



Negotiating with Confidence: Partnering with Preferred Tenderers.

Probity, Procurement and Tendering Article Series

Navigating contract negotiations is a critical phase in the tendering process, particularly for local governments seeking to finalise agreements with their preferred tenderer. In the fifth and final instalment of our Probity, Procurement and Tendering Series, this article explores the key elements of effective negotiations and provides practical insights into developing a negotiation strategy, maintaining competitive tension and ensuring that the negotiation process is transparent, fair, and legally compliant.

Objectives of the negotiation and the parties

The objective of any successful negotiation is to create a mutually acceptable contract that meets the needs of both parties. To achieve this objective, it is important to identify and assess the specific needs of each party – in this case, the local government and the tenderer – before negotiations commence. This exercise will inform the development of the negotiation strategy, as it enables the local government to anticipate the tenderer's likely demands and gain insight into their non-negotiables. By addressing these considerations early on, the local government can approach the negotiation with a clearer understanding of the tenderer's position.

In addition to understanding the needs of the parties, local governments must also have a clear understanding of the project's primary objectives. Documenting these objectives from the outset ensures that, whilst other aspects of the project may be compromised to achieve the primary objectives, the primary objectives themselves will not be compromised during the negotiation stage.

As local governments are heavily regulated and bound by strict probity requirements, they must take particular care not to jeopardise the integrity of the project or the negotiation itself. Local governments are bound by the terms outlined in the tender documents, and any significant deviation from the original arrangement may require re-evaluating the process, inviting other tenderers to revise their bids or even re-tendering the project entirely.

Premature commitments

A common mistake we see during negotiations is local governments making statements or giving the impression that they will proceed in a certain direction before final decisions have been made. This premature commitment weakens the local government's negotiating position, limits flexibility, and, in some cases, removes competition entirely. This can have significant consequences for the project's value and outcome. It is critical to maintain competitive tension between tenderers throughout the process to ensure the local government achieves value for money.

It must be noted that a local government's negotiating position will weaken once a preferred tenderer is selected, and competition is removed. To the extent possible, local governments should continue to appropriately maintain competition even after this has occurred. This may be achieved by, for example, keeping other tenderers aware of the ongoing nature of the negotiations to maintain pressure on the selected tenderer to offer favourable terms.

Where possible, negotiations should be limited to departures from the local government's position as put forward during the tender process.

Key considerations for a successful negotiation

The negotiation process involves more than just agreeing on terms; it requires careful consideration of the interpersonal dynamics between the parties. Once the needs of both parties have been determined, common ground can be identified and used as the foundation for further discussions. To ensure an effective, fair and accountable negotiation process, local governments should implement the following practices:

1. **Skilled negotiators:** ensure that the officers conducting the negotiations have the necessary skills and experience in commercial negotiations.
2. **Authority:** ensure that the officers have the requisite authority and delegation to make decisions on behalf of the local government.
3. **Resources:** adopt a team approach and ensure that the team has adequate resources to undertake the process.
4. **Planning:** prepare a negotiation strategy that clearly outlines the local government's aims, objectives, constraints, and minimum bargaining positions.
5. **Conflicts of interest:** identify the persons who will be involved in the negotiation and ensure there are no conflicts of interest.
6. **Communication protocol:** agree and adopt a formal communication protocol. This protocol should include (amongst other items) the contact persons for the negotiation, the designated communication channels, clear response timeframes, prohibited discussion topics and the process to submit clarification requests. To promote fairness and prevent any tenderer from gaining an unfair advantage, the protocol should also outline procedures for providing all tenderers with the same information at the same time.
7. **Involvement of advisers:** engage external advisers such as legal or financial professionals to ensure the process is sound from a legal and commercial perspective. These advisers can help mitigate potential risks and ensure compliance with applicable laws and regulations.
8. **Confidentiality:** maintain confidentiality and strictly comply with the agreed procedures for handling confidential or sensitive information.
9. **Document the process and outcomes:** ensure that all communications are documented and archived to maintain a clear and transparent record of interactions.

Negotiation strategy

Contract negotiation requires input from multiple parties with different skills and expertise. We recommend that local governments develop a negotiation strategy to coordinate the negotiation process. A well-prepared strategy is crucial to achieving a mutually beneficial outcome, particularly when working within the heavily regulated local government environment. The negotiation strategy should be finalised before negotiations commence to help the local government stay focussed on its objectives and determine in advance when to walk away or consider retendering.

The local government's negotiation strategy should be developed internally and should not be shared with tenderers. The strategy should:

1. **List and rank priorities:** clearly identify and rank the local government's priorities for the project (for example, the methodology used may be allocated a higher priority than price for a particular project).
2. **Separate needs from wants:** understand the difference between what is absolutely necessary for the success of the project (needs) and what would be nice to have (wants). This understanding will help guide decision-making and avoid unnecessary compromises.
3. **Establish a bottom line:** be clear about the minimum acceptable terms and conditions for the contract. This will serve as the point at which negotiations should either progress towards agreement or come to an end.
4. **Set time constraints:** set realistic deadlines and establish benchmarks for progress to ensure that negotiations do not delay the project timeline.
5. **Assess risks and liabilities:** evaluate the potential risks and liabilities involved with various terms and conditions and decide where there is room for flexibility and where risks cannot be tolerated.

Negotiation plan

The negotiation plan serves as a detailed framework for the negotiation. It should be developed before negotiations commence and shared with tenderers. The negotiation plan should include:

- 1.details of the persons involved in the negotiation and their respective roles;
- 2.a summary of the key items for negotiation and the local government's position on each;
- 3.the method for recording and documenting the negotiations, including the agreed matters;
- 4.an agreement not to introduce new matters during the negotiation, particularly once the core issues have been identified and discussions are underway;
- 5.an agreed timeline for the negotiation process;
- 6.the local government's reporting requirements; and
- 7.the steps required to finalise and execute the contract.

Finalising the agreement

During the negotiation, both parties typically exchange documents that outline their respective positions on the contract terms. These documents serve to clarify each party's position and expectations and may require the tenderer to explain or justify why their proposed terms differ from those of the local government. Local governments must carefully consider how any changes in position (whether by the local government or the tenderer) may impact the overall cost of the project and assess whether the revised terms can be accommodated.

Following agreement on all or most of the contract terms, financial and commercial matters – which would ideally occur before a preferred tenderer is chosen – there may be minor issues that require further negotiation and agreement. Once these remaining issues are resolved, the contract can be finalised and executed.

Final thoughts

Negotiating a contract with a preferred tenderer requires careful planning, a clear understanding of both parties' objectives, and a strategic approach to maintaining flexibility while safeguarding key project goals. By facilitating a fair, transparent, and well-documented process, local governments can achieve outcomes that provide value for money and ensure that projects are delivered successfully and on time. Whether it involves minor adjustments to contract terms or a more significant renegotiation, the focus should always remain on reaching an agreement that benefits the community and the public interest.

How we can help

At Muscat Tanzer, we regularly provide expert legal guidance to local government clients to facilitate effective negotiations, mitigate risks and ultimately secure a favourable and legally compliant agreement. Our team can assist local governments to develop a comprehensive negotiation strategy, provide direct negotiation support, draft and review contract terms, ensure compliance with procurement regulations, manage disputes, and assist with ongoing contract administration to ensure all parties fulfill their obligations under the contract. Please do not hesitate to reach out if we can assist with your next negotiation.

Paul Muscat and Craig Tanzer are also long-term probity and procurement practitioners having been regularly engaged by the Commonwealth, State and many local governments as probity and procurement adviser and auditor on numerous infrastructure asset development and other major procurements. If you require a probity adviser for such a project or would like us to provide probity training to your officers, please contact Paul Muscat or Craig Tanzer to discuss.



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