

Managing consortium bids

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A consortium bid is where two or more entities have decided to come together to bid for a contract opportunity. There is a big difference between consortium and sub-contracting arrangements. Sub-contracting sees one supplier bid for the contract opportunity but delivering at least part of the services through a third party that is contracted to the lead supplier. On the other hand, consortium members are all bidders for the opportunity, and will all enter into the contract with the contracting authority, either as individual organisations or by setting up a new single purpose vehicle (SPV). More of that later...

So, what should procurement and service managers be considering when running a tender where it is likely that consortium bids will be made? Firstly, consider which types of contracts are more likely to attract consortia. Construction work is a good example, where it is common to see a number of contractors and consultants bid as a consortium. There are three key pinch points in a tender process:

1. Selection qualification stage
2. Award criteria evaluation
3. Contract finalisation

1. Selection qualification stage

If the contract is above the regulatory threshold, then you should be using the standard Selection Questionnaire (SQ) as drafted by Cabinet Office. If the contract is for "light touch" services, then you do have a bit more discretion. Regulation 19(4) of the Public Contracts Regulations (PCR) 2015 states that a contracting authority can, "where necessary", set out in the procurement documents how groups of suppliers are to meet requirements relating to economic and financial standing or technical and professional ability, all of which are part of the selection stage. Any particular requirements must be objectively justified and proportionate. It's not always necessary to include a lengthy explanation in the procurement documents, but you should set out a full reason in your Regulation 84 report.

Evaluation of selection questionnaire responses is notoriously tricky with consortium bids but really important, as the reason for the selection stage is to make sure that only competent suppliers are given the opportunity to be awarded the contract. It's often compounded by not all members of the consortium providing information for each question. In some cases this is okay, because different consortium members are doing different things; however, for example, if a consortium member didn't provide financial standing information, that is a risk to you, not knowing whether you will be able to hold them to their liabilities under the contract if they are successful. It also creates a risk in relation to treating bidders fairly; you would never not ask for financial standing information from a single bidder.

It's also a bit trickier to work out how to evaluate some of the responses. Again, do you need responses to all questions from all consortium members or, where they are responsible for different elements of the contract, do you just get information from the relevant members? You will need to be clear, in your evaluation and scoring methodologies for the selection stage, where you require all consortium members to respond and where only some of them, and how those responses will be scored to ensure parity with individual bidders.

2. Award criteria evaluation

This is probably the easiest of the three stages because, regardless of how many members of the consortium there are, they should give composite responses addressing the requirements of the tender. Therefore, this element can be evaluated in exactly the same way as a

response from a single bidder. You will need to reflect on whether the response from a consortium describes the delivery of the solution by the relevant members and that they propose a joined-up and cohesive approach that doesn't leave any gaps.

3. Contract award and finalisation

Regulation 19(6) of the PCR states "Contracting authorities may require groups of economic operators to assume a specific legal form once they have been awarded the contract, to the extent that such a change is necessary for the satisfactory performance of the contract." In other words, if a contracting authority has a genuine reason to believe that consortium members all entering into separate contracts, or signing one contract as individual parties, increases the risk profile or is less likely to lead to a joined-up delivery approach, it can request the consortium members to form a new corporate entity. This is a common occurrence and often a consortium will propose a new joint venture (JV) as part of their bid. There are a few things that you should be live to:

1. A new company has no track record or assets; therefore, it will almost certainly not meet the SQ requirements that the consortium members did;
2. Therefore, the consortium members should be asked to stand behind the JV, most likely through a parent company guarantee; and
3. Ensure that you have proof of insurances and other required approvals or quality marks being held in the name of the new JV. There may be a time delay on some of these being achieved so consider whether there is an interim arrangement to ensure that the services are being delivered to the right standards. If it is a legal requirement then make sure you have enough time in the process for applications to be made.

Once the contract is in place, it's important to make sure that the JV is delivering as the JV and not as a disparate group of suppliers. It is the role of the JV to ensure that you receive services and management information from the JV but there are times when the process can feel disjointed. Regular contract management meetings and analysis of the information being provided will ensure that your supplier is acting as a single entity.

It is worth noting that the public procurement regime is soon to change. It is not anticipated that there will be huge changes to the rules around consortiums. However, for education clients, particularly those that regularly use the light touch regime to award contracts it is worth being aware more generally of the proposal to remove the concept of light touch. This may bring many more contracts under the PCR regime.

If you would like to be made aware of events running once the draft procurement legislation is published, please register your interest by contacting Anja Beriro.

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