

White Paper 2024

Belfast

Negotiation Angles

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How far can you push negotiations with bidders whilst remaining compliant with the new act, including new routes to market and post tender negotiations?

Negotiation – a timeline

PSCR 1995

- **Reg 13:**
Negotiated Procedure

PCR 2006

- **Reg 18:**
Competitive Dialogue
- **Reg 17:**
Negotiated Procedure

PCR 2015

- **Reg 29:**
Competitive Procedure with Negotiation
- **Reg 30:**
Competitive Dialogue
- **Reg 32:**
Negotiated Procedure without prior publication

Negotiation – where are we now?

PA23

Two competitive tendering procedures (S20(2)):

- Single-staged tendering procedure without restriction on who can submit tenders (an "open procedure")
- Such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding a public contract (a "competitive flexible procedure" or "CFP")

(S20(3)) Contracting authority must ensure procedure is proportionate – both in the context of the procedure choice and the design of the process in a CFP

No formal explanation or justification necessary for use of CFP

When will negotiation be permitted under the PA23?

Open Procedure

Not permitted. No change to how this single stage process currently operates and to be used for "simpler off the shelf competitions".

Competitive Flexible Procedure

Permitted, but subject always to principles and rules governing procedure.

A CFP can be constructed so as to include or exclude negotiation (akin say to current restricted procedure).

However, use of the CFP must be the default position if any form of negotiation / dialogue is proposed.

A simpler way to procure pursuant to PA23?

Yes

- No need to satisfy specific conditions for using CFP or choose between similar procedures.
- Can conduct process as relevant to project – with multiple stages and options.
- CA free to decide what is proportionate subject to PA23 and (most likely) public law principles.

No

- When can a CA reduce numbers to one bidder and be deemed to be "competitive"?
- Absence of what is permissible post-tender stage (note comments in guidance stating the possibility of this).
- Application of S98 record keeping duty in the context of negotiations.

Procurement Act guidance on competitive procedures:

Para 6

"contracting authorities must have regard to the procurement objectives (S12) and meet the procedural requirements applicable to the CFP, such as those relating to time limits and transparency."

Para 12

"procedure as designed is proportionate...having regard to nature, complexity and cost of the contract."

Para 15

"A CA can design a procedure similar to one of the procedures in the previous legislation...or design its own procedure entirely."

Para 41

"dialogue refers to a discussion between the CA and suppliers about any aspect of the procurement."

"negotiation is the discussion between the CA and a supplier with a view to improving the content of tenders."

Procurement Objectives (1)

As both legislation and guidance do not set prescriptive rules for CFP and associated negotiation – the objectives in S12 of PA 23 become key

Failure to comply with such principles is likely to be grounds for challenge to a CFP

S12 states a CA must have regard to the importance of:

- Delivering value for money.
- Maximising public benefit.
- Sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions.
- Acting, and being seen to act, with integrity.

Procurement Objectives (2) – S12 of PA 23 continued.....

In carrying out a covered procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment.

If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage.

Removal or reduction of barriers to participate for SMEs.

Legal Framework for a competitive tendering procedure

PA23 and Procurement Regulations 2024

S19 (Award of public contracts following a competitive tendering procedure)

S 20 (Competitive tendering procedures)

S 21 (Tender notices and associated tender documents)

Regulation 18 (Tender notices: open procedure)

Regulation 19 (Tender notices: competitive flexible procedure)

Regulation 20 (Tender notices: frameworks)

Regulation 21 (Tender notices: dynamic markets except qualifying utilities dynamic markets)

Regulation 22 (Tender notices: qualifying utilities dynamic market notices)

Regulation 23 (Associated tender documents)

Sourcing Playbook*

Guidance refers to the Sourcing Playbook on how to conduct dialogue and negotiation, itself not having been fully updated but refers to procurement reform throughout.

When used properly dialogue / negotiation "offer significant and clear benefits, in particular, enabling risk and assumptions to be thoroughly tested, solutions to evolve and the foundations established for ensuring a successful contractual outcome for all parties".

A successful process will:

- Be commercially and business driven.
- Identify complexities and risk early for dialogue / negotiation.
- Restrict dialogue / negotiation to areas that benefit process.
- Identify a chair and strong team for dialogue / negotiations.
- Be based on pre-agreed negotiation positions.

Clear timetable and project management to mitigate risk of cost and time overruns.

*The Sourcing Playbook is not automatically applicable in Northern Ireland but can influence procurement practices there as a form of guidance or best practice.

Multi-stage CFP

Not a pre-requisite of a CFP – but if successive stages required – CFP is the only option and should be stated in the procurement documents

Each successive stage needs to have clear criteria associated with it and any aspect of the procurement can be discussed

Stages do not need to be limited to negotiation but can include other options such as MVP demonstrations, site visits etc

No minimum number of bidders required (guidance states three for CFP but this is caveated both by initial interest and CA's requirements)

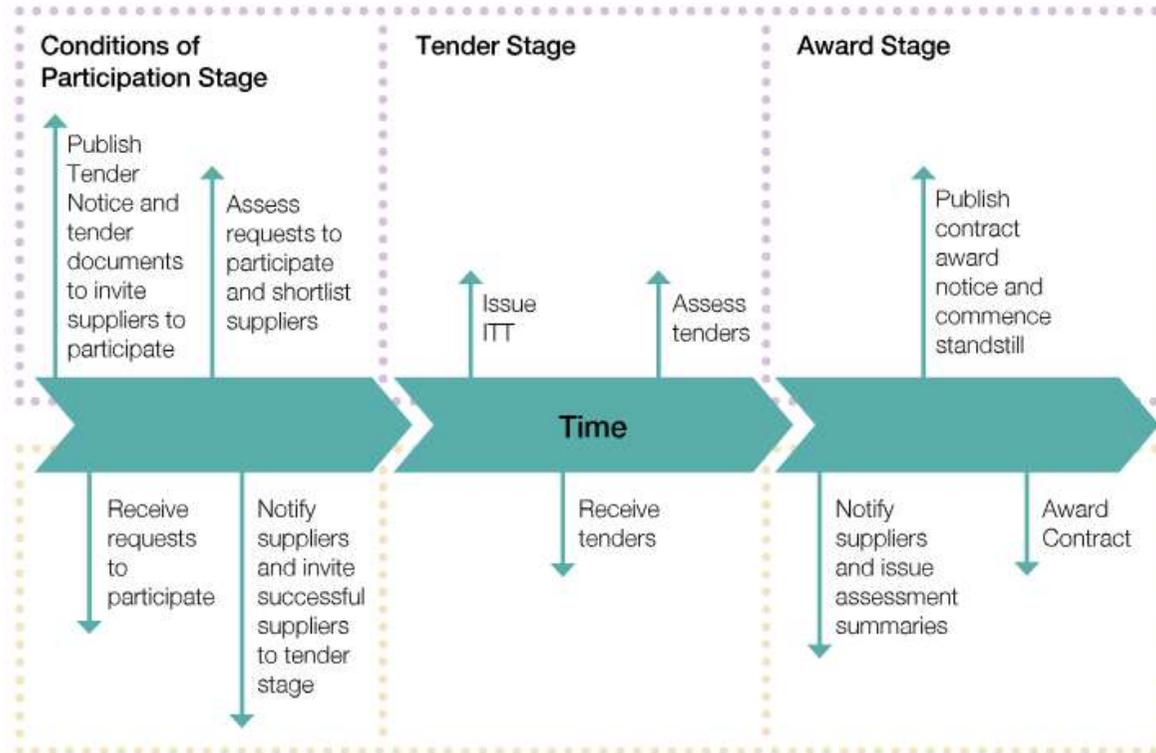
Intermediate Assessment of Tenders

- Reduction must be by application of the evaluation criteria
- Refining award criteria

Exploiting the competitive tension is a key aspect of negotiation

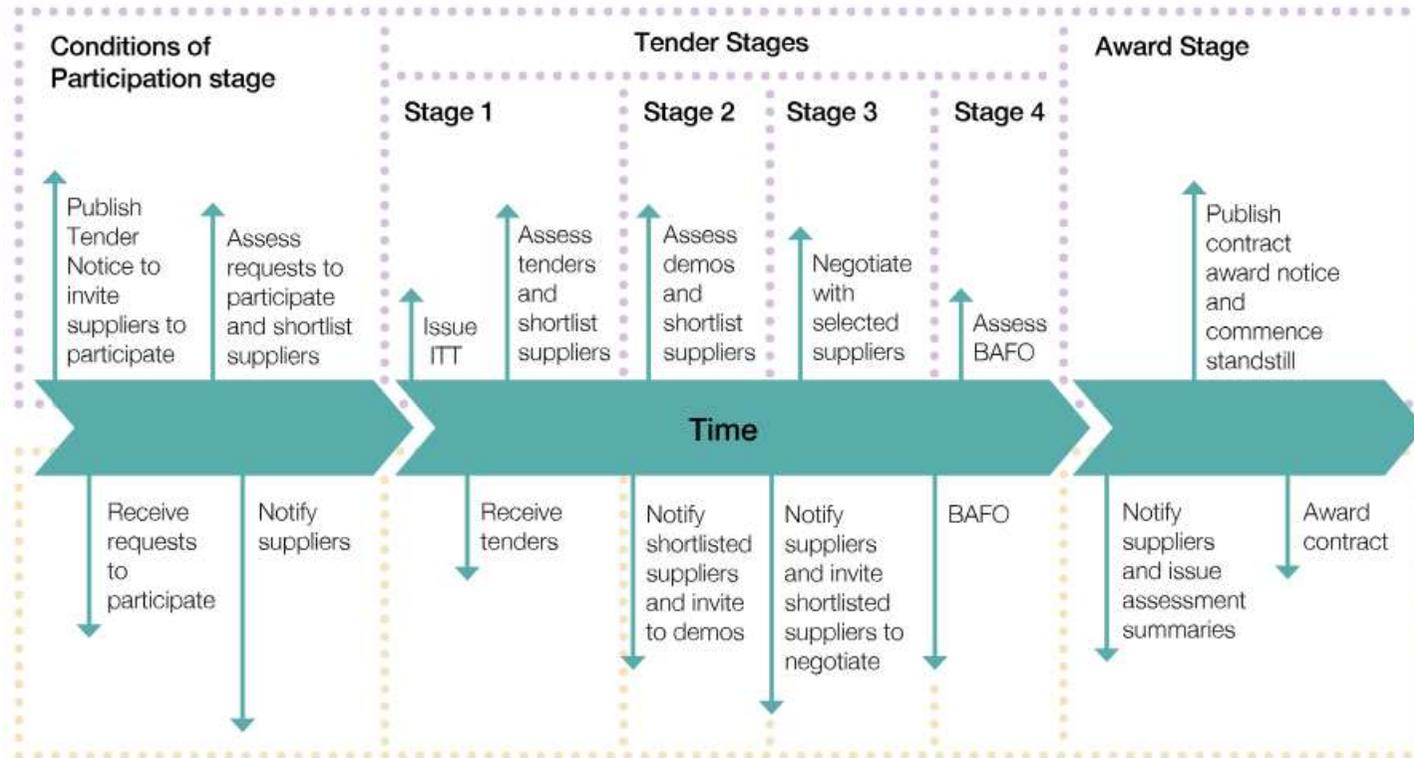
Overview of two-stage tendering procedure

Courtesy of gov.uk: Official Procurement Act 2023 learning modules



Overview of multi-stage tendering procedure

Courtesy of gov.uk: Official Procurement Act 2023 learning modules



Maximising Negotiation Outcomes

Preparation	Negotiation Stage	What can be discussed	What happens after negotiation
<ul style="list-style-type: none">• Use early market engagement to identify complexities• Define the process, key areas and objectives• Understand market issues / suppliers• Consider proportionality	<ul style="list-style-type: none">• Consider issues from market• Pre-meet to agree negotiation boundaries• Consider parties to attend, format and recording• Consider S12 objectives• Looking for a partner: start here	<ul style="list-style-type: none">• Consider any initial responses• Use any feedback to date to decide on the areas to interrogate• Commercial, legal and financial workstreams?• Different topics for different bidders?• Provide feedback as appropriate	<ul style="list-style-type: none">• Capturing actions• Revision of documents• Site visits? Presentations? Demonstrations?• Final tenders and post final tender negotiation.

Final thoughts.....

- The current position for a competitive procedure with negotiation and competitive dialogue
- Some clear benefits of the CFP pursuant to the PA23
- Where could the PA23 do better?
- Is proportionality and the objectives set out in S 12 the cornerstone when it comes to the discussion on negotiation parameters?
- Regardless of the above, is the public sector ready for radical change?
- Will the market ultimately have the final say?

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