Crown Commercial Service

LOCAL PARTNERSHIPS

Government Commercial Function

Local Government Association

CONTRACT MANAGEMENT PIONEER PROGRAMME

Supplier negotiations

PART OF CONTRACT MANAGEMENT SUITE OF TOOLS

CONTENTS

1 INTRODUCTION

This guidance has been developed to support the Local Government Contract Management Pioneer Programme (CMPP).

The purpose of the guidance is to support local authorities with contract negotiations with suppliers to help ensure they are getting what they asked for and need from their suppliers, across the whole of a council's housing function.

Contract negotiation is not just an activity for those with a direct contract management role. It is likely to involve a range of senior and frontline officers within any authority depending on the size and importance of the contract. Although councils have a range of different approaches to housing and housing management, this could include (for example) those dealing with housing development, housing repairs and maintenance, private sector housing, and homelessness prevention. Supplier negotiation is therefore a capability that will need to be identified and supported in housing teams.

Contract negotiation involves reaching mutually agreeable terms and conditions with suppliers. It requires councils to find a balance between ensuring that their best interests are pursued, while accommodating the needs of the supplier.

The aim of the process should be to minimise the risk of a rupture in relationships between the council and its suppliers which can result in misunderstandings, damaging disputes and sub-optimal outcomes for both parties.

If councils do not adequately prepare for negotiations and dedicate skilled resources to negotiate, they are potentially exposing themselves to the risk of accepting unfavourable terms from their supplier.

Some other benefits which councils might hope to achieve from effective contract negotiation include:

- More effective alignment of services to deliver organisational priorities around meeting housing need
- Compliance with Regulator of Social Housing standards
- More beneficial contract terms and conditions
- Improved supplier relationships

2 CREATING THE RIGHT ENVIRONMENT FOR EFFECTIVE NEGOTIATION

Councils can undertake a range of activities which will lay the groundwork for an effective supplier relationship and to facilitate an environment which is conducive to effective negotiation when required. These activities include:

2.1 Before and during procurement

- Developing outcome-based specifications which, if undertaken effectively, can help suppliers to achieve a deep understanding of the service's need, which can in turn lead to better results with more risk passed to suppliers.
- Early supplier involvement in the pre-procurement process to develop practical and innovative solutions which the market can provide.
- Establishing early on whether there are any key issues which may impact on bidders' ability to deliver the contract such as concerns about their track record, their economic and financial standing or their technical capacity and capability.
- Developing a clear understanding of supplier financial standing, profitability and their margins underpinned by benchmarking data from comparable suppliers.

2.2 During contract drafting

Ensuring clarity in contract drafting to avoid ambiguity by using plain English, clearly defining key terms and concepts and avoiding unnecessary legal jargon where possible. This will reduce the risk of the council and suppliers having different interpretations about the meaning of contractual clauses, increase the likelihood that agreements are enforceable and reduce the likelihood of disputes and litigation. It is particularly important that payment terms are explicitly and unambiguously stated in the contract.

Understanding and assessing the basis on which charges for services are to be incurred (for example a schedule of rates or a price per property option for housing repairs and maintenance contracts will have different advantages and disadvantages).

Understanding contract risks including those related to service delivery and financial costs.

Ensuring flexibility in contract terms that allow for adjustments under certain conditions (such as allowing for renegotiation, price adjustments based on market conditions or changes in service levels), along with effective change control provisions to address unanticipated changes which may have a significant effect.

Including clauses that provide protection in case of unforeseen circumstances, such as force majeure, which addresses unforeseen events preventing parties from fulfilling their obligations. These need to be clear and detailed to avoid misinterpretation.

Including dispute resolution clauses, including mediation or arbitration mechanisms, which should help provide a cost effective and less adversarial route to resolution in the event that contractual negotiations should fail.

Using contractual mechanisms such as warranties and indemnities, which can provide protection against specific risks and can outline the expectations and remedies if those expectations are not met. Guarantees also provide an additional layer of assurance, providing a commitment to rectification, replacement, or compensation if the goods or service do not meet the agreed standards. All of these mechanisms can also be tailored to address specific concerns or risks and can be critical in negotiating an acceptable contract.

Ensuring that there are clauses which offer a fall back position in case negotiation/mediation fails or in case negotiation is not possible such as termination clauses, which enable the contract to be ended under specified circumstances, such as insolvency breach of contract or failure to meet required performance levels. Protection is also offered by Step-in Rights and the ability of the councils to replace a supplier and operate services themselves in the event of supplier insolvency, or other circumstance which prevent the supplier from providing services.

Understanding other key clauses which might become relevant in the event of negotiation or a dispute such as:

- limitation of liability clauses which cap the amount one party has to pay to the other in case of a breach.
- intellectual property clauses to protect the councils' knowledge and interests.
- Avoiding excessive reliance on templated standard contracts.

The aim should be to develop bespoke contracts which reflect the specific terms and conditions of the agreement. This is not about creating new agreements for the sake of it. There will be some standard terms and conditions which are understood by suppliers and councils across the sector which will be appropriate.

2.3 In-life contract management

This involves conducting regular, formal and documented supplier reviews on contract performance and identifying opportunities to improve. It is important that councils are sighted about inadequate performance and difficulties affecting suppliers, for example through the provision of regular Key Performance Indicator (KPI) reports, so that timely actions can be put in place to resolve issues. In order to enable this to be as effective as possible, it is important that an appropriately balanced mix of KPIs are stipulated in the contract. For example, in a housing repairs and maintenance contract, this should not only include KPIs around turnaround times for repairs, but also areas such as health and safety and tenant satisfaction. Where possible, councils should look to benchmark their performance against other councils.

These reviews of contracts and desired outcomes can offer useful insights for future negotiations.

Ensuring that when concerns arise over a supplier's financial health (e.g. profit warning, external credit analysis, notice from the supplier), there is a clear escalation path within the council and a clear plan that can be implemented if the supplier fails. The scale of the risk will depend on the level of financial distress, the risk of collapse and the criticality of the service. If such a scenario should arise, as a minimum, a schedule of regular meetings between the council and supplier should be arranged to monitor the situation, mitigate risks and resolve concerns.

3 PREPARING FOR NEGOTIATION

3.1 When to negotiate

Negotiation occurs when:

- Negotiating a new contract.
- (Re)negotiating an existing contract as result of a contract coming to a review point or end or because of an unexpected change(s) in the operating environment (for example regulatory changes).

3.2 Pre-negotiation activities

The negotiation process typically begins with the preparation phase, which precedes the discussion phase.

As a starting point a team should be established to undertake the negotiation.

It should be made up of personnel with technical subject matter knowledge (e.g. construction or homelessness prevention) as well as legal, commercial and negotiation expertise.

3.3 Developing a clear understanding of the contract

This involves understanding the background and context of the contract, including:

The subject matter of the contract and the financial implications of key terms.

The legal context and implications of the contract (legal advice may be necessary at this point).

The key risks and contingencies related to the contract.

Clauses related to termination, renewal, and particularly those relating to dispute resolution, which dictate how parties will resolve disagreements should they arise, for example through a defined process of arbitration or mediation.

3.4 Developing a negotiation strategy

This involves the core council personnel who will take part in the negotiation undertaking the following activities:

- Ensuring a thorough understanding of the regulatory requirements stipulated by the Regulator of Social Housing.
- Agreeing the council's business objectives and outcomes (for example, is the council seeking primarily to reduce the price they pay for a service) and defining the minimum acceptable terms which the council would be prepared to agree to.
- Agreeing the "red lines" (non-negotiable terms) which the council is unwilling to compromise on, as well as the concessions and minimum acceptable terms which the council would be willing to accept as part of the negotiation process. This should be informed by gaining an understanding of areas where the council may have leverage and those areas where it may be appropriate to make concessions because the supplier is in a stronger negotiating position than the council.
- Agreeing the scope of the negotiation, key timelines and milestones for the process.
- Scenario planning to determine the best-case, worst-case and most likely outcomes of the negotiation.
- Determining what the supplier may want to achieve as well as any constraints they may be operating under.
- Identifying the supplier's key decision-maker and aiming to involve that individual directly in the negotiation in order to avoid wasting time by engaging with someone who is not empowered to make concessions and deals.

4 UNDERTAKING NEGOTIATION

4.1 Key principles of negotiation

A well-regarded reference book which provides guidance on developing negotiation strategies is the book, Getting to Yes (1981) by Roger Fisher and William Ury. It focuses on cooperation, flexibility, and problem-solving rather than adopting an adversarial approach to negotiation. Some of the key principles for effective negotiation which it covers include:

Separating people from the problem and focusing on the issues, not on personal conflicts or emotions, so as to maintain good relationships by addressing concerns objectively and calmly.

Focusing on interests, not positions, so rather than negotiating about what each side wants, explore the underlying interests of each party (why they want it).

Inventing options for mutual gain (i.e. exploring creative solutions that meet the interests of both the council and the supplier) to achieve “win win” solutions. The aim should be for both parties to offer reciprocal concessions, whereby if a concession is made, the other party asks for something in return.

Insisting on using objective criteria, such as regulatory standards, benchmarks or expert opinions to inform negotiations.

Developing a BATNA (Best Alternative to a Negotiated Agreement), which involves developing a best alternative, fallback position if the negotiation fails.

4.2 Good practice negotiation

There are a number of key activities which councils should undertake to help deliver a successful outcome from negotiation:

- Keep a record of the negotiation, documenting any contractual changes. This should prevent disputes from arising about what has previously been agreed.
- Use active listening and ask questions when clarification is needed.
- A deep understanding of suppliers' perspective and concerns can enable councils to create a negotiating environment which supports the identification of mutually beneficial solutions.
- A well informed perspective of the wishes and priorities of tenants, informed by consultation undertaken with them – either in preparation for this specific contract or more generally.
- Prioritise the council's objectives so that the greatest focus is on non-negotiable, "red line" areas (such as regulatory requirements) and those objectives which are merely "desirable" are given secondary prominence.
- Be explicit in negotiations about the council's expectations, while demonstrating understanding of the suppliers negotiating position.
- If the council has a strong negotiating position, aim to exploit it, but not to the detriment of the overall relationship with the supplier (where, for example, it results in resentment from the supplier that they have been forced to accept unfavourable terms).
- Engage with the supplier professionally and respectfully and in a spirit of collaboration, while remaining calm and avoiding any displays of aggression.
- Remain flexible and adaptable as circumstances changes. If the supplier rejects the council's proposal, try to be creative and consider alternative terms that could work for both sides. On occasions, it may be appropriate to suggest hypothetical offers to gauge the supplier's response without committing to the terms. This can help to explore options, without conceding a favourable negotiating position.

- Avoid excessive focus on short term objectives, instead focusing on establishing a productive long-term business relationship with suppliers.
- Break the contract down into individual, manageable component parts, addressing each in turn to ensure that each point of disagreement has been resolved before considering the next issue. This avoids the daunting prospect of trying to address issues as a whole, which can increase the risk of a breakdown in negotiations.
- Be mindful of, and respectfully push back against, high pressure negotiation tactics which the supplier may use such as offering considerably less than what is expected ("lowballing") or creating arbitrary, challenging deadlines for a decision, in order to pressurise the council into a hasty, ill-considered decision. On occasions it may be helpful to suggest a break in negotiations to calmly review the council's position and to avoid potential conflict areas.

4.3 Concluding negotiations successfully

This section covers key considerations for council officers when seeking a successful conclusion to negotiations:

- Avoid hastily closing a deal, instead take time to reflect and consult others before committing to an agreement in order to ensure the offer really is in the best interests of the council.
- Depending on the outcome of the negotiation, it may be necessary to draft and execute a formal amendment to the existing contract or to create a new contract. Either way, before any final agreement, it is important to review all negotiated terms carefully to ensure they are accurately reflected in clear, unambiguous language and that no important details have been overlooked or misunderstood.
- Inform all relevant stakeholders of any contractual changes.
- Following successful conclusion of a negotiation it is important to maintain ongoing communication and contract monitoring arrangements in order to manage and nurture the ongoing business

relationship with the supplier and provide a platform for addressing issues and disagreements at an early stage.

- Review and continuously learn from the negotiation process by identifying what worked well and what requires improvement for future negotiations. This review process should help to deliver more successful contractual outcomes over the long term.

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