

April 2019

# Briefing Note

## CECA Procurement Group/Burges Salmon Briefing: Optimising The Procurement Process for Authorities & Utilities

### 1. Background and Scope

- 1.1 CECA published its Procurement Report in November 2016. That Report highlights procurement processes commonly used by CECA members and some aspects of CECA Members' experience of procurement.
- 1.2 Burges Salmon helped facilitate two CECA Procurement Group sessions to inform this briefing note, and also assisted CECA in its preparation.
- 1.3 In its report, CECA identified 8 specific Industry Procurement Challenges being:
  - (a) 'Information Requirements disproportionate to bid value'
  - (b) 'Lack of client engagement during process'
  - (c) 'Too many bidders'
  - (d) 'Poor tender documents'
  - (e) 'Frameworks that deliver less than forecasted revenue and/or include secondary competition'
  - (f) 'Poor management of the procurement process'
  - (g) 'Quality of feedback post tender'
  - (h) 'Lack of checking and enforcement of undertakings made by contractors in tender documents'
- 1.4 Following the Report, CECA's Procurement Group discussed and debated what they consider are good practices in procurement processes. In doing so it considered and identified certain principles and practical recommendations aimed at making procurement processes more effective, efficient and able to deliver innovative solutions. These principles and recommendations recognise that good procurement by purchasers is a skilled and challenging exercise and that it is important that all sides, bidders and purchasers, continue to work together to improve outcomes.
- 1.5 Subsequently CECA's Procurement Group discussed the draft principles and recommendations with a number of purchaser bodies familiar with conducting procurement. The observations made by these purchaser bodies were considered in refining CECA's views on the principles and recommendations it has developed.
- 1.6 This paper comprises an addendum to the Report aimed at making positive recommendations to Authorities and purchasing Utilities within the construction sector about how some of the above challenges could effectively be addressed.
- 1.7 CECA members put forward these recommendations for discussion from their experience and preliminary engagement with experienced purchasing bodies. CECA would like to use its findings to engender a wider debate with Authorities and purchasing Utilities to streamline and better focus procurement processes to the benefit of all parties and hopes this paper could be used as a starting point for such a debate.

### 2. Principles supported by CECA

- 2.1 CECA recognises that managing effective and efficient procurement is a skilled and difficult task for Authorities and purchasing Utilities. Where regulated, it is also a process which must be conducted on a legally robust basis in accordance with formal procurement law requirements.
- 2.2 CECA further recognises that the deliverables from any procurement are ultimately a matter for the Authority or Utility (potentially subject to policy) and the resources and specialist skills available to Authorities and Utilities to conduct procurement vary considerably.
- 2.3 In particular, CECA observed from its engagement with a range of experienced procuring bodies that the procedural realities of purchasers can differ substantially. By way of example:
- a. Funding realities for conducting the process (and, for example, conducting pre-market engagement) can differ substantially. In particular where ultimate funding derives from a different public source (e.g. central funding for local authority procurement) it may be necessary to seek approvals/ release of funds against the best available scope at the relevant time. This can add an additional dimension to timings and output requirements;
  - b. Internal approvals and governance differ significantly within purchasers, (including by reference to value) and internal validation may require additional steps or influence the structure and timing of procurement processes. By way of example, demonstration of competitive tension in a bid process may be necessary to satisfy accountable committees/individuals that public money has been properly spent;
  - c. Some purchasers (for example those undertaking sizeable or repeatable projects) will develop a deep understanding of the particular sector and solutions and may be able to use direct experience of similar procurements to hone and focus procurement documents and achieve high efficiency. Others will conduct a wide range of types and sizes of procurement (e.g. a landmark project followed by regular maintenance outsourcing followed by a once in a generation capital development) which may result in less depth of specific experience in any one type of purchase but a consistent stream of high value requirements;
  - d. Some purchasers will maintain close relationships with a small number of providers on established frameworks. Others may undertake less regular bespoke projects.
  - e. Procurement timings and horizons can vary substantially with some projects being required urgently while others may undergo a significant gestation period during which several rounds of public consultation and market engagement may be possible;
  - f. The availability of specialist procurement resource and specialist evaluators (SMEs) will vary considerably according to funding, history and the number of projects anticipated;
- 2.4 The above factors and others will influence all aspects of design, delivery and award of tendered contracts. CECA members would welcome openness and clarity from purchasers about the challenges faced in respect of particular procurements such that bidders can understand better what is required and assist in satisfying purchaser requirements most efficiently.
- 2.5 Nonetheless, CECA considers that the following principles for procurement will be applicable in most cases and would welcome further discussion of them with Authorities and Utilities.
- (a) **Procurement processes should as far as possible be lean. Purchasers should aim for processes which are as low cost as reasonably necessary to procure the deliverables. In addition, purchasers should aim to keep to published timings to avoid additional cost for bidders from delay (e.g. keeping a team available). In longer processes, where bidders are realistically out of contention, purchasers should include mechanisms to discontinue their further involvement rather than requiring them to continue to incur bid costs;**

In discussion with experienced purchasers, it was noted that bidder response questions may in some cases increase because they are 'carried through' from documents used in previous procedures without due cause. This was unhelpful to all parties. However, purchasers pointed out that there was a limit to what could be cut

from responses (particularly qualification questions) as purchasers still needed to be able to confirm that they retained the resource and capacity which they formerly had and to allow new bidders to demonstrate their capabilities.

In some cases, dynamic change in the construction industry (with businesses being bought, merged, and founded) may result in changes of personnel and relationships with providers and purchasers need to be able to ensure that bidders are still able to deploy the skills and resource which has previously been available to them. It is also important that bidders focus on work for which they have specific capabilities, skills and experience and do not over-claim for projects where they may not be suitable or cannot deploy their resource in the manner and location required.

CECA members recognised these concerns and that best practice will involve intelligent drafting of tender questions to minimise bidders duplicating proof of capabilities while ensuring that new bidders are able to fully demonstrate their capabilities. One option for this may be to provide for certain questions which are only triggered where a qualification etc (e.g. ISO) is not offered. Where questions are carried over from previous competitions (or already appear in framework competitions), there should need to be an explicit reason to continue to include them.

- (b) **Purchasers should engage effectively in market pre-engagement and should take notice of such engagement in designing both the deliverables and the process. CECA's experience is that in many cases pre-engagement occurs too late or on the basis of deliverables which have already been formulated allowing little realistic opportunity for change. The degree of pre-engagement currently undertaken could increase and purchasers would in many cases benefit from engaging with the market earlier and prior to formulation of the detail of deliverables;**

Pre-engagement was recognised as an important step by purchasers. The purpose of pre-engagement must be to get a better end product (or a more efficient process). Purchasers noted that they would like bidders to be clear in such pre-engagement precisely what information they would need to decide to participate.

Both purchasers and bidders noted that pre-engagement could deliver benefits in setting (i) the output required (ii) process, (iii) the timelines, (iv) the scope of works, (v) the contract terms, (vi) allocation of risk (vii) 'innovation' (i.e. other means of achieving the objective), and (viii) agreeing the budget.

Key to this part of the process (and others) was recognised to be open, honest and trusted exchanges of what was required and what bidders were capable of delivering.

- (c) **As far as possible, purchasers should expressly consider when designing a process how to address the requirement for flexibility such that bidders can add value whilst at the same time ensuring that the core requirements will not change unnecessarily during the process;**

Purchasers recognised the value in obtaining flexible solutions and allowing innovation. Bidders do need to ensure that they are proposing solutions clearly and early rather than simply defaulting to the same process previously used.

Bidders recognised that much of the technical innovation comes from the supply chain and efficiency/logistics innovation from the main contractor. Purchasers can encourage innovation by evaluating supply chain innovation and mandating supply chain use. In this way there is a clear incentive for the supply chain to contribute.

- (d) **Purchasers should focus on the clarity of communication with bidders. Bidder teams seeking to understand and deliver the purchaser's client requirements can find that procurement documents are expressed in language which does not directly link to the technical requirements and may be overly long. Purchasers should seek to ensure that documents explaining the requirement are technically precise. Where questions are raised, purchasers should seek to respond openly and fully, avoiding where possible simple references back to the documents.**

In discussion with purchasers it was recognised that communication must be both ways and that bidders need to express questions in terms of the requirements in the bid. A greater openness in asking questions and responding to them was welcomed.

Purchasers and bidders recognised that communication is most effective if it starts well before the procurement itself commences and where established needs and relationships allow a joint understanding of the key issues.

### 3. Specific Recommendations

In addition CECA members identified a number of more specific recommendations for purchasers to consider in relation to different parts of the processes adopted. The following were highlighted in particular:

- a. Tenders should reflect an appropriate allocation of risk. To ensure the widest range of appropriate bidders, purchasers should consider whether more flexibility on legal and financial terms (including limits of liability and guarantees) would result in greater effective competition, the involvement of medium sized businesses and avoidance of inappropriate risk premiums in bids, resulting in higher cost to the authority. This needs to be held by those who most appropriately can manage this risk which is not always the contractor;
- b. Benefits can be obtained where evaluators are identified early in the process and are directly involved in setting the requirements and (where appropriate) engaging with bidders in identifying the requirements. Late introduction or briefing of evaluators can lead to a disconnect between scoring and the development of bids;
- c. Terms for qualification (e.g. SQ) based upon bidder capability and down-selection based upon ranking of bidders to take forward on the project should be clearly defined and expressed separately. Purchasers should not seek to take forward discussions with too many bidders where that will involve bidders with a limited prospect of success incurring bid costs. CECA notes the need for competitive tension in some cases, however, highlights the additional benefit which can come from specific knowledge and extended relationships e.g. through framework offerings;
- d. The length and detail of any negotiation and discussion phase should be controlled. CECA members have observed an increase in length of such phases without substantial additional benefit to the outcome being noted. Separate workstreams (e.g. commercial, technical, legal) for meetings has been seen to work effectively provided that the relevant specialists (including evaluators) are fully engaged. A procurement timetable should be made available at the outset;
- e. Requirements and questions raised in procurement documents should be necessary and clear, ideally without duplication. CECA members have observed an increase in questions being asked, where a number of general questions appear to have little specific relevance to distinguishing between bidders. Members have observed that there is sometimes a tendency to include requirements and documentation from previous procurements without necessarily considering whether they are appropriate. Over time has led to a steady increase in the volume of procurement documentation, not all of which may be necessary for the procurement in question;
- f. Procurement of works must address the needs of small businesses as well as larger contractors. For example where lots are graded by value, overlapping the higher limit for the procurement of works under Lot 1 with Lots 2 and so on maximises SME access to medium-sized schemes and adds to resilience.
- g. Technical/Quality evaluation criteria should be transparent and aim to separate bidders with the best solution. Insufficiently focussed technical/quality criteria can lead to a price-only selection.
- h. The use of best and final offer at the end of a procurement exercise should be considered carefully as it can favour lowest-price over the long-term value of an asset.

### 4. Conclusion

- 4.1 CECA has sought to put forward general and more specific recommendations for purchasers in designing and running procurement processes with the aim of engaging in discussion on these points with purchasers.
- 4.2 In doing so, CECA understands and respects the difficulty of effectively running a procurement process and seeks to assist purchasers with doing so. It would welcome responses and observations from purchasers and to the refinement of the recommendations in this note accordingly.

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