

AUSTRALIAN GOVERNMENT IN-HOUSE COUNSEL DAY

Thursday 4 March 2021

*Professional Development and Networking for the
In-House Legal Community*

Negotiating for the Commonwealth

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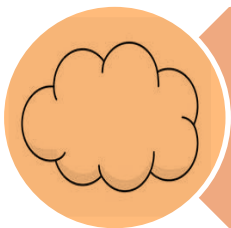
Key themes



Negotiating for the Commonwealth is subject to rules



Market engagement and competition drives VFM



Negotiations must be efficient and effective

Part 1

Before you Negotiate...

If you can avoid it, don't negotiate!

- VFM is best achieved through a competitive process: put your contract out to market and choose the cheapest!
- Complexity in government requirements means this is not always possible
- Negotiations are the fall-back option

Legal Issues

Be careful what you say....

Don't worry too much about:

- Negligent Misstatement
- Misleading and Deceptive Conduct

Do worry about:

- Promissory Estoppel
- Details of negotiations (including any representation) may be used for the purposes of resolving ambiguity in the contract

Legal Issues

And do worry about....

- Confidentiality
- *Public Service Act* and APS Code of Conduct
- Rule 10.8 of the CPRs:

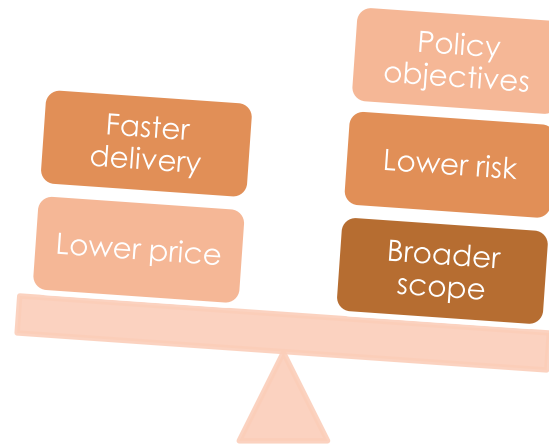
Relevant entities must ensure that potential suppliers and tenderers are dealt with fairly and in a non-discriminatory manner when providing information leading to, or following, an approach to market...

- Agency-specific policies that apply to negotiations

Preparing for negotiations

Preparations are EVERYTHING

- If you don't know what you want...you probably won't get it
- Commonwealth objectives must be aligned
- Competing objectives on the Commonwealth side of table may include:



Don't give up competitive pressure too early

Parallel negotiations or ODIA:

- Expensive



- Various probity risks



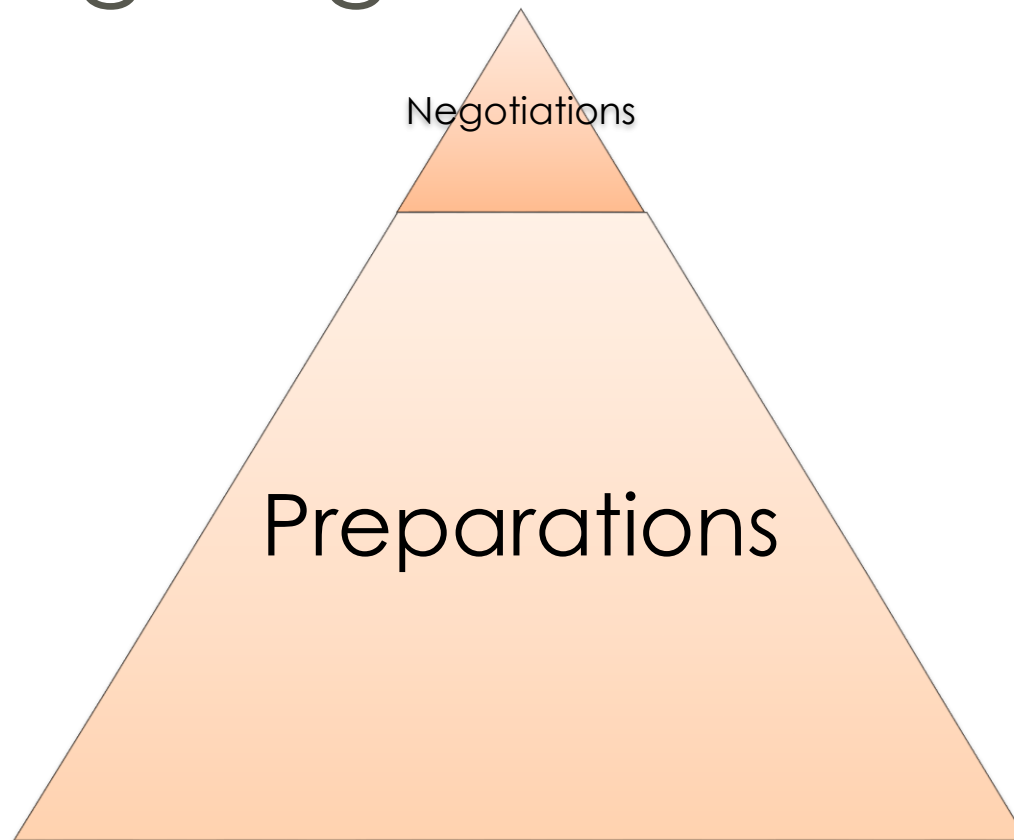
- However it maintains competitive pressure



Part 2

Efficient and Effective negotiations

The 'Negberg'



Don't sweat the small stuff



Negotiations are like a gas



- *Gases are in rapid motion, and they undergo elastic collisions with each other and the walls of the [negotiation] container; that is, momentum and energy are transferred not lost during [negotiation] collisions. Gases expand spontaneously to fill any [negotiation] container [rapid/Brownian motion]*
- Implications:
 - Comprehensively identify all issues;
 - Get all showstoppers off the table before preferred;
 - Structure a lean negotiation program (albeit with some contingency)
 - Use a negotiation protocol to set parameters

Negotiate from principle not position

- So, so Harvard School...
- But, it works!
- Genuinely seek to understand each counterparty's concerns with each negotiation point
- Sometimes, this will enable crossed wires to be uncrossed
- Otherwise, it will enable a compromise to be identified

Allocate/manage risk appropriately to maximise VFM

- A massive issue in the infrastructure space
- Just ask anyone who worked on Sydney Light Rail
- Managing/allocating risk properly in the first place minimises negotiation heartache – be sophisticated not partisan
- But, to the extent issues still arise in negotiations:
 - Listen and understand industry's specific concerns
 - Work hard to identify reasonable compromises which reflect an appropriate balance between the parties' legitimate interests



Things to avoid

- Explain your position – ‘it’s not market’ doesn’t cut it
- Don’t run a collaborative process and then not listen
- Don’t seek a collaborative contract and then play hardball
- Don’t conflate drafting and substantive issues
- Don’t hide behind false positions
- Once a point is agreed, stop talking, move on
- Don’t seek a BAFO or run parallel negotiations unless it is genuinely required

Optimise use of collaborative industry engagement

- Much industry debate about this at present
- All part of a broader concept of 'industry negotiation'
- Why start with the contract at preferred tenderer status?
- Why not start with industry even before the formal procurement process commences?
- Comes to the fore for high-risk, complex projects or bespoke delivery models
- Can assist in improving delivery models/ risk allocation and reducing adversarial tension and negotiations
- Interactive tender processes can also assist greatly

Competitive v negotiated deals

- Much procurement proceeds on the basis of competition
- But, there are always single source/negotiated deals
- The missing VFM ingredient is competitive tension
- This needs to be replaced with other structures to drive the deal/VFM (and an open book approach)
- Adopt competitive tender-like documents and processes
- Adopt the same evaluation and negotiation approach
- Use MOU/heads of agreement with agreed commercial principles
- Implement robust negotiation protocols and project manage them!

Some other approaches

- Other government approaches to avoid/mitigate negotiation
- Ban contract departures outright – make a conforming bid subject to not submitting contract departures [the Defence Capital Facilities and Infrastructure model]
- Contract departures then become an alternative VFM offer;
OR
- Make contract departures a significant evaluation item in tandem with the use of interactive tender workshops
- The PPP model – strong focus on ‘bidding clean’

Team Contacts



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