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Using Real Life Examples how do you create a golden opportunity for lawful negotiation following final tenders in CD or competitive negotiated procedure?

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Scope of talk

- The law
- Actual practice
- Real life examples
- How to create the “golden opportunity”?

Overriding principles

- CAs shall treat EOs equally and without discrimination and shall act in a transparent and proportionate manner
- Design of the procurement shall not be made with the intention of ... artificially narrowing competition
- Competition shall be considered to be artificially narrowed where the design of the procurement is made with intention of unduly favouring or disadvantaging certain EOs (Reg. 18)
- Confidentiality (Reg. 21)

PCR

Justification for NCP or CD:

- With regard to works, supplies or services:
 - (1) CA's needs cannot be met without adaptations of readily available solutions;
 - (2) include design or innovative solutions;
 - (3) specific circs re nature, complexity or legal and financial makeup or risks attached;
 - (4) tech specs cannot be estab with sufficient precision by CA with ref to standard
 - (5) Irregular or unacceptable bids in open or restricted procedure
- Reg. 26(4)(a) & (b)

Position re Final Tenders under CNP (Reg. 29)

- Negotiation in successive stages to reduce no. of tenders to be negotiated by applying award criteria
- Where CA intends to conclude negotiations it shall:
 - a) inform Ts and set common deadline
 - b) verify tenders conform with min. reqts
 - c) evaluate
 - d) award contract
- CAs shall negotiate with Ts on initial and subsequent tenders to improve content **except the final tender** – Reg 29(13)
- Appears to be no room for post final tender negotiation in CNP unless –
 - failed open/restricted procedure
 - clarification
 - variant bids – Reg. 45
 - contract change – Reg. 72

Final Tenders under CD

- 2 opportunities for negotiation before & after PB:

(1) Before PB

- Final tenders must contain all elements necessary for performance of project
- CA may clarify, specify and optimise tenders
- Must not change essential aspects of bid or procurement where changes likely to distort competition or have discriminatory effect

(2) After PB

- CA can negotiate with T with best price quality ratio bid to confirm financial commitments or other bid terms by finalising contract provided:
 - a) does not materially modify essential aspects of bid or procurement as in OJEU or DD and;
 - b) does not risk distorting competition or causing discrimination

Variants, clarifications and modifications

- **Variant Bids**

- CAs must state min. requirements & apply same award criteria

- **Clarifications**

- CAs can request EOs to submit, clarify or complete – apparently incomplete/erroneous info or docs w/in time limit provided comply with equal treatment & transparency principles – Reg. 56(4)

- **Modifications**

- CAs can change contract during term if falls within “permitted” changes in Reg. 72 without new procurement

These can help reduce need for negotiations after final tenders.

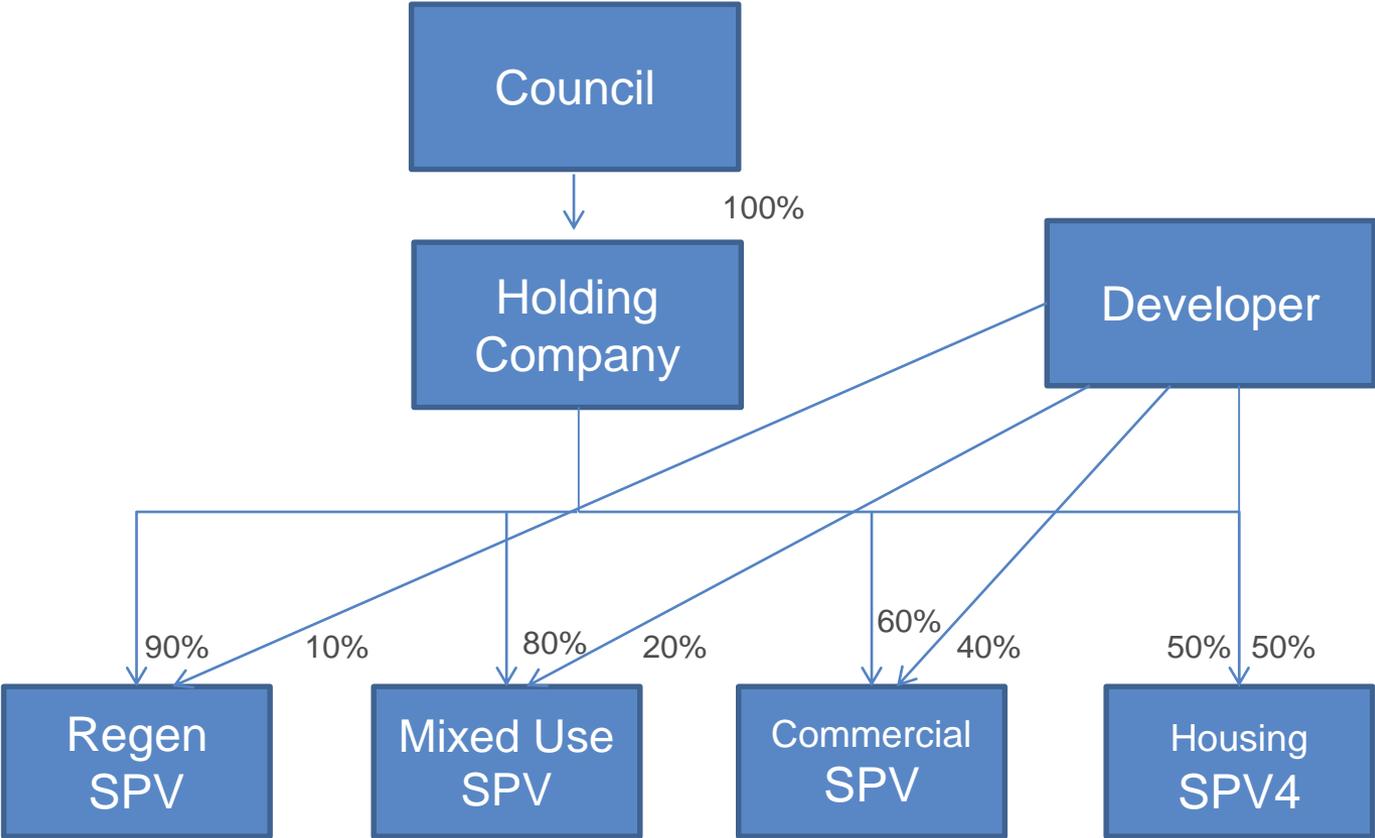
Some Cases of Interest

- Equal treatment & transparency preclude negotiation between CA and Ts
- Walloon Buses re clarification
- BFS Group Ltd v SoS for Defence & Purple Foodstore 2006
- Clarification only on exceptional basis, ltd to corrections, can't favour/disadvantage a T, send to all Ts in same situation, not where justifies rejection and must be after looked at all bids - SAG ELV Slovensko C599/10
- Excel Europe v University Hospitals Coventry (2010)
- More liberal than Slovensko, CA can request amplification on ltd & specific basis provided request for info predated bid deadline & not rejection ground & don't unduly favour/disadvantage Ts – Manova C-366/12
- Clinton v Dept for Employment (NI – 2012)
- CA's power to negotiate in CNP cannot stretch to negotiating bids non-compliant with mandatory requirements – Nordecon v Rahandusministeerium C-561/12
- CA has no duty to correct T's mistake – Adia T19-95 Leadbitter (2009) & Legal Services Commission 2011 unless proportionate to resolve ambiguity Tideland T-211/02
- Edenred (2015) liberal approach to parameters

What happens in practice

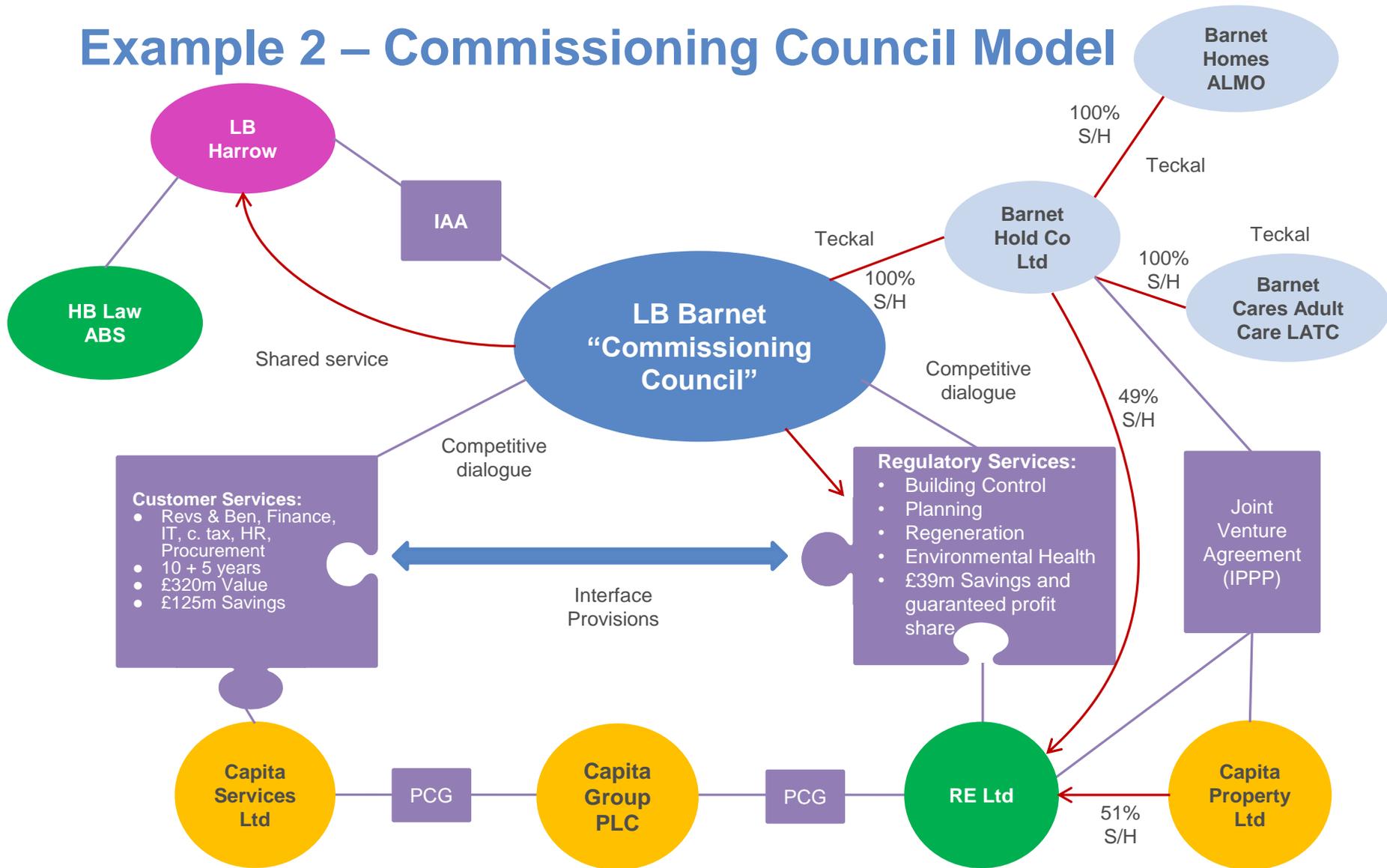
- Factual context
 - Ts' bid budgets limited during competition
 - CAs can't afford to underwrite all Ts' bid costs upfront
 - CA's bargaining position weakens when down to single T / on PB appointment
- Typical issues deal with after PB:
 - Funders' terms & DD
 - Detailed design & PP
 - Certain specialist bid components

Example 1 – Public/Private Property Joint Venture



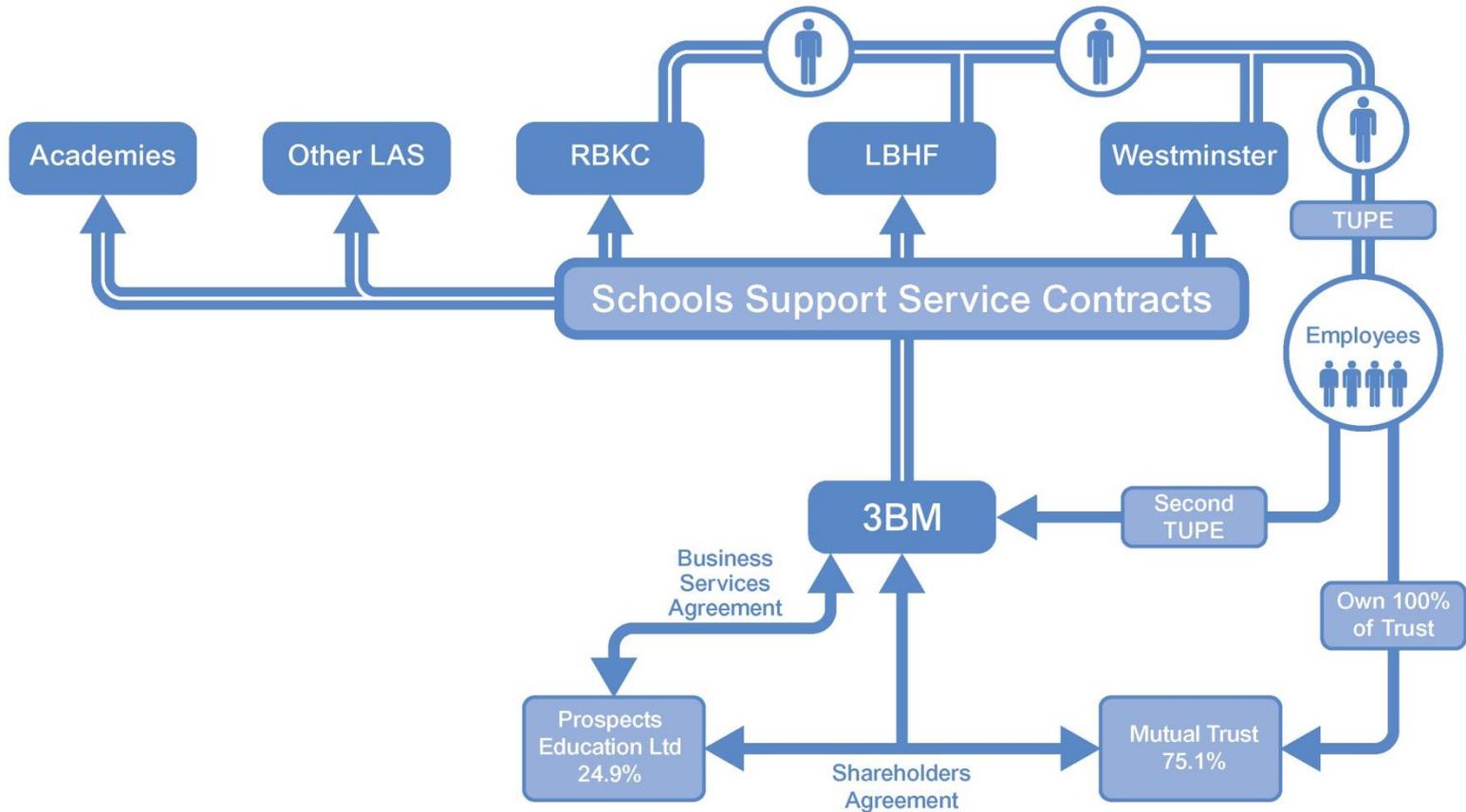
Negotiation: funding terms, shareholdings, outline designs and scheme components (before final tenders)

Example 2 – Commissioning Council Model



Areas of negotiation: interface provisions, profits share, innovation in service delivery (before final tenders)

Example 3 – Public Sector Employee-led Mutual Spin-Out



Areas of negotiation: shareholder consent matters and voting rights (before final tenders)

How to generate the golden opportunity to negotiate?

- Preprocurement market engagement
- Stakeholder consultation
- Realistic timetable & no surprise environment
- Prep work to minimise unknowns helps level playing field
- Consider bid parameters – Presstext principles
- Use market knowledge to scope potential variables affecting price and basic terms
- Consider inviting variants (not too many)
- Negotiation/dialogue protocol
- Don't invite Ts to next stage to make up nos.
- Judicious use of mark-ups and position papers
- Unless dialogue/negotiation results in change it is a waste of time

How to generate the golden opportunity to negotiate?

- Consider commercial sustainability
- Don't conclude negotiation/dialogue too hastily
- Don't negotiate to the wire
- Consider reserve bidder (RB)
- Scope outstanding detail in PB & RB letters to minimise backsliding
- Better no deal than a bad deal - be prepared to walk away
- Well-prepared and candid debriefings

Conclusion

- For legal & commercial reasons, post tender negotiations should be scoped in advance and limited in remit.
- Any negotiations should not stray beyond parameters of the original procurement.

Any questions?

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