

1 October 2024

White Paper Procurement Conference Negotiation Angles

Euan Murray, Partner



SHEPHERD+ WEDDERBURN

Speakers



Euan Murray

Partner

T: +44 (0)131 473 5679

M: +44 (0)7825 964 248

E: ewan.murray@shepwedd.com

Today's Question

- *Negotiation angles - How far can you push negotiations with bidders whilst remaining compliant with the regs, including Competition with Negotiation as a route to market and post-tender negotiations?*



Overview

- Negotiation under each procedure
 - Open Procedure
 - Restricted Procedure
 - Competitive procedure with Negotiation
 - Competitive Dialogue
 - Innovation Partnerships
- Limits on Pre-Tender Negotiation
- Post Tender Negotiation
- Practical Considerations
- The Procurement Act 2023



The Open and Restricted Procedures

- Generally, no scope for negotiation
- Once ITT has been issued bidders are preparing their Tenders
- No negotiation expressly permitted during the process
- Can clarifications be used?
- If clarifications impact the way bidders may tender, consider extending the timescales
- Ensure treating all bidders equally and without discrimination
- Although no negotiation or dialogue phase, you may be able to utilise post tender negotiations, more on this later



Competitive Procedure with Negotiation

- Significantly greater scope for negotiation (it's in the name!)
- Can only be used for more complex procurements where use of the open or restricted procedure would not allow for the effective award of the contract
- Must negotiate the initial tender and all subsequent tenders, **except the final tender**, to improve its content...but
 - **You cannot negotiate the minimum requirements or the award criteria**
- You can use successive stages to reduce the number of bidders but the final stage must have sufficient number of tenderers to allow for genuine competition
- Negotiation is therefore expressly permitted during the competition
- Wording in the Regulations suggests that the final tenders should not be negotiated
- Difference with competitive dialogue...



Competitive Procedure with Negotiation

- Regulation 30(17):

During the negotiations, a contracting authority must—

- (a) ensure equal treatment of all tenderers;*
- (b) not provide information in a discriminatory manner which may give some tenderers an advantage over others;*
- (c) inform in writing all tenderers whose tenders have not been eliminated of any changes to the technical specification or other procurement documents; and*
- (d) following any such changes, provide sufficient time for all tenderers referred to in paragraph (c) to modify and re-submit amended tenders, as appropriate.*



Competitive Dialogue

- Can be used in same circumstances as Competitive Procedure with Negotiation
- Allows for a Dialogue phase – ITPD sets out information on dialogue phase and the parameters
- Dialogue phase effectively allows for two way negotiations and is quite flexible
- Post tender the regulations specifically envisage clarification and fine tuning, which is not referred to in the Competitive Procedure with Negotiation
- Must bear in mind the requirement to treat all bidders equally and without discrimination
- Final Tenders may “Subject to paragraph (18) be clarified, specified and optimised at the request of the contracting authority”



Innovation Partnerships

- Ability to establish an innovation partnership with one or several partners conducting research and development activities.
- Must be aimed at the development of innovative works, products or services and the subsequent purchase of the same provided that they meet the performance levels and maximum costs agreed.
- Must be structured in successive phases following the steps in the research and innovation process.
- Must set intermediate targets and based on those the authority, after each phase, can terminate the partnership or reduce the number of partners (where there are several).
- Contracting authority must negotiate with tenderers the initial and all subsequent tenders, **except the final tender**, to improve its content.



Innovation Partnerships

- Regulation 32(17)

During the negotiations, a contracting authority—

- (a) must ensure equal treatment of all tenderers;*
- (b) must not provide information in a discriminatory manner which may give some tenderers an advantage over others;*
- (c) must, in writing, inform all tenderers whose tenders have not been eliminated of any changes to the technical specifications or other procurement documents; and*
- (d) must provide sufficient time following any such changes for all tenderers referred to in paragraph (c) to modify and re-submit amended tenders, as appropriate*



Limits on Pre-Tender Negotiation

- Cannot make a “material” change that would have had an impact on the identity of the participants
- Consider whether it relates to something set out in a published notice
 - If yes, may need to restart the process
 - If no, would need to be communicated to all bidders
- Ensure you are not negotiating the minimum requirements in a CPN process
- Consider whether any negotiated positions result in an inability to evaluate on a like for like basis.
- Remember confidentiality obligations, is this bidder specific?



Post Tender Negotiation – General Position

- Scope for completing the terms of the agreement in minor ways following appointment of Preferred Bidder under all of the processes
- Arguably nothing to prevent the contracting authorities from negotiating to seek an improvement to that bid (without any other adjustment to project and terms)
 - If not successful you cannot then negotiate with other bidders
- Other negotiations/changes generally ruled out in principle in order as otherwise there is a risk competition will be undermined
- May be an argument that changes to respond to circumstances that were unforeseeable may be acceptable (i.e. where the choice of winner would not have been affected as the issue would have applied to all bidders)



Post Tender Negotiation – General Position

- Procurement Journey envisages PTN is possible provided it does not distort competition or affect the outcome of the tender.
- Noted as distinct from clarification (which is simply to clarify aspects of the tender)
- Important to ensure it does not change the outcome of the competition
- Bid confidentiality must be maintained
- There should be a considered approach to value for money
- Only procedure which specifically provides for an element of post tender discussion is Competitive Dialogue...



Post Tender Negotiation - Competitive Dialogue

- Regulation 31(17) and (18):

(17) The final tenders—

- (a) shall contain all the elements required and necessary for the performance of the project; and*
- (b) may, subject to paragraph (18), be clarified, specified and optimised at the request of the contracting authority.*

(18) Any clarification, specification, optimisation or additional information provided pursuant to a request referred to in paragraph (17)(b) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where such changes are likely to distort competition or cause discrimination.



Post Tender Negotiation - Competitive Dialogue

- Regulation 31(20) and (21):

(20) At the request of the contracting authority, and subject to paragraph (21), negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with regulation 67 (contract award criteria) may be carried out to confirm financial commitments or other terms contained in the tender in order to finalise the terms of the contract.

(21) Any negotiation and finalisation of the terms of the contract referred to in paragraph (20) must not involve changes to the essential aspects of the tender or the procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where such changes are likely to distort competition or cause discrimination.



What about Competitive Procedure with Negotiation?

- Historic case law relating to the previous negotiated procedure with a notice suggested that negotiation was generally permitted post tender subject to limitations based on transparency and equal treatment
 - That it would not impact the identity of the Preferred Bidder
 - That the change is not material
- In terms of CPN, one line of argument suggests that inclusion of the words “except final tenders” means that no negotiation is permitted and that CPN is more restrictive than Competitive Dialogue
- Professor Arrowsmith argues that this is not the case as CPN requires negotiation to “improve” tenders but not necessarily to “complete” them as with Competitive Dialogue and that the difference between the procedures is related to the scope for completing terms after appointing the Preferred Bidder.
- Remember - you cannot negotiate the Minimum Requirements!



Practical Considerations

- Factor flexibility into your process from the outset
 - Consider the need to negotiate in selection of the relevant procedure - do you need to use CPN or Competitive Dialogue?
 - Consider structuring your selection and award criteria such that you can take account of negotiated aspects of tenders
- If using CPN or Competitive Dialogue make sure you are making the best use of the negotiation phase/dialogue phase
- If Post Tender Negotiation is required, is it simply improving the bid from the authority's perspective and not introducing either:
 - a material change; or
 - factors that would have resulted in a different preferred bidder



The Procurement Act 2023

- Why am I talking about the Procurement Act in Scotland?
- Allows for a competitive flexible procedure
 - Could your process be structure to specifically provide for post tender negotiations with the preferred bidder?
 - Act itself is silent on post tender negotiations
- No case law yet and may diverge from case law relating to Scottish procurement legislation





Questions



SHEPHERD+ WEDDERBURN

shepwedd.com

Edinburgh

9 Haymarket Square
Edinburgh
EH3 8FY
T +44(0)131 228 9900

Glasgow

1 West Regent Street
Glasgow
G2 1RW
T +44(0)141 566 9900

London

Octagon Point
6th Floor, 5 Cheapside
London EC2V 6AA
T +44(0)20 7429 4900

Aberdeen

37 Albyn Place
Aberdeen
AB10 1YN
T: +44(0)1224 621 166

Dublin

27/28 Herbert Place
Dublin
D02 DC97
T +353 1487 1119

© 2024 Shepherd and Wedderburn LLP. Shepherd and Wedderburn LLP is a limited liability partnership (with registered number SO300895) regulated by the Law Society of Scotland and authorised and regulated by the Solicitors Regulation Authority (with number 447895). Shepherd and Wedderburn Europe LLP is registered with the Law Society of Ireland with number F9807. This material is for general information only and does not constitute legal or other professional advice or seek to be an exhaustive statement of the law and should not be relied on. Professional advice appropriate to a specific situation should always be sought. For further information, please speak to your usual Shepherd and Wedderburn contact.