

# POST TENDER NEGOTIATION

**T**he definition of Post Tender Negotiation (PTN) used in this Guidance is: *"Negotiation after receipt of formal bids or tenders and before the letting of contract(s) with those companies submitting tender(s) offering the best value for money with a view to obtaining an improvement in content in circumstances which do not put the other tenderers at a disadvantage, distort competition or affect adversely trust in the competitive tendering process."*

### WHY IS PTN IMPORTANT?

During the competitive tendering process, PTN may be used to secure value for money, provided that the adverse effects on competition referred to in the definition above are avoided.

### WHO IS INVOLVED?

Senior management is responsible for authorising the use of PTN. Only duly authorised, trained and experienced purchasing staff should be allowed to undertake PTN.

### PRINCIPLES OF PTN

PTN is part of the competitive tendering process, bearing in mind that public purchasing policy is to use competition wherever possible and that the UK's international obligations normally require such competition for purchases above certain thresholds. There will, however, be occasions where competitive tendering is not used: for example, where the costs involved in comparison with the value of the purchase would not justify the process (in which cases alternative means of testing the market for competitive sources of supply should be used) or in the



case of single tendering where only one supplier is available and both purchasing policy and the UK's international obligations allow the purchaser to seek an offer only from that supplier. In these circumstances it will be usual to negotiate with the supplier concerned, in order to reach a mutually acceptable agreement which provides value for money – defined in the public purchasing guidelines as quality (or fitness for purpose) and delivery against price, judged on whole-life costs rather than just initial costs.

*The key principles of PTN are:*

- it must be conducted within the scope of the EC Procurement Directives

The Commission has issued the following statement: *"In open and restricted procedures all negotiation with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities and provided this does not involve discrimination."*

- it must be a controlled and documented process

It should not be used automatically on all procurements.

*Before engaging in PTN, the following criteria must be met:*

- there must be a considered and soundly based prospect of improving value for money

- it must be possible to justify the resource costs
- it must be subject to senior management's prior approval
- trained and experienced purchasing staff must conduct negotiations
- the negotiations must be fully documented, so that a clear audit trail is left
- it must have a clear audit trail

This is to ensure that the use of PTN can be justified and shown to have been conducted in a fair manner:

*The relevant contract files etc should clearly show:*

- the justification for the use of PTN
- the approval for PTN
- the aim of the negotiations
- the methods used
- a precise record of all exchanges, written and verbal
- management approval for the award of contract

*PTN must not:*

- be conducted in ways which put tenderers at a disadvantage, distort competition or adversely affect trust in the competitive tendering process
- in particular be any form of Dutch auction: unfairly trading one tenderer off against another by using the lowest tender to seek a reduction in time or costs from the other tenderers and then repeating the process

## THE PTN PROCESS

PTN needs to be considered in the context of the overall procurement process. During competitive tendering there will generally be a number of stages when contact is made with potential suppliers prior to the award of contract.

*The first contacts after advertisement are likely to be during the process of pre-qualification, which is designed:*

- to select a sufficient number of interested, competent, financially sound suppliers with adequate capacity to undertake the work
- to avoid the ethical hazard of disqualifying a supplier after receipt of tenders for reasons which should have been earlier identified
- to reduce the number of potential suppliers to manageable proportions
- to confirm that the selected purchasing strategy, including the overall timing, is viable and can be met by the market; and
- to avoid nugatory costs for suppliers in the preparation of bids, which can be very substantial

The pre-qualifying process – often called appraisal or screening – is normally carried out by means of buyer research and/or formal questionnaires; and/or visits to suppliers; and/or by taking up references with other clients, banks, etc. The results of these investigations are measured against pre-set qualification criteria and the preferred list of tenderers is chosen. Each is then promptly informed, as are any unsuccessful applicants. Where a 'bidding list' is chosen from an existing 'approved list', the pre-qualifying process is likely to be confined to confirming that the suppliers are currently capable and willing to submit tenders by the due date.

The next contacts are likely to be during the bidding process, when, in response to the enquiry documents, questions of interpretation, acceptability of alternatives, delivery, payment, etc, may be raised by the tendering companies.

*These should be handled as follows:*

- they should be received and the answers transmitted by one person, usually the responsible purchasing officer, who should carefully document the exchanges
- the responsible officer must decide whether the answer to a question by one supplier should be transmitted to all suppliers in order to maintain equitable treatment. (Note: it may be that an answer affects the competitiveness of one tenderer in such a way that the information should not be passed onto others.)

The next stage will be the process of bid clarification. Despite the question and answer process referred to above, the purchaser will probably encounter aspects of the bids received that are unclear or contain errors. Hence there will follow a series of exchanges (which again should be documented) with one or more of the bidders, aimed at clarifying and correcting the bids so that the purchaser thoroughly understands the content of each, and all are without error.

Bid conditioning takes this process a stage further. It is designed to ensure that the bids are fully responsive to all the requirements specified in the enquiry documents and can therefore be evaluated on a like-for-like basis. There may, for example, be differences in the way that the bidders respond to the specified requirements. Bid conditioning will involve establishing whether these are fully acceptable; or whether changes are necessary or desirable; or, equally, whether minor changes to the specified requirements in the light of the bids might be advantageous. These references to the specified requirements relate to all aspects of the bids' contents, both technically and commercially: for example, some might be offering different production or delivery schedules, alternative payment terms, after-sales service, etc, in ways that suggest that minor changes in the specified requirements would provide better value for money. Any minor changes as a result of this process should be confirmed by the bidders in the form of amended offers. But note again: if the discussions with bidders during this bid conditioning period produce significant changes in either individual bids or the specified requirements – to a degree that the overall nature of the business to be let has substantially changed – then the purchaser will need to decide whether formal re-tendering should be undertaken.

Having clarified all the bids and conditioned all or some of them, there follows the initial evaluation of the competing bids. This will involve detailed comparative analysis of all the technical and commercial aspects of the bids, including whole-life costs where appropriate. The results of this initial analysis will identify those offering the best potential value for money.

It is at this stage that PTN may be considered: designed to identify whether any improvements in the bidders' offers are available. Even if one bidder is ahead of the others in value for money terms, it may still be possible to achieve improvements. Hence PTN is the exploration by the parties of the means by which the purchaser can achieve a better deal on a mutually acceptable basis. The potential areas for negotiation will differ for every contract but typical topics might be the terms of payment; quality of goods or services; supply and cost of spare parts; earlier delivery or completion dates; warranties and guarantees; documentation requirements; expediting and inspection procedures; maintenance, repair or after-sales service; compensation for failure to meet specified requirements (eg of delivery, quality etc); and procedures for remedial action for unsatisfactory service. This list is not meant to be exhaustive: it is a concept of purchasing that 'everything is negotiable'.

Following any such negotiations, the outcome should be documented, and substantiated by revised bids. Final bid evaluation can then be completed, and the contract approved at the appropriate authority level and concluded with the chosen supplier. Thereafter the unsuccessful tenderers will be informed. These latter may request a debriefing.

Additionally, and equally importantly, competition must not be distorted by allowing a competitor, not clearly in the lead, a chance to improve its offer without giving the same opportunity to all other competitors. At all stages the competing tenderers must be treated in an honest, fair and ethical manner, while retaining the confidentiality of their bids.

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## PASS CONSULTANCY

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*The PASS consultancy's mission is to help you deliver the best in government procurement through:*

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- Joined-up government
- Improved performance indicators
- Strategic direction and performance
- Opportunities offered by e-government
- Capacity to deliver change to meet identified needs
- Continuous improvement of services and challenging poor performance
- Sustainable development within decision-making processes and delivery of services
- EU-compliant processes
- Best practice procurement training

## PASS TRAINING

Our consultants can provide you with bespoke training packages to suit your needs. Consultancy and training is available for the following: environmental purchasing, partnering, evaluation, e-government, supplier debriefing, UK legal processes and precedents, contract management, EU-compliant tendering and much more.

## PASS ONLINE GUIDANCE

The *PASS* service provides online guidances on all aspects of the public procurement process and legal requirements: [www.bipsolutions.com/html/briefing.php](http://www.bipsolutions.com/html/briefing.php)

## PASS – EFFECTIVE DISPUTE MANAGEMENT

Contractual and procurement-related disputes are time-consuming, expensive and unpleasant. They can destroy client/contractor relationships, can add substantially to the cost of the contract, and can nullify some or all of its benefits or advantages. They can also have an impact on value for money. It is therefore in everyone's interest to work at avoiding disputes in the first place. Inevitably, however, disputes do occur and when they do the importance of a fast, efficient and cost-effective Alternative Dispute Resolution (ADR) procedure cannot be overstated. If a dispute arises, it is important to manage it actively and positively and at the right level in order to encourage early and effective settlement. Unnecessary delays and inefficiency can lead to rapid deterioration in relations and entrenchment of opinions. ADR through PADRE mediation involves the use of a trusted expert third party and is an effective alternative to litigation. PADRE mediation is provided by experts in contracting and public procurement. If you would like more details on how PADRE can help your organisation and become your mediation service of choice, telephone the *PASS* team on **0845 270 7055** or email [pass@bipsolutions.com](mailto:pass@bipsolutions.com).

## PASS HEALTH CHECK

The *PASS* service can help your organisation examine its current procurement organisational structures, strategies, processes, practices and related strengths and weaknesses. It delivers a detailed *PASS Mark Health Check Outcome Highlight Report (OHR)* that outlines areas of strength as well as those requiring further attention, and provides an outline *Project Initiation Document (PID)* designed to deliver a more effective and efficient tendering process that will help you achieve optimum performance and better value-for-money procurement.

## PASS IN-HOUSE PRESENTATIONS

*PASS* consultancy can provide you with in-house presentations directed to buyer or supplier. Each presentation will be bespoke to your requirements, whether they be with regards to improving your tendering practices or your procurement strategy or processes. Contact: [pass@bipsolutions.com](mailto:pass@bipsolutions.com)



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