

## PROCUREMENT POLICY OFFICE

### Directive No. 61

(Issued Pursuant to Section 7 (b) of the Public Procurement Act 2006)

#### Procedures for Negotiations

1. The purpose of this Directive is to set procedures for negotiations pursuant to section 25B, 40(2) and (2A) of the Public Procurement Act 2006 (Act).  
This Directive supersedes Circular 15 of 2008 and Circular No. 7 of 2010.  
In this Directive, “chief executive officer” and “Board” shall have the same meaning as in the Public Procurement Act 2006.
2. Competitive Negotiations may be used:
  - (a) as a method of procurement, subject to the conditions stipulated at section 25B (1)(a), (b), (c) and in regulation 5B of the Public Procurement Regulations 2008 (Regulations); and
  - (b) as a complementary method in accordance with section 25B (1)(e).
3. Regulation 8 of the Regulations provides for special circumstances for negotiations pursuant to section 40(2) and (2A) of the Act.
4. The procedures to be followed are annexed to this Directive as shown below.

<b>Legal Provisions</b>	<b>Procedures</b>
Section 25B (1)(a), (b), (c) of the Act and in regulation 5B of the Public Procurement Regulations 2008	Annex A
Section 25B (1)(e) of the Act and regulation 8 of the Public Procurement Regulations 2008	Annex B

5. This Directive shall have immediate effect

**Procurement Policy Office**

**30 November 2021**

## **Procedures for Competitive Negotiations**

### **1. Competitive Negotiations**

When competitive negotiations are resorted to in accordance with section 25B(1)(a), (b) and (c), the public body shall proceed in the following manner:

- i. Negotiations shall be conducted with each of the selected bidders deemed fully qualified and best suited.
- ii. Discussions shall emphasize qualifications and suitability, based on the factors in the bidding document.
- iii. Price shall be considered but need not be the sole determining factor.
- iv. After negotiations have been completed with the bidders, the Selection Committee shall recommend the award to the bidder that, in its opinion, has made the best proposal. Upon approval of the chief executive officer or Board, as applicable, the contract shall be awarded to that bidder.

### **2. Selection Committee**

The chief executive officer or the Board in case of major contracts shall appoint a Selection Committee, which shall be chaired by a senior officer, not below the rank of Deputy Permanent Secretary, and comprise the chairperson and members of the Bid Evaluation Committee (BEC).

The Committee may co-opt other members, who have the appropriate expertise required, on the approval of the chief executive officer or the Board.

### **3. Preparatory Phase**

- i. The Selection Committee shall scrutinize the report of the BEC and the bids received. It may require each bidder to submit written clarifications about points in the original bid.
- ii. The selected bidders shall be informed well in advance of: -
  - the date, place, and time of the negotiations;
  - the date for a site visit, if required;

- a list of issues related to their bids;
  - any other background information on the procurement;
  - the time allocated for negotiations;
  - a brief explanation of the selection process; and
  - the evaluation criteria for negotiations.
- iii. Each bidder should be provided with identical information.
- iv. For design projects other than those that are the simplest and most straightforward, a site or facility visit prior to negotiations may allow bidders to observe the situation and ask questions before they finalize their presentation for negotiations.
- v. When scheduling the meeting, at least forty-five minutes should be allotted for each interview, and a free period should be provided between each bidder to allow the Selection Committee members to discuss among themselves about the negotiation session just completed, before opening negotiations with the next bidder.

#### **4. Scope of Negotiations**

- i. Negotiations must be confined exclusively to the bidder's proposal and its identified deficiencies in relation to the requirements of the invitation to bid, and the requirements and format of the proposed written contract.
- ii. During negotiations, the bidder may elaborate on its qualifications and may revise, modify, or alter its proposal so that the public body can obtain the best and final offer.
- iii. For the procurement of goods and other services, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of the price for services.
- iv. The Selection Committee shall not:
- Help a bidder bring its proposal up to the level of other proposals through successive rounds of discussion.

- Disclose technical information to a bidder that results in improvement of its proposal.
  - Indicate to a bidder a cost or price that it must meet to obtain further consideration.
  - Disclose proprietary information, technical information or ideas, or cost information of another bidder.
  - Advise a bidder of its price standing relative to another bidder.
  - Disclose the relative strengths and weaknesses of competing bidders.
- v. During the negotiation process, the Selection Committee must be sensitive not to disclose any unauthorized information that may provide an unfair advantage to one bidder over other bidders.
- vi. The evaluation criteria used in the selection of bidders for the negotiations stage shall also guide the negotiations.

## **5. Conducting Negotiations**

- i. The Selection Committee is responsible for conducting negotiations in a manner that will ultimately lead to the award of a contract to a bidder. The objective of the negotiation process is to arrive at a complete agreement on all basic issues and not leave any issues for later negotiation. Thus, negotiations should be conducted so that best and final offers can be accepted without the need for further negotiations.
- ii. The Selection Committee should:
- Lead and control all discussions.
  - Identify deficiencies.
  - Advise the bidder of deficiencies in its proposal so that it can satisfy the bidding requirements.
  - Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal.
  - Resolve any suspected mistakes by raising them for the bidder's attention as specifically as possible, without disclosing information concerning other bidders' proposals or the evaluation process.

- Provide the bidder a reasonable opportunity to submit any cost, price, technical, or other revisions to its proposal that may result from the interviews.
  - Inform a bidder that its cost or price is too high or unrealistic.
- vii. The Selection Committee should document its proceedings and final decision.
- viii. On completion of the negotiations, the Selection Committee shall submit its report to the chief executive officer or the Board, as applicable, who would request the selected bidders to submit their best and final offer, which shall not be further negotiated.

**6. Award of Contract**

- i. After reviewing the recommendation for award without negotiations to the bidder who has submitted the best offer (if such was provided in the bidding document) or after having completed the negotiations and evaluated the best and final offers, the Selection Committee may recommend the approval of award to the selected bidder to the chief executive officer or the Board.
- ii. The chief executive officer or the Board shall approve the award as recommended or request the Selection Committee to review its recommendation on specified grounds.
- iii. No award shall be made based on criteria not specified in the bidding documents.

**Procedures for Negotiation**

**Applicable to negotiations under Section 25B (1)(e) of the Act and regulation 8 of the Public Procurement Regulations 2008**

**1. Application of these procedures**

1.1 As per section 25B(1)(e) of the Public Procurement Act, 2006, Competitive Negotiations may be used as a complementary procedure, because –

- (i) there is a tie in the lowest evaluated price by 2 or more bidders;
- (ii) there is a tie in the highest combined score points; or
- (iii) the lowest evaluated price substantially exceeds the estimated cost.

1.2 Regulation 8 of the Public Procurement Regulations 2008 provides for special circumstances for negotiations.

1.3 In accordance with the provisions of section 25B(1)(e) of the Act,

- (i) where there is a tie between 2 or more bidders, negotiations shall be carried out with those bidders; and
- (ii) where all the bids received are substantially above the updated cost estimate, the public body shall limit invitation for negotiations only to those bidders whose bids are substantially responsive and do not exceed the cost estimate by more than 25%.

1.4 When negotiations have been completed in respect of (i) at paragraph 1.3 above, the bidders shall be invited to submit their best and final offer.

1.5 Negotiations in respect with (ii) at paragraph 1.3 above shall start with the bidder having submitted the lowest evaluated substantially responsive bids. In case negotiations fail with that bidder, the next lowest shall be called for negotiations.

The updated cost estimate must be disclosed to the bidder who is invited to negotiate.

## **2. Procedures**

These procedures shall therefore apply, with appropriate variances, in the above circumstances.

- 2.1 The chief executive officer of the Public Body or the Board shall appoint a Negotiating Team which will be responsible to prepare the strategy for negotiation and a Team Leader from among officers who are knowledgeable in all aspects of the procurement and shall include members of the Bid Evaluation Committee.
- 2.2 The chief executive officer or the Board shall oversee the negotiations process by carrying out a pre-negotiation review and approving the strategy for negotiation.
- 2.3 A review is conducted so that the chief executive or the Board can be assured that the Team leader of the Negotiating Team is well prepared and that the other members of the team are agreeable with the strategy of negotiations to achieve the expectations of the Management or the Board.
- 2.4 From the Negotiating Team's point of view, the advantage of the review is the opportunity to understand the expectation of management and to obtain the authority to handle problems. The review can be:
  - (a) a quick run-down of the facts and the objective if it is a small deal; or
  - (b) a formal presentation by the negotiating team or a written justification and request for clearance to proceed.
- 2.5 The Public Body concerned shall provide a member of its staff as secretary to attend the negotiation sessions and to maintain record of the proceedings. Such record shall be part of the procurement records.
- 2.6 The outcome of a negotiation shall only be executed after approval of the Board or chief Executive of the Public Body depending on whether the procurement is for a major or minor contract.

2.7 As negotiation is an exceptional measure, used in exceptional circumstances, public bodies should ensure that the bidding exercise is preceded by sufficient market search and the correct methodology is used to work out the cost estimate.

Moreover, the specifications, qualifications and evaluation criteria should not be set in such a manner that would restrict competition.

### **3. Works Contracts**

3.1 The strategy for negotiation may be based on the content of the bid and particularly the Bill of Quantities or Activity Schedule.

3.2 The Bid Evaluation Committee has the responsibility to comment on the reasonableness of the Lowest Evaluated Substantially Responsive Bid as per the estimate and rates obtained in the table above.

In case the lowest evaluated bid is more than 15 % higher than the updated estimated cost, the Evaluation Report should identify the high-priced items or bills.

3.3 The final negotiated price for Works Contracts shall not exceed the updated estimated cost by more than 15%.

### **4. Contracts for Goods, Other Services, and Consultancy Services.**

#### **4.1 Goods**

There is no set percentage limit to determine whether the bid amount for goods is substantially higher than the estimated cost as prices vary according to market conditions, country of origin and various other factors. Therefore, it is up to the Board or public body to identify the causes of the increase to determine whether the bid amount is substantially higher than the pre-bid estimated cost by considering all relevant factors such as current market conditions, country of origin etc.

- 4.2 For **Consultancy Services**, fees can only be negotiated when the method of selection is based on quality only. Otherwise, only the reimbursable expenses can be negotiated.
- 4.3 For **Other Services**, the different components of the bids should be compared with the cost estimates to identify items which can be negotiated.
- 4.4 For **Goods Contracts**, as there is little scope for negotiating the contracts, particularly when their prices vary according to their country of origin, proper market search, which may include early market engagement, should precede the invitation for bids.

Therefore, negotiation for a reduction in price should only be undertaken after proper analysis of the methodology used for working out the cost estimate and identification of the cause of the higher priced bids.