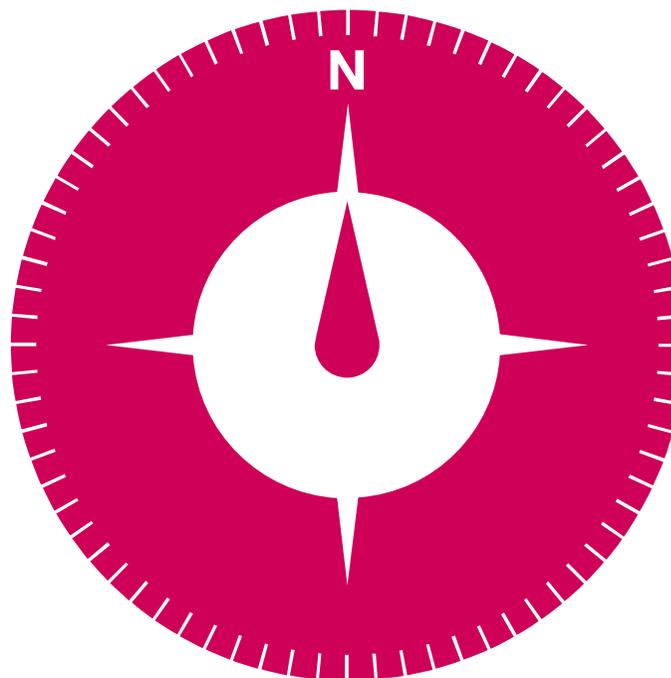




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White Paper Conference

Awarding public contracts
skilfully and lawfully within the
procurement rules



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Post award variations



Drawing on grey area examples, how do you move your post tender negotiations into compliant post award variations?

On a sliding scale of risk what are the do's and don't's of tender negotiations?



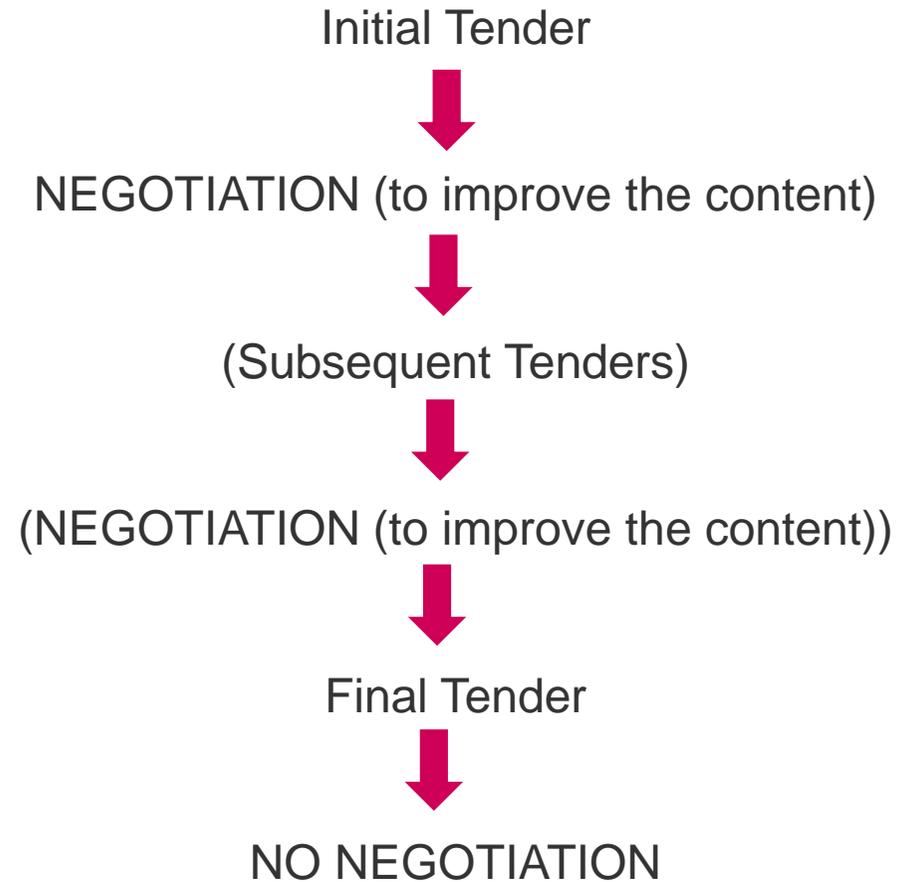
Which procedure?



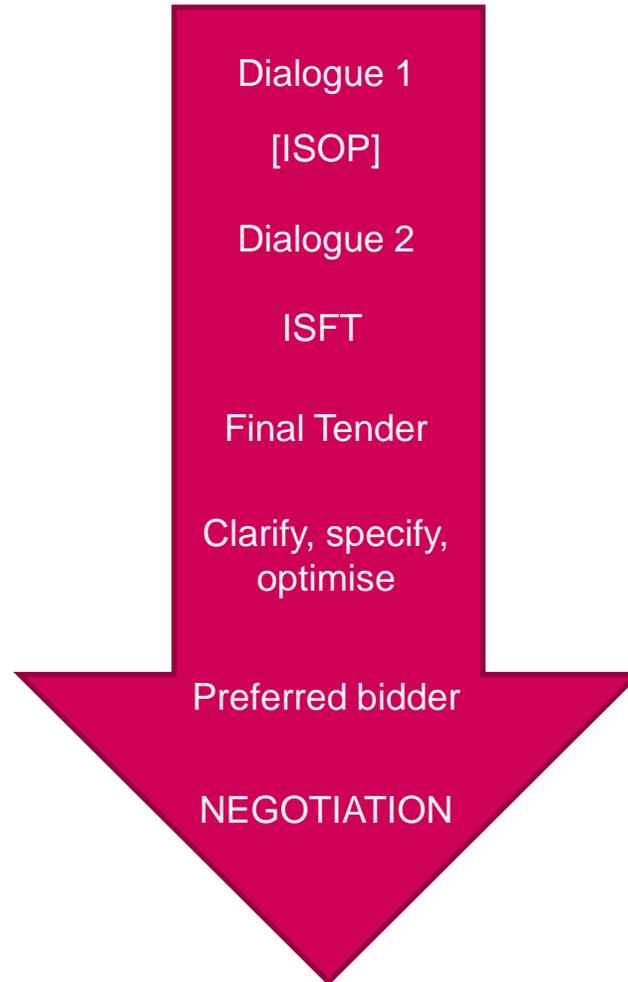
- Open
- Restricted
- Competitive Procedure with Negotiation
- Competitive Dialogue
- Innovation Partnership



Competitive Procedure with Negotiation



Competitive Dialogue



Competitive Dialogue negotiations (Reg. 30(20))



- At the request of the contracting authority – not the bidder
- Best price-quality rated tenderer only
- To confirm financial commitments or other terms contained in the tender
- For the purpose of finalising the terms of the contract
- Must not materially modify essential aspects of the tender or the procurement (including the needs and requirements set out in the OJEU or descriptive document)
- Must not risk distorting competition or causing discrimination.

Competitive Dialogue – how far can you go?



- Don't change the procurement
- The tender submitted must remain essentially the same thing
- But negotiation means negotiation, it is not just clarification
- Commission decision on London Underground PPP (N-264/2002)
 - relates to “old” Negotiated Procedure (perhaps less regulated)
 - shift in value arising from negotiations was within the margin that can be expected in the negotiation of such complex and innovative contracts
 - practicality of tying up funding and all details in major infrastructure
 - What is the effect on the original decision?



Open and restricted procedures – basic principles



- SAG ELV Slovensko – in principle tenders can no longer be amended at the request of either party. Any negotiations between the contracting authority and one or other tenderer breaches principles of equal treatment and transparency
- Council and Commission Statement (1994). “All negotiations with candidates and tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out.”



Open and restricted procedures – what flexibility?



- Is the issue “fundamental”?
- Does it distort competition?
- Price or non-price related?
- Is it permissible if done with everyone?



Incomplete Procurement Information



- Problem Areas
 - Staff – TUPE, pensions etc.
 - Asset transfer
 - Asset condition
 - Incomplete schedules
- What flexibility is afforded in the ITT?



Regulation 56(4)



- Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may request the economic operators 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.
- Timing
- Does this allow improvement?

How do we treat non-conforming bids?



- Is it fundamentally different from the contract/specification?
- Is it just procedurally different?
- Options:
 - accept
 - allow correction
 - refuse and disqualify
 - start again



Key considerations



- Bidder “qualifies” the tender
- Non-compliant?
- Provide for post tender adjustments?
- Risks:
 - unrealistic (winning) tenders
 - best tenderer walks away
 - contractual problems (underpriced tenders)



Change of requirements



- Similar considerations to Regulation 72 apply but full application not appropriate
- Changes post contract need to be accommodated with the contractor or undertake a new procurement (see Regulation 72 generally)
- More options during procurement to deal with change
- What are the reasons for the change?
- Unforeseen circumstances should allow changes to be made subject to usual principles i.e. fairness/no distortion of competition/transparency
- Clear, precise and unambiguous provisions governing incorporation of new information



Two Stage Tendering



- What do we mean? Traditional procurement route in the construction industry
- Stage 1
 - Competitively appoint preferred contractor
 - Limited information in procurement documents
 - Pre-Construction Services Agreement (PCSA)
 - Contractor paid initial fee
- Stage 2
 - Contractor and employer complete the final technical documents
 - Jointly market test works packages/sub-contracts
 - Agree programme and cost plan
 - Agree price and enter into main contract
- How do we justify in Open/Restricted?



Other situations



- Frameworks
- Dynamic Purchasing Systems
- Electronic Auctions



Keeping a record – Regulation 84



- Contracting authorities shall document the progress of all procurement procedures, whether or not they are conducted by electronic means. To that end, contracting authorities shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on —
 - communications with economic operators and internal deliberations
 - preparation of the procurement documents
 - dialogue or negotiation (if any)



Panel and Questions





Go further

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