

# Stuck in the wrong procedure?

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- What can you do if you are stuck in the wrong procedure: e.g. you want to negotiate but feel that you can't?
- What are the relative merits of the different procedures available?

# Modern, flexible Regulations – allowing negotiation



## A Brief Guide to the 2014 Public Procurement Directives (Crown Commercial Service):

- The new rules support UK Government priorities of economic growth and deficit reduction by making the public procurement process faster, less costly, and more effective for business and procurers alike....

- These changes provide a much more modern, flexible and commercial approach..... Outdated and superfluous constraints have been removed, and many new features have been added to streamline and modernise public procurement. For contracting authorities, this means being able to run procurement exercises faster, with less red tape, and more focus on getting the right supplier and the best tender. And for suppliers, the process of bidding for public contracts should be quicker, less costly, and less bureaucratic, enabling suppliers to compete more effectively.

- Crown Commercial Service, Guidance on changes to procedures
  - *The UK has pressed for a long time for more flexibility to use negotiation to achieve the best commercial outcomes. The wider ability to use the competitive procedure with negotiation and competitive dialogue, together with the introduction of innovation partnerships, gives purchasers the toolbox to achieve such outcomes.....*

# But...use the open procedure



- Crown Commercial Service, PPN 12/15 (Availability of Procurement Procedures (Decision Tree))
  - *There is a strong preference for the Open Procedure and this should be the normal default choice for government procurement*
  - *The Restricted procedure should only be used where there is a genuine need to pre-qualify bidders or where there is evidence that (after effective pre-procurement market engagement) the market, and therefore the number of potential bidders, is very large*

- *The Decision Tree shows a clear preference for the Open procedure as the normal route, with the other choices shown as exceptions.....*
- *Competitive procedure with negotiation: Where the minimum requirements can be specified but negotiations with bidders are needed to improve initial tenders*

# The problem



- Assume open or restricted procedure
- When and why does the need to negotiate arise?
  - Before/after receipt of tenders
  - Authority's requirement is not clear enough
  - Bids are not clear
  - No bids, no suitable bids, only irregular or unacceptable tenders

- Surrender or..... review your options?
- Clarify your requirements
- Clarify the bids
- Introduce a negotiation stage
- Ask for a Best and Final Offer
- Abandon/ change procedure

# Option 1 – clarify your requirements and give bidders more time



- Reg. 47(3)(b):
  - *Contracting authorities shall extend the time limits for the receipt of tenders so that all economic operators may be aware of the information needed to produce tenders ....where significant changes are made to the procurement documents*
  
- Sounds great, but:

➤ Recital 81:

- *....significant changes should be understood as covering changes, in particular to the technical specifications, in respect of which EOs would need additional time .....*
- *It should, however, be clarified that such changes should not be so substantial that the admission of candidates other than those initially selected would have been allowed for or additional participants in the procurement procedures would have been attracted. That could, in particular, be the case where the changes render the contract...materially different in character from the one initially set out in the procurement documents*

# Option 2 – clarify the bids



- CJEU case law shows tenders can be clarified:
  - On a limited and specific basis
  - Particularly when it is clear that they require mere clarification or correction of obvious material errors
  - Requests must be sent in an equivalent manner to all tenderers in the same situation
  - The clarification cannot amount to the submission of a new bid
  
- *SAG ELV Slovensko (2012)*
  
- *Ministeriet for Forskning v Manova (2012)*

➤ Regulation 56(4):

- *Where information or documentation to be submitted by EOs is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may request the EOs concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency*

- But beware negotiation - *SAG ELV Slovensko (2012)*:
  - *By its very nature, the restricted public procurement procedure means that, once the tenderers have been selected and once their respective tenders have been submitted, in principle those tenders can no longer be amended either at the request of the contracting authority or at the request of the tenders. The principle of equal treatment of tenderers and the obligation of transparency resulting therefrom preclude, in that procedure, any negotiation between the contracting authority and one or other of the tenderers*

# Option 3 – Introduce a new stage (negotiation or BAFO)



- Introduce a new stage (negotiation or BAFO)
  - Be transparent
  - No real ground to object to a BAFO stage? See *Danninger v Bus Atha Cliath* (2007)

# Option 4 - Surrender



- Simply abandon and re-design the procurement
- If only irregular or unacceptable bids, transfer to negotiated or CD procedure with qualifying bidders under Reg. 26(4) – (7)
- If no tenders or no suitable tenders or requests to participate, transfer to negotiated procedure without notice under Reg. 32(2)(a)

- Irregular or unacceptable bids:
  - Irregular: do not comply with the procurement documents, were received late, evidence of collusion or corruption, found by the CA to be abnormally low
  - Unacceptable: tenderers do not have the required qualifications or whose price exceeds the budget
  - Proceed with all tenderers which satisfy Regs. 57 – 64 (selection)

- No or unsuitable bids or requests:
  - Bid not suitable: where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the CA's needs and requirements in the procurement documents
  - Request not suitable: where EO is to be or may be excluded under Reg. 57 or does not meet selection criteria

# Other procedural problems



- You're in the negotiated procedure but you want to negotiate on a different solution:
  - *Nordecorn v Rahandusministerium* (2013)
  - Don't change your procedure to match one of your bids!
  
- You're in the negotiated procedure but you don't want to negotiate:
  - *BSF v Secretary of State for Defence* (2006)
  - Reserve the right not to negotiate (Reg. 29(15))

- You're in the negotiated procedure and you need to negotiate the final tender:
  - Authorities can negotiate the initial and all tenders except for the final tender (Reg. 29(15))

- Key questions:
  - Negotiated and competitive dialogue procedures:
    - When are they available?
    - Are there any significant differences?
  - Merits of open v restricted procedures

NP and CD are available where:

- The needs of the CA cannot be met without adaptation of readily available solutions
- They include design or innovative solutions
- The contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attached

- The technical specifications cannot be established with sufficient precision
- Where, in response to an open or restricted procedure, only irregular or unacceptable tenders are submitted

## Key elements (Reg 29):

- CAs can negotiate all stages except for final tenders
- CAs can reserve right not to negotiate (Reg. 29(13))
- Confidential information is not to be revealed without a specific waiver
- Successive stages permissible
- Final tenders

## Key elements (Reg 30):

- Dialogue to identify and define means best suited to satisfying CA's needs
- Confidential information is not to be revealed without a specific waiver
- Successive stages permissible
- The CA continues dialogue until it can identify the solution(s) capable of meeting its needs

- Final tenders must contain all elements required and necessary for the performance of the contract
- Final tenders may be clarified, specified and optimized at the request of the CA
- But, this and additional information may not involve changes to the essential aspects of the tender where variations to those aspects are likely to distort competition or have a discriminatory effect

- Negotiations can be carried out with preferred bidder at the CA's request to confirm financial commitments or other terms in the tender by finalising terms of the contract, provided that it does not materially modify essential aspects of the tender/procurement and does not risk distorting competition or causing discrimination

## ➤ Pros and cons (Cabinet Office)

- *Competitive Procedure with Negotiation offers an attractive new choice for those procurements where although some element of negotiation is needed, it is possible to specify a minimum requirement from the outset*
- *The Competitive Dialogue now provides for clarification and optimisation after the final call for tenders and has no minimum requirement at the outset, making it much better for highly complex outcome based procurements*

- Don't forget:
  - The “state of urgency” provisions. Time limits can be reduced to 15 days where a state of urgency is duly substantiated by the CA which renders impracticable the ordinary time limit
  - In open procedures, there is no need to pre-qualify tenderers before examining tenders (Reg. :
    - Where CAs do so, they shall ensure that verification is carried out in an impartial and transparent manner
  - Risk of wishful thinking/bias?

## What are they?

- Where a CA needs an innovative product, service or works not already available on the market
- And wants to procure the development and purchase in a single award procedure
- A cross between competitive dialogue and competitive negotiated procedures

## Why?

- Research and innovation are among the main drivers of future growth
- And have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth
- Buying innovative products, works and services contributes to achieving best value for public money and wider economic, environmental and societal benefits

- A good thing?
- Cabinet Office, Technical Note on Drafting (Sept 14):
  - *Unlike the regulations setting out the other procedures, it does not follow a logical order from the start of the procedure to its finish, but jumps about, with propositions about a similar topic (such as the structure of the partnership) separated from each other by unrelated material...*
  - *...almost each paragraph jumps to something completely different from the paragraph which precedes it, often returning to a theme previously touched on....*
  - *We considered if there was a case for departing from copy-out to inject more sensible reordering of the material, without losing important nuances implicit in existing juxtapositioning, but no obvious way forward emerged....*

- Choose your procedure wisely
- But there is scope for transparent, creative thinking...

**Thank you for listening**

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