

## **Negotiation with bidders under the Procurement Act 2023**

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- Royal assent 26 October 2023
- Expected to come into force in about October 2024
- From the ministerial foreword to *Transforming Public Procurement*:

“For too long, modern and innovative approaches to public procurement have been bogged down in bureaucratic, process-driven procedures. We need to abandon these complicated and stifling rules and unleash the potential of public procurement so that commercial teams can tailor their procedure to meet the needs of the market.”
- Was this really the problem with the prior state of procurement law? If it was, does the new Act make things worse or better?

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- Specific provision for “competitive procedure with negotiation” (PCR reg 29):
    - May only be used where reg 26(4) conditions are satisfied
    - Authority must describe its needs, and the characteristics of what is to be procured, and specify award criteria – reg 29(2)
    - Initial tenders to be submitted and to be basis for subsequent negotiations – reg 29(11)
    - May be subsequent pre-final tenders, and staged reduction in number of bidders – regs 29(13), 29(19)
    - Authority negotiates tenders “to improve their content” – reg 29(13) – “except the final tender”
    - Minimum requirements and award criteria not to be negotiated – reg 29(14)
    - Remaining bidders must be told when procedure is being concluded, and given deadline for final tenders to be assessed according to award criteria – reg 29(21)
    - During negotiations, authorities “shall ensure equal treatment of all tenderers” – in particular, no discriminatory provision of information – reg 29(16)
  - As discussed in *Arrowsmith*, considerable uncertainty as to what further negotiation permitted after final tenders and identification of preferred bidder – never satisfactorily resolved

- Competitive dialogue procedure also available, on basis of same reg 26(4) conditions – reg 30
  - Aim of dialogue is to identify and define means best suited to satisfying authority’s needs – reg 30(8)
  - Authorities must ensure equality of treatment among participants, and information not to be provided in discriminatory manner – reg 30(9)
  - Final tenders submitted after conclusion of dialogue declared – reg 30(15) – on basis of solutions presented and specified during dialogue
  - Final tenders must contain all required elements, but “may be clarified, specified and optimised” at authority’s request – no changes to “essential aspects” of tender or procurement, including where variations likely to distort competition or have discriminatory effect - regs 30(16)-(18)
  - Negotiations with best bidder permissible, at authority’s request, to “confirm financial commitments or other terms ... by finalising terms” – but must not materially modify essential aspects, and must not risk distorting competition or causing discrimination – reg 30(20)
- By implication, no dialogue or negotiation permitted in open and restricted procedures (certainly on an individual bidder basis)

- Section 19(1):

“A contracting authority may award a public contract to the supplier that submits the most advantageous tender in a competitive tendering procedure.”

- Section 20(1):

“Before awarding a public contract under section 19, a contracting authority must carry out a competitive tendering procedure in accordance with a tender notice and any associated tender documents.”

- Section 20(2): a competitive tendering procedure is either –

- An “open procedure”, defined as a single-stage tendering procedure without a restriction on who can submit tenders; or
- A “competitive flexible procedure”, i.e. such other procedure as the authority “considers appropriate” for the purpose of awarding the contract

- It is hard to see that this would be permitted
- There is no definition of “single-stage tendering procedure”, but any process of negotiation (or dialogue) would appear by its nature to introduce multiple stages
- *Transforming Public Procurement* described the open procedure as being intended for “simpler, ‘off the shelf’ competitions”
- By contrast it described the new “flexible procedure” as giving purchasing authorities “freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors”
- Contrast reg 13(3) with reg 14(3) in the draft Procurement (Transparency) Regulations – only for the competitive flexible procedure is the tender notice required to state whether the procedure may include negotiation

- *Transforming Public Procurement.*
  - Intended “to give commercial teams maximum flexibility to design a procurement process that meets their needs and the needs of the market” (para 63)
  - Greater flexibility supposed to “encourage innovation” and allow buyers “to build in stages of negotiation and deploy modern commercial tools such as reverse auctions” (para 65)
  - Suggested that, for complex requirements, “negotiations with bidders would be beneficial in helping them understand the requirements and/or in delivering better value for money and innovation” (para 65) – “more outcome-based specifications to allow the market to come forward with innovative solutions” (paras 67, 87)

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- Section 20(3): authority “must ensure that the procedure is a proportionate means of awarding the public contract, having regard to the nature, complexity and cost of the contract.”
  - Section 12(1): authority “must have regard to the importance of” matters including delivering value for money, and acting (and being seen to act) with integrity.
  - Sections 12(2), (3): authority must “treat suppliers the same unless a difference between the suppliers justifies different treatment”, in which case it must take all reasonable steps “to ensure it does not put a supplier at an unfair advantage or disadvantage.”
  - Section 21(5)(b), 21(6)(a): tender notice or associated tender documents must contain details of the authority’s requirements which are “sufficiently clear and specific” – whilst under the draft Procurement (Transparency) Regulations, both a contract award notice and a contract details notice must describe the contract subject-matter “in such detail that a reader of the notice can compare the goods, services or works to those described in the relevant tender notice” – see regs 20(3)(d) and 22(3)(h).
  - Draft Procurement (Transparency) Regulations, reg 14(3)(c): tender notice must describe “the process to be followed during the procedure”, including whether it may include negotiation at any stage.

# What is negotiation anyway?

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- The concept is not defined
- In ordinary language, “negotiation” denotes a process of bargaining leading to commitments – “if you do or agree to this, I will do or agree to that” – never seemed an entirely happy description for pre-final tender processes
- Presumably the Act intends references to “negotiation” to embrace any sort of dialogue or discussion with bidders

# What has changed (1)?

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- This much seems reasonably clear -
  - No longer necessary to be concerned with whether specific conditions for using a particular procedure are met
  - No need to select irrevocably between specific non-open procedures
  - No specific requirements as to how CFP may be conducted (but then, for negotiated procedure and competitive dialogue, there never really were)
  - The authority is the judge of what is an “appropriate” procedure, subject to the specific requirements of the legislation, and (probably) ordinary public law principles – no generalised requirements of transparency, good administration etc - see my discussion at [https://www.procurementlawyers.org.uk/wp-content/uploads/2023/10/PLA\\_The\\_Procurement\\_Act\\_2022\\_Nigel\\_Giffin\\_KC\\_11KBW.pdf](https://www.procurementlawyers.org.uk/wp-content/uploads/2023/10/PLA_The_Procurement_Act_2022_Nigel_Giffin_KC_11KBW.pdf)

- There is less clarity as to –
  - The degree of detail with which the tender notice must describe “the process to be followed” – in this respect, note that s 24 (refining award criteria), and especially s 31 (modifying the terms of a procurement), are arguably less flexible than the current law
  - How much precision is entailed by the stipulation for requirements to be “sufficiently clear and specific” – though note that this is couched subjectively, in terms of whether the authority is “satisfied” that the standard is met
  - The stage (if any) at which, or the circumstances in which, the authority could reduce the number of participants in the procedure to one – is that still a “competitive” procedure?
  - Whether the s 20(3) proportionality requirement has any meaningful teeth
  - How far the authority can commit itself to a particular approach to evaluation before final tenders are submitted
  - What the s 98 record-keeping duty requires in relation to the course of negotiations
  - Critically, what is permissible at the post-tender stage

- How the courts interpret and apply this duty may well be the single most important factor in how the new Act operates from a legal perspective
- At one level the duty is obviously the new version of the PCR reg 18(1) requirement to “treat economic operators equally” – but is a requirement to treat different undertakings “the same” (unless difference is justified) identical to a requirement to treat them “equally”? – arguably, it is narrower, and does not embrace aspects such as an obligation to treat different cases differently, or to refrain from the application to all bidders of rules with differential effect (i.e. indirect discrimination)
- In any event, this is drafted as an objective standard – the court is the ultimate arbiter of justification, albeit it may accord respect to a thought-through approach adopted by the authority
- What about post-tender negotiation?
  - Seems very likely to involve not treating suppliers “the same”
  - So justification is required – is the fact that someone has submitted the best final tender by definition justification in itself, or is a more nuanced approach required? – probably the latter – post-tender negotiation should not normally be such as might have affected the outcome – might an unexpected change in circumstances provide justification?