



RDTL—MINISTRY OF FINANCE

Procurement Service

BEST PRACTICE GUIDE 5: POST-TENDER NEGOTIATIONS

RDTL—Procurement Guidelines

The Procurement Legal Regime—Decree Law sets out new procurement processes which must be carried out by government procurement officers for purchases on behalf of the Government of Timor Leste. The revised processes and documentation system is explained in this series of Guides. There are now ten new Guides available that broadly summarize the updated key procurement process set out within the new Decree Law. They are available on the Ministry of Finance website (<http://www.mof.gov.tl>) and from the Procurement Service of the Ministry of Finance to assist government officers in their work.

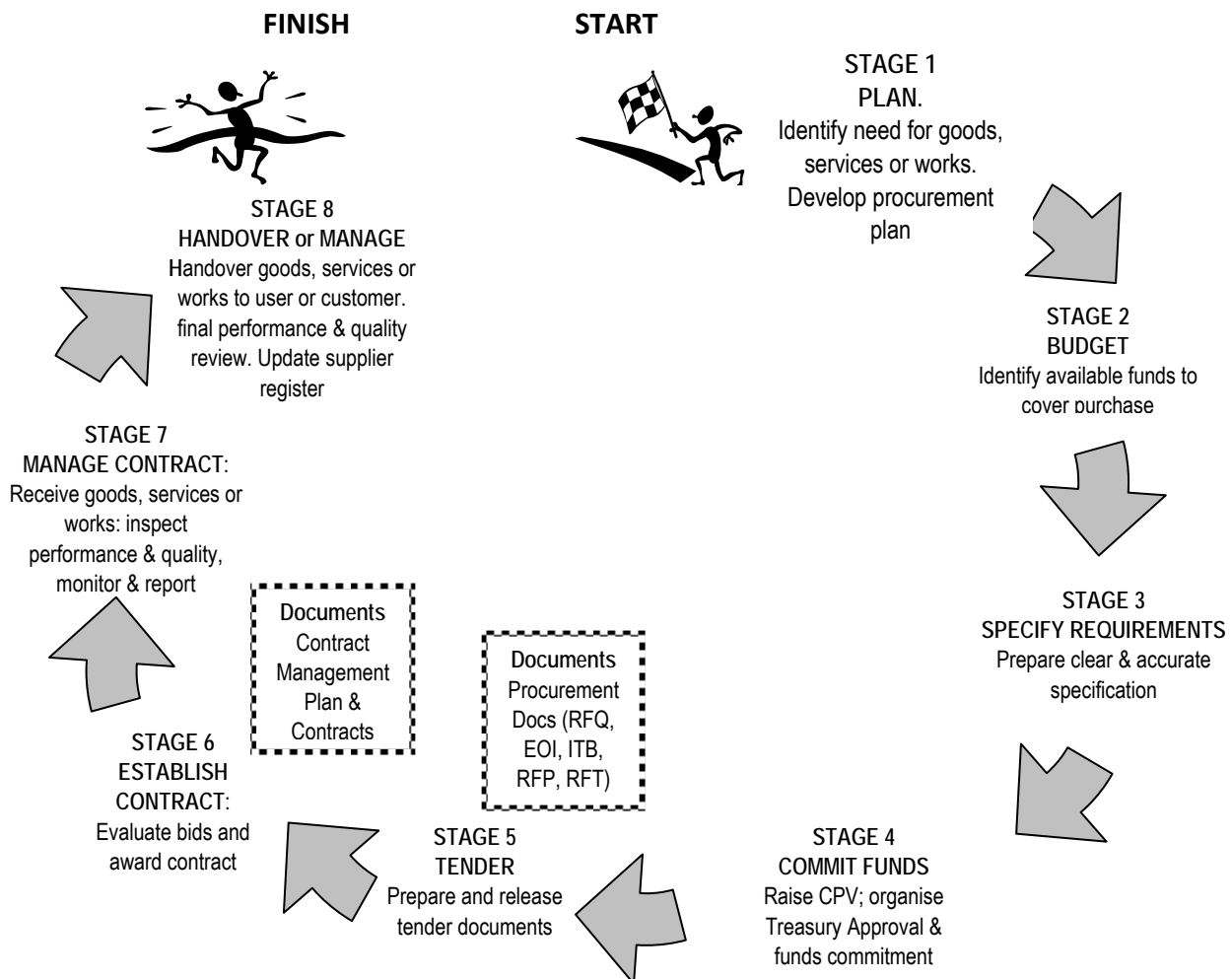
What is this Guide?

This **Guide** is for Government Procurement Managers and senior officers.

This Guide explains **how and when to conduct post-tender negotiations** when procuring goods, services and works for the Government of Timor-Leste.

These negotiations cross over between **STAGES 5 and 6** of the Cycle of Procurement detailed below.

Diagram: CYCLE of Procurement



IMPORTANT: Negotiations over \$250 000 dealt with by Ministry of Finance

Post-tender negotiations for purchases over \$250 000 are only to be undertaken by the **Tender Management Unit** within the Procurement Service, Ministry of Finance.

The aim of negotiations: best outcome for government

The aim of post-tender negotiations is to obtain the best outcome and commercial arrangements for the government. Negotiations should not just be seen as a process of selecting the lowest-priced, compliant bid. Post-tender negotiations should be considered an important part of a purchasing strategy in all government procurement. Some key principles should prevail:

Equal opportunity for tenderers

Once the tender is closed the procurement team makes an initial assessment and selects the best bids to make up a short-list. These short-listed tenderers are selected on the basis that they satisfy mandatory and desirable criteria and offer acceptable solutions (see *Procurement Best Practice Guide 4: Tender Bid Evaluation*). Once the best bids have been selected, or short-listed, it is essential that the equality of opportunity these tenderers (or preferred bidders) is maintained throughout the post-tender negotiations. This can be achieved by ensuring that the following occurs:

- if any changes to the requirements are made (which do not substantially alter the specification) then all short-listed tenderers are given the same information and have the same opportunity to revise their offer; and
- the same general questions and propositions are put to all short-listed tenderers (e.g. the opportunity to improve the solution tendered and/or reduce the costs in a last and final offer). In this process questions of clarification from particular tenders can be answered.

Competitive negotiations

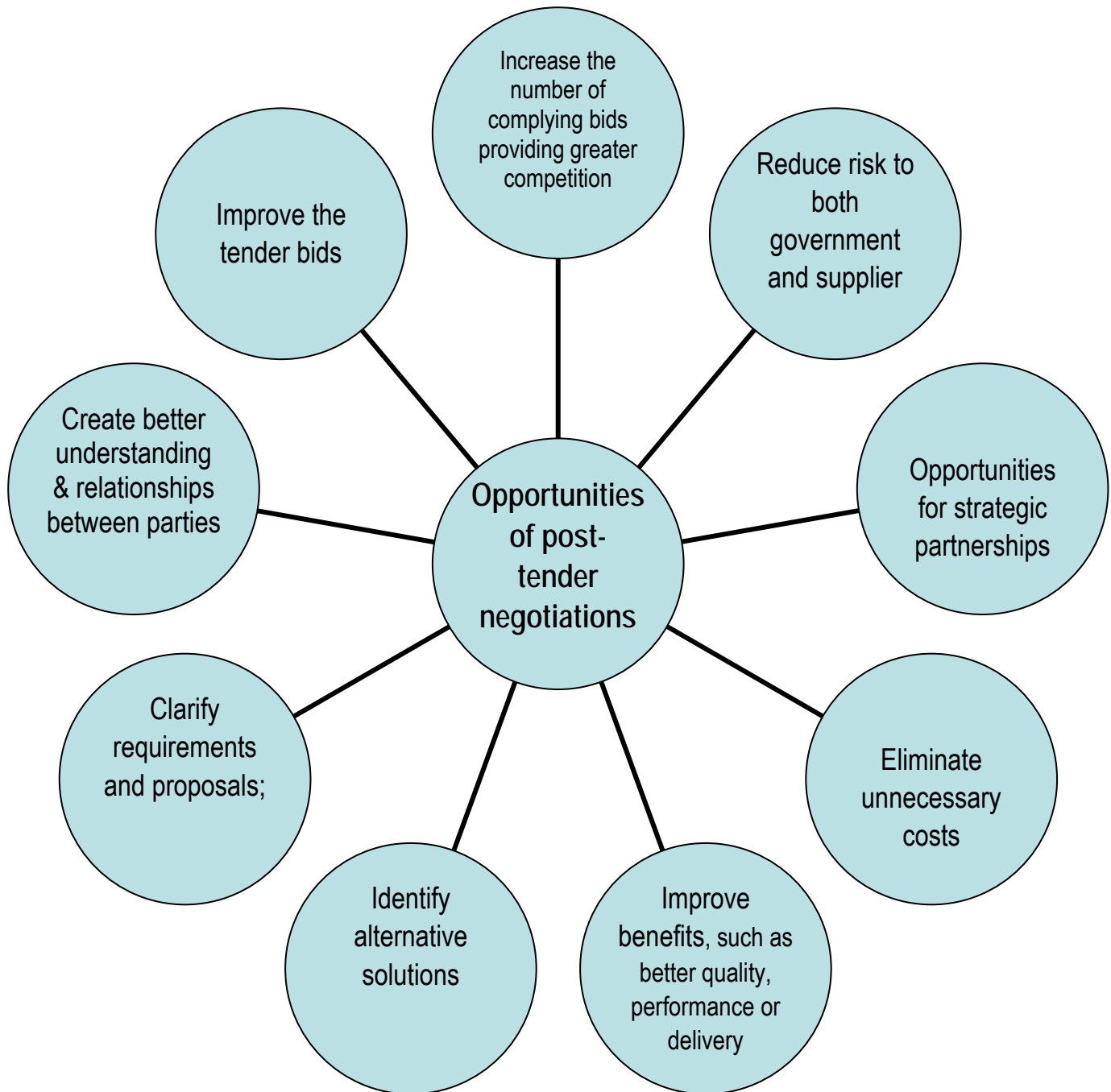
When post-tender negotiations are being made at the same time with two or more short-listed tenderers it can become a competitive process and such a situation should be viewed as a purchasing strategy that provides benefits to both buyer and seller. Usually such competitive negotiations are only done in high value (\$) and/or large and complex purchases. This technique maintains a competitive market situation between the tenderers during the tender evaluation process and post-tender negotiations and one which places the purchaser in a good position to negotiate on price and terms. Although lower costs can be a likely outcome of post-tender negotiations, there are more issues to consider than just obtaining a lower price.

The ethical and probity challenges

Post-tender negotiations can raise serious ethical issues that arise when government officers engage with the commercial market, often referred to as **probity**. These challenges can be addressed through carrying out tender processes in an open, transparent and fair manner throughout the whole procurement cycle and ensuring all tenderers have the access to the same opportunities and information. There are a number of ways probity can be achieved (as listed below and described in more detail in this Guide).

- ☑ Good record keeping
- ☑ Clear evaluation criteria
- ☑ Impartial and fair supplier relationships (open meetings and transparency in specification changes)
- ☑ Planned approach to negotiations and detailed negotiation guidelines
- ☑ Professional and objective price negotiations
- ☑ Trained and experienced negotiators

The opportunities of post-tender negotiations



Post-tender negotiations: 4 key steps

Following tender scoring and evaluation (see *Procurement Guide 4: Evaluating Tenders*) a short-list is prepared. Any post-tender negotiations with these tenderers that follow should be conducted according to a planned approach as described in the steps below and in the following pages:

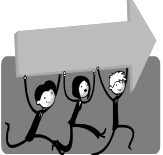


1. Confirm Negotiating Team, Responsibilities & Objectives (based on Procurement Team)

2. Planning & Pre-negotiation Consolidation of Team:

Agreement and unified approach upon;

- government requirements;
- quality and evaluation of short-listed bids;
- current economic market and ■ negotiation strategy: objectives and preferred settlements.



3. Direct Negotiations

First and subsequent negotiation meetings and correspondence with tenderers carried out in accordance with the negotiating policy and principles set out here in the following pages.

See Example below for illustration of possible outcomes of post-tender negotiations.



4. Pre-contract award negotiations

Ensuring Probity: Detailed negotiation guidelines

Negotiation guidelines as set out below should be prepared and the following documents should help:

LIST of items up for negotiation are wide ranging and listed in ANNEX A

A CHECKLIST for government officers: Planned Post-tender Negotiations in ANNEX B

A CHECKLIST for government officers: Key Principles for Conducting Tender Negotiations in ANNEX C.

Ensuring Probity: Good Record Keeping

Good record keeping is a practical aid to the challenges of probity and ethics in post-tender negotiations. A record of all negotiations should be kept for audit purposes. The negotiation process may be conducted by mail, and copies of letters should be filed, or where a meeting or phone call is involved, brief details should be recorded such as:

- date and time of meetings;
- persons present or addresses;
- topics discussed; and
- outcomes.

It is also essential for the potential supplier to document their understanding of the negotiations in a letter back to the Ministry as their latest offer. This further clarifies the progress of negotiations.

Minutes of meetings and other internal government documents, however, should not be exchanged with suppliers as they may create legal difficulties at some time in the future.

Example of Post-tender Negotiations Outcomes (not real case)





Integrated Services Program for Young People

In the past many young people in Timor-Leste have missed out on adequate Government services. Government hopes to fill these gaps and has increased funding over the past two years to the range of Government services offered to young people (16-25yrs) by the Ministries of Health, Education, and Infrastructure. To fulfill its good governance obligations, the Government plans to undertake a review of the provision of these services. As part of this review services will now be coordinated becoming an ‘Integrated Services Program for Young People’. The Government would like the review to measure the efficiency and effectiveness of its programs to ensure it is obtaining value for money for the youth of Timor-Leste.

In seeking an independent body to undertake this review and make recommendations, a detailed specification for consultancy is completed and a public tender process is initiated. Six bids are received and a bid evaluation process is undertaken by a team of Procurement Officers. Most are unsuitable and do not meet the mandatory technical and performance requirements. Two are shortlisted.

Bids from New Dawn Research and Harmony University achieved similar scores in the initial bid evaluation. Both research survey methodologies are similar, and conform to the specifications. New Dawn Research quotes \$260,000 and Harmony University \$300,000. Both New Dawn Research and Harmony University will create 6 short term jobs (3 months) for Timorese citizens distributing and analyzing survey questionnaires. However Harmony University plans to survey 600 families on a targeted basis, using 6 surveyors, and New Dawn Research, 400, using its 6 surveyors.

Short-listed Tenderers



 New Dawn Research	\$260,000	6 jobs x 3 months	400 surveys
 Harmony University	\$300,000	6 jobs x 3 months	600 surveys

The Team is assembled and plan their post tender negotiations to obtain the best value for money.

New Dawn Research offers to cut its price by \$10,000 (to \$250,000), whilst still employing its 6 short term staff and conducting 400 surveys.

However, Harmony University offers a bid of \$260,000, but will increase its staff by another 4, and conduct an additional 100 surveys (totaling 700).

Results of Post-Tender Negotiations

 New Dawn Research	\$250,000	6 jobs x 3 months	400 surveys
 Harmony University	\$260,000	10 jobs x 3 months	700 surveys

Following these PTNs, Harmony University offers the best VFM and is selected as the successful bidder.

Ensuring Probity: Open pre-tender briefings and meetings

Another method of ensuring probity is holding open pre-tender briefings or meetings (within STAGE 5 of the Procurement Cycle). These meetings involve supplying prospective tenderers with copies of the draft Request for Tender documents before tenders are called. Discussions can then take place at open meetings and/or through individual interviews which clarify technical and commercial matters, or explore opportunities to develop the specification, or to remove elements which can reduce costs without affecting outcomes.

Ensuring Probity when making variations to published tender specifications

As a tender proceeds, a Ministry may require variations from the original circulated or published tender specifications (ITB, RFP or RFT). The reasons for this vary, but may include identifying errors or omissions and correcting them, market feedback, or changed conditions. For instance, a Ministry may conclude from new information incorporated in bidders' responses that it needs to change the scope of the tender if the procurement project is to proceed. In such a case, the Ministry should make such changes to the process following proper consideration of the probity implications. For example, variations may occur if:

- indicative or received bids, may prompt the Ministry to rethink the basis on which bids should be sought (due to new information or solutions)
- external factors or disruption to government business lead to delays in preparing tender documents or providing key information to the market.

Changing tender arrangements and specifications during the procurement process in general, and during negotiations in particular, is generally undesirable, particularly if a change was not anticipated in the specifications of the tender specifications (ITB, RFP or RFT). These should be drafted allowing the Ministry a degree of flexibility to adjust requirements. These challenges can be addressed through carrying out tender processes in an open, transparent and fair manner and ensuring all tenderers have the access to the same opportunities and information. There are several ways this can be achieved:

- all bidders understand the basis on which they participate;
- all bidders are given the same information regarding the process at the same time; and
- the change in bid requirements is not perceived as being made to favor or disadvantage a particular bidder or group of bidders.

Project teams are strongly advised to consult a legal adviser and/or a probity adviser before contemplating any significant changes from the terms of the tender specifications.

As stated, in considering whether to make such a change, the Ministry needs to consider the likely impact on the bidders and the risk that it may be liable to compensate bidders affected by the change. For example, the changes being considered may alter the attractiveness of the tender for bidders. The underlying principle is to ensure that any changes do not adversely impact on the integrity of the process. When changes are made, Ministries need to allow adequate time for bidders to modify and re-submit their initial tenders, as appropriate.

PLANNED APPROACH TO NEGOTIATIONS

Negotiations for large or complex acquisitions should involve a planning and a negotiating team. The following pages provide detailed guidelines on how the process should be conducted and managed.



STEP 1: Confirm Negotiating Team, Responsibilities & Objectives

In most instances negotiations are conducted by a team comprising representatives from the users and specialist advisers as required such as an accountant, technical specialist and solicitor (such teams are likely to have already been assembled as the Procurement, Tender or Tender Evaluation Team (see *Best Practice Guide 1: Strategic Procurement Planning & Guide 2: Tender Processes and Documents*).

When negotiating the terms and conditions of contracts the government negotiating officer should seek to achieve the following objectives:

- reach agreement on terms and conditions which are fair and reasonable to both government and supplier;
- ensure that everyone involved in the negotiations are aware that any agreements which are reached are subject to ratification by senior officers in government (according to delegation);
- ensure that the competitive element is maintained wherever possible by ensuring that information given in confidence by potential suppliers is not revealed to others. In addition everyone must be advised that no decision has been made in regard to awarding the contract

Ensuring Probity: Trained and experienced negotiators

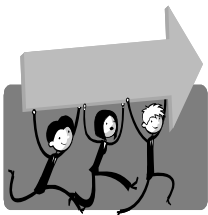
It is advisable that only people with negotiation training and experience lead and conduct negotiations.

Government negotiating officers should remember that in all contracts with potential suppliers, they are a representative of the Government or Ministry. They should be objective and impartial and form professional, formal relationships with their suppliers

Ensuring Probity: Impartial and fair supplier relationships

The development of partnerships or strategic alliances with individual suppliers requires an objective and impartial approach and professional, formal relationships between government officers and their suppliers. In all procurement negotiations bidders, tenderers, suppliers and contractors should be treated as trusted parties and partners and not adversaries to be aggressively or unfairly bargained with. Good post-tender negotiation should facilitate a fair and objective approach to doing business, and competitive suppliers should be able to benefit from these arrangements too.

STEP 2: Planning & Pre-negotiation Consolidation of Team



A unified team approach in dealings with potential contracts is required. Therefore before entering into formal negotiations with potential contractors, adequate preparation is essential to ensure that the negotiating team is agreed upon a complete and thorough understanding and knowledge of the procurement. This includes the following:

Understand government requirements

The first aim of the government negotiating officer and team in preparing for negotiations is to obtain a detailed knowledge of the Ministry's requirements and non-negotiable outcomes and also a complete understanding of the contractual requirements of the Ministry.

Understand bids or offers

The second aim is to fully understand the bids or offers made by the potential contractors. All aspects of offers which are unclear must be investigated and clarified. Also, terms and conditions of a suppliers bid must be evaluated in relation to the total contract price.

Understand current market

The conditions prevailing in the current economic market which may affect the bids made by (potential) contractors (e.g. recession or boom in the economy generally or in particular industries; fluctuations in prices of inputs to production) should also be considered. It may be necessary for the negotiating team to meet and clarify with each other or their advisors these issues prior to commencement of the negotiations.

Determine negotiating strategy

The negotiating team should agree upon a base position from which to negotiate and a strategy for negotiation. The key elements in a negotiating strategy are:

Clear leadership and unified team

The team leader must make it clear who in the team has primary responsibility for negotiating the various aspects such as solutions, terms and conditions. Any differences of opinion between team members during the negotiations must be settled by internal discussion so as to present at all times a united approach externally to the tenderers or suppliers.

Determine buyers objectives and preferred settlements

The team should determine in advance appropriate objectives, and establish a minimum and maximum limit for each item or objective. Objectives represent 'preferred settlements' and taken together they represent a package covering possible negotiable aspect of the purchase. The team will need to determine in advance the appropriate degree to which each objective needs to be specified for possible disputed aspects, i.e. rank the objectives. Setting out to decrease the potential contractor's offer by a certain per cent or to secure the best possible price is not a sufficient objective.

Analyse supplier's objectives

The team leader should also analyse the potential contractor's objectives and thereby seek to assess what the potential contractor's minimum and maximum offers might be. This approach should assist in assessment of the potential contractor's true position.

Commitment to negotiating principles

Once objectives have been determined, the team leader should formulate a strategy to achieve them. The following principles should be observed:

- always keep your particular objective (in relation to the aspect of the negotiation under discussion) in mind;

- ensure that the planned strategy is flexible and adaptable to changing circumstances;
- instead of renewing an approach in the same form after it has failed, consider the possibility of approaching it a different way; and
- ensure that a way exists to reach an equitable compromise without humiliation on either side.

Review ANNEX C: Key Principles for conducting negotiations.

Ensuring Probity: Professional and objective price negotiations

Price is an obvious focus for post-tender negotiations. Price negotiation by government officers should be done in a professional, objective and forthright manner. It should not be viewed as unethical for a government buyer to challenge the prices quoted by a supplier. A supplier will naturally act to maximise company profits and price a bid according to the highest level at which the market or a buyer can pay. Buyers within government have a corresponding duty to minimise costs as much as they can without risking the quality of goods or services.

It is possible that suppliers will anticipate the prospect of a price negotiation and artificially inflate their initial bids accordingly. However suppliers must balance this with the knowledge that price is a key criterion for selecting and short-listing bids and quoting inflated prices may eliminate them from consideration. Ministries need to think about these issues when planning a purchase and when preparing for negotiations with suppliers.

STEP 3: Direct negotiations with tenderers



First Negotiation

Seating arrangements

Before a negotiating meeting occurs, the seating arrangements should be determined. The best seating arrangement, for all parties, is to have both teams facing each other down the sides of an oblong table, with the team leader for one side facing the other team leader, flanked by the respective team members. These team members, however, should not be paired off across the table according to their areas of expertise. Instead, they should be placed at opposite ends of the table so that all discussions go across the negotiating team leaders.

Order of issues and resolutions

As a first step in negotiation the order of the issues is agreed to. The alternatives are:

- the issues can be negotiated one at a time and a resolution reached prior to moving to the next issue; or

- all the issues can be established and discussed individually, without resolving any single issue until the full extent of the contentious issues and associated concessions is apparent to everyone involved.

Ensuring Probity: Selecting preferred bids and initial negotiation with bidders

As part of the initial evaluation of bids (see ***Best Practice Guide 4: Tender Bid Evaluation***) or as part of early post-tender negotiations, government procurement officers may need to:

- seek clarification from individual bidders on their tender responses;
- apply additional assessments to all the bids; and/or
- negotiate with one or more bidders to obtain a more competitive best bid or determine whether a bid is acceptable.

These type of post-tender negotiations should be carried out by the ***Procurement Service, Ministry of Finance*** on behalf of the Ministry if the procurement value is above \$250 000.

As a guide, at this stage of the post-tender negotiations:

- bids should be rejected if they do not fulfill requirements or the bidder's response has not demonstrated a clear prospect of winning the tender;
- all bids considered acceptable and short-listed should be further evaluated to determine whether each bid should proceed. A bid is acceptable if the bidder could readily address any outstanding matters if their bid was to proceed into post-tender negotiations.
- The procurement process must achieve a value-for-money outcome: supplier's reliability and viability and the total cost of performing the task over time.

The probity principles set out in this Guide need to be adhered to. However, unique circumstances must be taken into account. The procurement strategy should carefully consider the rules to apply to the process and they should be articulated in the tender documentation.

Negotiation Techniques

Difficult negotiations

Members of a negotiating team should avoid questions which antagonise those they are negotiating with, create feelings of inferiority or cause other negative reactions. When a question is unanswered, the respondent should not be left to flounder indefinitely, and it should be clear and noted when a question has been set aside and may be the subject of later discussion.

Lack of agreement

If agreement on a particular issue cannot be reached, the issue should also be deferred—the point of difference should be summarised and the matter noted and set aside. If several consecutive issues cannot be resolved, it may be necessary to change the approach in order to develop a pattern of agreement.

Summary notes

A summary of the facts and agreements reached at each stage of the negotiation should be noted. In lengthy negotiations, summaries and conclusions may be required at various points, in particular, when a major point of issue has been resolved or has been exhaustively analysed without resolution and the issue is to be deferred until later. However, throughout the negotiations, minutes of meetings between government procurement officers and suppliers should not be exchanged as they may create legal difficulties at some time in the future.

Competition maintained

Negotiating teams should ensure that where more competitive offers or bids have been made, a 'competitive situation' is maintained throughout any pre-contract award negotiations. All team members should be aware that an invitation to negotiate with one potential contractor should not preclude negotiations with others. Accordingly, wherever possible during a pre-contract award negotiation the firm should be referred to as the 'tenderer' or 'supplier', rather than as the 'contractor'.

Negotiate all terms and conditions

Negotiating teams should bear in mind that negotiations are not necessarily concluded when the prices and delivery schedule have been agreed. Agreement must be reached on *all* relevant terms and conditions expected to be part of the contract.

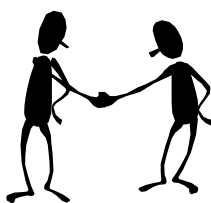
For a list of all possible items see ANNEX A: Examples of possible negotiable items and issues.

Standard and non-standard conditions

Standard government conditions should apply except in special situations where it might be inappropriate (e.g. in the case of high value or complex contracts, or a major overseas acquisition, requiring more detailed and more relevant terms and conditions). If standard conditions are not acceptable to the selected tenderer, attempts should be made to modify them so that they are suitable to all. Completely new clauses should be avoided unless there are unique features of the contract being negotiated which prevent the standard conditions or modified form being used.

Government negotiating teams must ensure that there is no conflict between the various conditions to be included in the contract. This is best achieved if each clause is treated as a part of the whole contract and not as a separate entity.

STEP 4: Pre-contract award negotiations



In some instances, negotiating teams will comprise a solicitor who will provide legal advice and draft new and/or amended contract clauses. In large value or complex contracts requiring considerable amendments to the standard contract terms and conditions, the solicitor will prepare the final contract which is agreed to by both parties. The contract should be an entire agreement namely include all contractual issues (with no ambiguities) required for the purchase.

At the conclusion of contract negotiations there must always be a signed contract or 'Heads of Agreement' and includes all terms and conditions agreed (see *Procurement Best Practice Guide 6: Contract Establishment*).

ANNEX A

LIST of NEGOTIABLE ITEMS and ISSUES

- | | |
|---|---|
| <input type="checkbox"/> acceptance testing | <input type="checkbox"/> installation and commissioning |
| <input type="checkbox"/> access to premises | <input type="checkbox"/> insurance |
| <input type="checkbox"/> alternatives offered | <input type="checkbox"/> life cycle support |
| <input type="checkbox"/> arbitration | <input type="checkbox"/> liquidated damages |
| <input type="checkbox"/> buyer-furnished equipment, services or consumables | <input type="checkbox"/> maintenance |
| <input type="checkbox"/> cancellation terms | <input type="checkbox"/> order quantity and packaging |
| <input type="checkbox"/> charging for consumables | <input type="checkbox"/> ownership of intellectual property, where appropriate |
| <input type="checkbox"/> completion dates | <input type="checkbox"/> payment terms and arrangements; method; timing |
| <input type="checkbox"/> defects liability | <input type="checkbox"/> performance bonds; bank guarantees; retention monies |
| <input type="checkbox"/> delivery dates | <input type="checkbox"/> price and price variations |
| <input type="checkbox"/> determination of contract cost | <input type="checkbox"/> production schedules |
| <input type="checkbox"/> discounts | <input type="checkbox"/> profit or return on investment |
| <input type="checkbox"/> documentation requirements | <input type="checkbox"/> quality management; certification; required tests; cost of testing |
| <input type="checkbox"/> duration of contract | <input type="checkbox"/> sources of particular components, sub-assemblies or service |
| <input type="checkbox"/> freight terms and packaging; freight escalation; verification of costs | <input type="checkbox"/> specification changes |
| <input type="checkbox"/> functions and performance | <input type="checkbox"/> new generation technology |
| <input type="checkbox"/> guarantees and warranties | |
| <input type="checkbox"/> incentives for suppliers | |

ANNEX B

CHECKLIST: Planned Post-Tender Negotiations

The factors listed below will be relevant to most post-tender negotiations. Use this as a checklist as you proceed through the steps.

- Ensure you have the authority to negotiate and that you understand the limits of that authority.
- Establish a negotiating team and arrange to call on expert advice (technical, legal and probity) when necessary. Seek early involvement of a solicitor where legal advice may be required.
- Ensure that those leading the negotiation team are suitably trained and experienced in conducting negotiations.
- Ensure the team completely understands both the specification requirements and the bid responses offered by bidders.
- Identify non-negotiable items.
- Determine and agree on negotiating technique and tactics and the roles of each team member and review these when necessary.
- Prioritise aims and establish realistic limits for each factor to be negotiated.
- Understand and know the supply market and what it offers and the benefits the successful supplier may expect.
- Learn what you can about the supplier's operations and reputation.
- Obtain information about members of the suppliers' negotiating teams and the approach to negotiation that they may adopt, and adjust your approach accordingly.
- Make sure you understand the authority given to the suppliers' negotiators.
- Ensure effective methods of decision-making and communication are established within your own organisation and with the supplier.
- Establish an appropriate method of recording agreements.
- Plan to allow adequate time to avoid pressure for hasty decisions.

ANNEX C

CHECKLIST: Key principles for conducting tender negotiations

- Aim for a good result for buyer and supplier.
- Agree on the issues and the way to proceed.
- Maintain confidentiality and treat suppliers fairly.
- Be careful about using tactics which may undermine your own negotiating position.
- Ensure the bidder is fully aware of, and understands, the real requirements.
- Ensure that the competitive element is maintained whenever possible, e.g. that inappropriate information regarding the contract or order is not revealed to other competing parties.
- Do not give the supplier the impression that the contract/order is a certainty.
- Maintain an ethical approach according to the standards of conduct both expected by and required of you.
- Ensure your overall strategy is flexible and adaptable to changing circumstances, but seek to settle differences within your team outside the negotiation venue.
- Behave so that ways exist for both sides to reach agreement without humiliation.
- Aim to use negotiating techniques which better enable you to find common ground with the other party, e.g. discuss the argument/rationale both for and against the views adopted by either party on a particular issue. This approach can help in more easily obtaining all the relevant facts, considering all available points of view, and providing a summary of views.
- Break for a meeting when the team need to confer privately.
- Be open-minded and make concessions when good reason exists to do so.
- Look for long-term consequences.
- Use standard forms of agreement whenever possible (See *Procurement Best Practice Guide 6: Contract Establishment*). Where they are modified or new clauses written, legal advice may be necessary to ensure the changes achieve the intended results. Ensure changes are considered in the light of the whole document.
- Be careful not to reject offers which you may wish to accept later.
- Make clear that negotiations are 'subject to contract' until you are ready to commit your organisation.
- Ensure that the essential terms have been actually agreed to and entered into the contract document.
- When dealing with a breach of contract (i.e. post contract), ensure that you have the necessary resources, training and experience available. Make clear that you do not waive any other legal rights that your organisation may have.