GUIDANCE NOTE ON PRICE NEGOTIATIONS FOR GOODS, WORKS AND NON-CONSULTING SERVICES

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Prepared by The Caribbean Development Bank

COMMON ABBREVIATIONS AND DEFINED TERMS

Common abbreviations and defined terms that are used in this Guidance Note. Defined terms are written using capital letters.

Abbreviation/term	Full terminology/definition
Bank	CDB.
BDS	Bid Data Sheet.
Bid	An offer, by a Bidder, in response to a Request for Bids, to provide the required Goods, and/or Works and/or related services.
Bidder	A Firm that submits a Bid for the provision of Goods and/or Works and/or related Services.
CDB	Caribbean Development Bank.
CIP	Incoterm, meaning Carriage and Insurance Paid To (named place of destination).
Consulting Services	Intellectual services delivered by a Consulting Firm or an Individual Consultant. Consulting Services are normally of a professional, expert, or advisory nature.
Core Procurement Principles	The Core Procurement Principles of Value for Money, Economy, Efficiency, Integrity, Equality and Fairness and Transparency, which govern all procurement under CDB Financing, as detailed in Section 3 of the Policy.
Financing Agreement	The legal agreement between CDB and the Recipient of CDB financing, which governs the provision of such financing.
Firm	Any eligible private, public or government-owned legal entity, or any combination thereof, that intends to enter into an agreement or is bound by an existing agreement in the form of a Joint Venture, consortium or Association, for-profit or not, that provides Goods, Works, or Services.
FOB	Incoterm, meaning Free on Board.
Goods	A category of Procurement that includes, for example: consumables, equipment, machinery, vehicles commodities, raw materials, or industrial plant. The term may also include related services, such as: transportation, insurance, installation, commissioning, training, or initial maintenance.
GN	Guidance Note.
ITB	Instructions to Bidders.
Non-Consulting Services	Services which are not Consulting Services. Non-Consulting Services are normally Bid and contracted based on performance of measurable outputs, and for which performance standards can be clearly identified and consistently applied. Examples include

Abbreviation/term	Full terminology/definition
	drilling, aerial photography, satellite imagery, mapping, and similar operations.
MDBs	Multilateral Development Banks.
OCB	Open Competitive Bidding.
Open Competitive Bidding	Openly advertised procurement opportunities in accordance with paragraphs 7.02-7.07 of the Procedures.
PCs	Particular Conditions of Contract.
The Policy	The Procurement Policy for Projects Financed by CDB.
The Procedures	The Procurement Procedures for Projects Financed by CDB.
Procurement Framework	Consists of the Policy and the Procedures.
Procurement Plan	The Recipient's Procurement Plan for a CDB financed Project, as detailed in Paragraphs 5.09 – 5.14 of the Procedures.
Probity Assurance Provider	Independent third party, hired by the Purchaser to oversee the integrity of the procurement process, and in particular the conduct of the negotiations (see Paragraphs 6.62-6.66 of the Procedures).
Procurement Strategy	The project-level document that describes how the procurement will deliver the intended development objectives and provide value for money through the application of CDB's Core Procurement Principles.
The Purchaser	The entity authorised by the Recipient, if different to the Recipient, to award contracts to Suppliers, Contractors or Consultants.
The Recipient	The entity or entities, signing the Financing Agreement with CDB for a Project.
SCC	Special Conditions of Contract.
Services	Non-consulting Services and Consulting Services.
SPDs	Standard Procurement Documents.
USD	United States Dollars.
Works	A category of Procurement that refers to construction, repair, rehabilitation, demolition, restoration, maintenance of civil work structures, and related services such as transportation, insurance, installation, commissioning, and training.

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SECTION 1 – INTRODUCTION

Overview

This Guidance Note (GN) is intended to provide client countries of the Caribbean Development Bank (CDB) with guidance on dealing with those exceptional situations in which, following an open, competitive bidding process, where price is a criterion used in the evaluation of Bids, the need may arise for a Purchaser to enter into post-bidding price negotiations with a Bidder.

Definition

The term "post-bidding price negotiations" refers to the circumstance in which a Purchaser, after having has conducted a procurement process by an Open Competitive Bidding (OCB) selection method and having undertaken the evaluation of Bids but not yet awarded the contract, finds itself unable to proceed to contract award without first entering into price negotiations with a Bidder. This would invariably be the Bidder that is recommended for the award of the contract in accordance with the evaluation and qualification criteria defined in the bidding documents.

Scope of Application

This GN applies only to the procurement of Goods, Works and Non-consulting services conducted under OCB in accordance with CDB's Procurement Procedures[1/] (the Procedures). As detailed in Sections 7.02 to 7.07, OCB can take the form of International Competitive Bidding (ICB), Regional Competitive Bidding (RCB) or National Competitive Bidding (NCB). The GN is primarily intended for use under ICB but can equally be applied, with the approval of CDB, to RCB and NCB.

It does not apply to selection methods for the procurement of Goods, Works and Non-consulting Services other than OCB methods, that is, those defined in Sections 7.08 through 7.11 of the Procedures.

Equally, it does not apply to e-reverse auctions in accordance with Section 7.17 through 7.19 of the Procedures. Furthermore, it does not apply to the selection methods for Consulting Services defined in Section 8 of the Procedures nor to negotiations under prior-reviewed contracts which do not result in substantive changes to the draft form of contract provided to Bidders in the bidding documents[2/].

Finally, it does not apply to the post-bidding negotiations of only non-price attributes of Bids, such as delivery time, warranty terms or the allocation of risks and responsibilities between the parties[3/], although, in practice, because of the inter-dependent nature of the relationship between the non-price and price attributes of Bids, it may prove difficult in practice to negotiate one or more non-price attributes of a Bid without also affecting its price. Under those circumstances, such negotiations would fall within the scope of this GN.

[1/] Procurement Procedures for Projects Financed by the CDB (January, 2021).
[2/] See Procurement Procedures, Section 6, paragraph 6.60.
[3/] See Procurement Procedures, Section 6, paragraph 6.59.

SECTION 2 – CONTEXT

Background

The following sections explain how the chain of logic governing post-bidding price negotiations flows from the Core Procurement Principles, contained in the Bank's Procurement Policy[1/], through the procedural requirements of OCB, as specified in the Procedures, to the transaction-specific rules of the bidding process which are defined in the Bank's Standard Procurement Documents (SPDs). These documents are written with the express purpose of ensuring that post-bidding price negotiations are not necessary but, in the exceptional circumstances where these may prove necessary, the SPDs also inform how the Purchaser is required to conduct such negotiations.

Procurement Policy and Core Procurement Principles

One of the principal objectives of OCB is to enable a Purchaser to benefit from the operation of the private-sector market to source the Goods, Works and Services it requires for the delivery of public services. At the same time, a further objective is to safeguard the integrity of the procurement process by ensuring that, to the fullest extent possible, interactions between the Purchaser and private-sector Bidders are formalised, recorded in written form, and conducted on an arms-length basis.[2]

To achieve the latter objective, CDB's OCB selections methods are built on rigorous procedural requirements which define how they are to be implemented. These requirements flow from the Core Procurement Principles, as defined in the Policy. One or more of them may be either jeopardised by a Purchaser's entering into post-bidding price negotiations with a Bidder, while others may be furthered by such a course of action.

The principle of **integrity** may be put at risk in circumstances where a Bidder is afforded an opportunity to enter into face-to-face negotiations with representatives of the Purchaser. Such negotiations create a risk that the invited Bidder may take advantage of its access to the Purchaser's personnel to improperly influence their decision-making. In so doing, the Bidder may apply pressure on the Purchaser's personnel to ensure that it wins the contract and/or to negotiate more favourable terms and conditions of contract than those that were offered to all Bidders in the bidding documents, which would also violate the principle of equality and fairness.

The principle of **equality and fairness** is particularly vulnerable to compromise where post-bidding negotiations take place. The requirement of this principle, "that all Bidders be treated in an equal and fair manner and be provided equal opportunities" is put at risk when only one Bidder is afforded an opportunity to negotiate directly with the Purchaser, while other Bidders are denied the same opportunity.

Furthermore, the **transparency** principle, requiring that, "relevant procurement information be made publicly available to all interested parties" may, for obvious reasons, be compromised where, through the process of negotiation, the Purchaser affords only the invited Bidder access to information that is not shared with the other Bidders.

Alternatively, there may also be circumstances where other aspects of the Bank's Core Procurement Principles may be advanced by post-bidding price negotiations.

[1/] Procurement Policy for Projects Financed by CDB (November, 2019).

[2/] O. Dekel, "Legal Theory of Competitive Bidding for Government Contracts", Public Contract Law Journal, Vol. 37, No. 2, Winter 2008.

Where there is a risk that an OCB process will fail to result in the award of a contract, the principle of **efficiency** may in limited circumstances, some of which are explored later in the GN, be served by the conduct of price negotiations. In these specific circumstances, price negotiations may be the best or, in some cases, the only way for the Purchaser to ensure that the bidding process results in the award of a contract, which may be particularly important where the timely execution of that contract is essential to ensuring the successful implementation of the project.

In a similar vein, there may be exceptional circumstances in which the principle of **value for money** may be served where a Purchaser, through post-bidding price negotiations, achieves a price reduction and/or more favourable contract conditions, such as earlier delivery of Goods or an extended warranty, without sacrificing the other Core Procurement Principles or compromising the requirements of the Procedures or the applicable bidding documents.

Given all the attendant risks and complexities, post-bidding price negotiations may be justified only in exceptional circumstances. Indeed, the Policy, Procedures and SPDs are written in such a way as to design out the need to conduct them. Yet, because of the many intervening variables in the OCB process, exceptional situations may arise in which negotiations are an appropriate course of action.

For this reason and because of the inherent risks involved, in all instances of post-bidding price negotiations, with the exception of those prior-reviewed contracts referenced in paragraph 6.60 of the Procedures, the Purchaser is required to obtain Bank's additional prior clearance, as well as to put in place specific safeguards to manage the attendant risks and to ensure that the Core Procurement Principles are respected during the process of price negotiations.

Procurement Procedures

The Procedures build on the Core Procurement Principles and provide the Purchaser with the greater level of detail they need to operationalise the principles when conducting procurement transactions. While there are multiple provisions throughout the Procedures which may affect the issue of price negotiations, the most salient paragraphs are:

- 5.09 – 5.14 which require the Purchaser to prepare a Procurement Plan and, for higher-risk or sensitive contracts, to develop a detailed Procurement Strategy, both of which are essential to ensuring that OCB processes attract a sufficient number of substantially responsive Bids, an outcome that is essential to avoiding the need to enter into post-bidding price negotiations, and which may provide an opportunity to incorporate price negotiations into a procurement process where the need can be foreseen;

- 6.07 which requires that "Communications between the Recipient and Bidders/Proposers during the different stages of the procurement process shall be in writing with proof of receipt. The Recipient shall keep a written record of meetings, such as: early market engagement, pre-Bid conferences, negotiation meetings, and exploratory/clarification meetings." Limiting communication to these formal channels should prevent attempts by Bidders to use other approaches to conduct informal negotiations during the procurement process.

- 6.18 which requires that, with limited exceptions, for procurement subject to ICB or RCB, the Recipient shall use the Bank's SPDs, which clearly establish the communications permitted between the Purchaser and Bidders and provide clarity on the wider approach to bidding, including limitations on negotiations.

- 6.35 and Annex 6, which provide that the contract documents shall clearly define the scope of Services or Work to be performed, or the Goods to be supplied, the rights and obligations of the Recipient and of the Supplier or Contractor and that the conditions of contract shall provide an appropriate allocation of rights and obligations, risks and liabilities, informed by an analysis of which party is best equipped to manage the risks, considering the costs and incentives of risk allocation. This provides the necessary clarity on the Purchaser's requirements thus limiting the need for negotiations.

- 6.45 which requires that the Recipient shall not ask or permit Bidders to change the substance or price of their Bids after the Bid opening, thus further limiting avenues for negotiation. Requests for clarification and the Bidders' responses shall be made in writing, in hard copy, or by an electronic system satisfactory to CDB.

In addition, the specific provisions relating to negotiations are contained in Section 6, paragraphs 6.60 through 6.65 of the Procedures and are reproduced in Box 1, below.

Box 1: Paragraphs of the Bank's Procurement Procedures on Negotiations

6.60 In the case of prior review, CDB's no-objection shall be obtained before rejecting all Bids, soliciting new Bids, or entering negotiations with the lowest evaluated Bidder. If the form of contract to be entered into substantively changes as a result of negotiations from that previously reviewed by CDB, a further no-objection shall be required from CDB.

6.61 In international competitive procurement subject to prior review, CDB may agree in certain circumstances to the Recipients use of negotiations following Bid evaluation and before final contract award beyond that set out in Paragraph 6.60.

6.62 Any negotiation shall be in accordance with the requirements of the Procurement Documents. If negotiations are undertaken beyond that set out in Paragraph 6.60, they shall be held in the presence of a Probity Assurance Provider, agreed with CDB. Negotiations may involve terms and conditions, price, and/or social, environmental, and innovative aspects, as long as they do not change the minimum requirements of the Bid.

6.63 The Recipient shall negotiate first with the Bidder that has the most advantageous Bid. If the outcome is unsatisfactory or an agreement is not reached, the Recipient may then negotiate with the next most advantageous Bid, and so on until a satisfactory outcome is achieved.

6.64 When the use of negotiations has been approved by CDB, the Recipient shall appoint a Probity Assurance Provider acceptable to CDB, as further detailed in Paragraph 9.10, to oversee the integrity of the procurement process, and in particular the conduct of the negotiations. The Probity Assurance Provider shall be approved by CDB. For the two-stage opening of the second envelopes financial (price) part:

(a) the second envelopes shall not be opened at a public opening, but at an opening in the presence of the Probity Assurance Provider; and

(b) the Recipient shall prepare a record of the opening of the financial envelopes which shall be signed by the Probity Assurance Provider.

6.65 When the Recipient has made the decision to award the contract, the Probity Assurance Provider shall prepare a probity report. The report will be provided to the Recipient and a copy sent to CDB. To ensure transparency and accountability the Probity Assurance Provider's report shall be sent by the Recipient to all Bidders (that is every Bidder that submitted a two-stage Proposal regardless of whether they were invited to negotiate) and published on the Recipient's website. This shall be done at the same time as the publication of the Contract Award Notice or if a standstill period applies at the time of transmission of the Notice of Intention to Award the contract.

Standard Procurement Documents (SPDs)

The SPDs, required for use under ICB, provide Bidders with detailed instructions on how they are required to prepare their Bids, how to construct their prices, how taxes and duties are to be handled, in which currency/ies they may express their prices and how different currencies will be treated in the evaluation process.

Furthermore, the SPDs contain standard Bidding Forms which Bidders are required to complete, and which ensure that all Bidders include the same categories of information in their Bids. This is a necessary prerequisite for achieving comparability between Bids and for enabling the Purchaser to compare and evaluate Bids on a common basis.

In addition, the technical specifications that are used to describe the Purchaser's supply or Works requirements must be based on relevant characteristics and/or performance requirements and to be sufficiently neutral so as to allow the maximum number of eligible Bidders to submit Bids offering Goods, Works or Non-consulting services which are substantially responsive to the Purchaser's stated requirements.

Even with all these rigorous requirements in place, competitive bidding is not a precise science. It may and often does produce unexpected outcomes. The perfect Bid is an uncommon sight in any procurement procedure, especially in OCB, where an indeterminant number of Bidders may participate. Both bidding documents and Bids are vulnerable to human error, which may include key bidding or contractual provisions being unclear or bidding documents being produced which contain material omissions or contradictions which may confuse Bidders.

Even when the published bidding documents are clear and perfectly compliant with the Bank's applicable SPD, different Bidders may interpret the same bidding documents differently and, as a result, prepare their Bids based on differing assumptions. This increases the level of variability from one Bid to another, thus complicating the process of Bid evaluation.

While a number of variables may push the Purchaser in the direction of having to conduct post-bidding price negotiations, doing so is always an exception. The Purchaser should plan and conduct the procurement process accordingly.

SECTION 3 – STEPS TO REDUCE THE NEED FOR PRICE NEGOTIATIONS

Avoiding Post-Bidding Price Negotiations

It is established, therefore, that the Policy, Procedures and SPDs are written on the basis that the Purchaser shall conduct the procurement process at "arm's length" from the Bidders and that it may enter into post-bidding price negotiations only in exceptional circumstances and only with the prior clearance of CDB. Given these requirements, the Purchaser's objective should be to conclude the procurement process in such a way that the need to enter into such negotiations is avoided. Section 3 presents some of the key tools available to the Purchaser for achieving this objective.

Steps to Obviate the Need for Negotiations

Ensuring effective competition in the procurement process is the single most powerful tool at the Purchaser's disposal to avoid having to enter into post-bidding price negotiations. The fewer the number of Bids submitted, the more limited the Purchaser's power is to "hold the line" on the terms and conditions it specified in the bidding documents or, indeed, to hold a recommended Bidder to the terms and conditions offered in its Bid.

From the Purchaser's perspective, the least favourable situation to find itself in is one where only one Bid has been submitted, which offers a price that significantly exceeds the available budget. Where this happens, because Bids are opened in public, the single Bidder will know that its Bid is the only one submitted and that, as a result, the Purchaser's alternatives to negotiating with it are few and likely to be unappealing. Often, the Purchaser's only option, should it fail to negotiate a contract with the single Bidder, will be to cancel the procurement process and re-bid, thereby losing months of precious time and incurring additional costs. In cases where the Goods, Works, or Services are required by a fixed delivery or completion date - for example, when a Ministry of Education procures textbooks that need to be in students' possession by the beginning of the school year - the Purchaser's negotiating power will be further reduced.

Steps to help negate the need for negotiations include:

<u>Proactive Preparation and Planning:</u>

Ensuring effective competition in response to an OCB process often flows from the Purchaser's development of a carefully considered procurement strategy and from effective procurement planning. Where the Purchaser has conducted research into the supply market from which it plans to procure, identifies who are the most highly-qualified suppliers or contractors in that market and understands the dynamics of how competition between those firms works, the Purchaser increases its understanding of the potential for competition and may harness this understanding to identify ways to stimulate competition and Bidders' participation in bidding.[1]

Thorough market research, as a precursor to OCB, is particularly important in sectors where suppliers or contractors are unaccustomed to participating on Multilateral Development Bank (MDB)-financed procurement and are, therefore, unfamiliar with MDB procurement procedures and standard forms of contract. In the geothermal sector, for example, CDB found drilling contractors typically do not have past experience of using MDB standard forms of contract or terms and conditions of contract, which also do not easily accommodate the sector's established commercial practices. As a result, past

[1/] For guidance on procurement strategy and planning, see the CDB's Guidance Note: Procurement Planning and Strategy Development. (April, 2021).

competitive procurements in this sector have sometimes resulted in limited responses and the submission of substantially non-responsive Bids. To address this issue, CDB has undertaken a market outreach initiative with geothermal contractors to gain a deeper understanding of the sector's standard contracting practices. Stemming from this initiative, CDB is working to develop a new SPD for Drilling Services that meets MDB standards yet, at the same time, better reflects industry contracting norms. It is anticipated that this effort will result in greater and more effective competition for drilling services contracts on CDB-financed geothermal projects in the future.

Developing Accurate Cost Estimates:

Within the process of procurement planning, the preparation of an accurate, current cost estimate is critical to the success of a procurement process. Firstly, it helps the Borrower in producing realistic budgets and, thus, in allocating appropriate levels of funding for all contracts from within the total funds available under the Financing Agreement. This, in turn, helps ensure that all procurement processes can be completed, and the resulting contracts funded.

Secondly, having an accurate, up-to-date cost estimate provides the Purchaser with a basis for determining whether the prices quoted by Bidders are reflective of prevailing market prices and constitute value for money. In this regard, an accurate cost estimate may help a Purchaser to protect itself against abusive market practices, such as price gouging, and may inform decisions about the treatment of abnormally low Bids.

Additionally, being armed with an accurate cost estimate allows the Purchaser to conduct effective post-bidding price negotiations with a Bidder when this becomes necessary. A comprehensive understanding of all the costs involved in a contract equips the Purchaser with a reliable baseline against which to measure more favourable terms and conditions of contract, cost savings and improved value for money.

Preparing Robust Bidding Documents:

Once at the bidding stage, the procedural requirements of the bidding process should be stated clearly, consistently and completely in the bidding documents, so that all Bidders understand them correctly and equally. This is achieved by ensuring that the Purchaser fully completes the Bid Data Sheet (BDS) associated with the Instructions to Bidders (ITB) of the bidding document. It is imperative that the ITB and BDS should not contain any contradictions, particularly in respect of the applicable evaluation criteria and how those criteria will be applied to the evaluation of the Bids[2/].

Furthermore, the bidding documents should include clear, complete and appropriate terms and conditions of the contract that the Purchaser intends to sign with the recommended Bidder. This requires the Purchaser to complete all the relevant Special Conditions of Contract (SCC) or Particular Conditions of Contract (PCs) in the bidding document before issuing them to the Bidders. This step is essential to ensuring that all contractual duties, responsibilities and risks are clearly defined and apportioned to the relevant party. This allows Bidders to prepare and price their Bids in full knowledge of the responsibilities and risks they will be required to assume should they sign the contract.

Complete SCCs and PCs also inform the Bidders which risks and responsibilities will be borne by the Purchaser. In any instance where SCCs or PCs are left blank in the Bidding documents - a surprisingly common occurrence - this leaves a void in the Bidding process which creates a risk that

[2/] For guidance on evaluation criteria, see the CDB's Guidance Note: Evaluation Criteria for Goods, Works, and Non-Consulting Services. (December, 2021)

Bidders will prepare and price their Bids on the basis of different assumptions. This, in turn, increases the likelihood of non-responsive Bids being submitted or that submitted Bids will not be comparable. Both of these occurrences may impede a fair evaluation process or make evaluation impossible to conclude without seeking clarification from Bidders of their Bids or, in the most complex circumstances, entering into negotiations with one of the Bidders. The latter is, of course, the outcome the Purchaser should be seeking to avoid.

Notwithstanding the rare exceptions referenced below, to the same end, the Bidding documents should make it clear to all Bidders that the Purchaser does **not** intend to enter into contract negotiations and that the recommended Bidder will be required to enter into a contract strictly in accordance with the form of draft contract included in the Bidding documents.

In addition, the Bidding documents should make it clear that, except for the correction of arithmetical errors, no Bidder shall be requested, permitted or required to alter its Bid after the deadline for submission of Bids. Given the psychology of OCB, where a Bidder anticipates, while preparing and pricing its Bid, that the Purchaser may attempt to negotiate its Bid price downwards, the Bidder has a perverse incentive to inflate its Bid price; a Bidder may use this tactic so as to keep in reserve a certain price margin to concede to the Purchaser during post-Bidding price negotiations, while still protecting its targeted profit margin under the resulting contract.

The Bidding documents should also clearly inform Bidders that any Bid offering an alternative Bid shall, where such is not specifically invited by the Bidding documents, be rejected and that a Bid that contains any substantive omission, deviation or reservation to the Bidding documents shall be evaluated as non-responsive and rejected.

<u>Utilisation of Pre-Bid Meeting and Site Visits:</u>

The Purchaser has at its disposal several tools that may help it to ensure that Bidders are fully informed of the nature of its requirements and that they, therefore, have the fullest possible information to enable them to prepare responsive Bids. Pre-Bid meetings and site visits are two of the most valuable of these tools. Pre-Bid meetings are appropriate in the case of the procurement of large civil Works or of contracts encompassing complex Goods and related services, such as systems involving Information and Communications Technology which involve the supply of large quantities of hardware and the development of related software. Site visits are invariably organised as part of a Bidding process for large, complex civil Works. All of the above good practices, as well as many others, are already incorporated in the SPDs are intended to be applied as written. In addition, where the Purchaser is conducting procurement by National Competitive Bidding, in accordance with Sections 7.04 through 7.07 of the Procedures and, therefore, typically using its country's own national Bidding documents or other non-standard documents, it should ensure that these and other relevant provisions from the appropriate SPD are incorporated into the Bidding documents it uses.

SECTION 4 – NEGOTIATIONS UNDER CDB'S PROCUREMENT FRAMEWORK

Common Circumstances Where Price Negotiation May Be Necessary

What are the types of procurement issues that may necessitate a Purchaser entering into post-Bidding price negotiations with a Bidder? Given the wide variability of outcomes that are inherent in the OCB process, it is not feasible, in a GN of this nature, to provide an exhaustive treatment of such matters. With that caveat in mind, below is a selection of most common circumstances in which post-Bidding price negotiations may be appropriate or even necessary.

Scenario 1: Where, in a Bidding process for multiple items, the Bid recommended for contract award is missing some items, the Purchaser adds them to the Bid price for evaluation purposes and subsequently negotiates with the Bidder to add them to the contract at the negotiation stage, thereby increasing the contract price by comparison with the submitted Bid price.

It frequently happens that, where the Purchaser's requirement is for multiple items, Bids are submitted that are missing some of the required items. In this case, if allowed in the bidding document, the Purchaser may, by a process of interpolation, add either the highest or the average price of each of the missing items from among all the other substantially responsive Bids to the evaluated price of the subject Bid for evaluation purposes only.[1/] In the case where, following the making of such notional adjustments, the subject Bid remains the most advantageous Bid, the Purchaser may, following the Bank's no-objection as necessary, negotiate with the recommended Bidder to add the missing items to the contract at the award stage. Where the Bidder agrees, the contract price would be increased accordingly to reflect the addition of the items that were missing from the Bidder's Bid.

Scenario 2: Where only one Bid has been submitted and its Bid price is substantially higher than the Purchaser's cost estimate.

Where, in response to an open, competitive Bidding process which has been conducted in compliance with the requirements of the Procedures, only one Bid has been submitted and its price significantly exceeds the Purchaser's cost estimate, entering into post-Bidding price negotiations may be the Purchaser's best or, indeed, only option for salvaging the procurement process and ensuring that it leads to the award of a contract that is both acceptable to the Purchaser and eligible to be financed from Bank proceeds.

In the circumstance where only one Bid has been submitted, assuming the Bidding process has been appropriately advertised and correctly conducted, concerns about transgressing the principle of equality and fairness are not at stake, as there are no other Bidders who would be treated unequally or unfairly by the Purchaser's entering into negotiations with a single Bidder. However, before pursuing this option, the Purchaser is required to provide CDB with appropriate analysis confirming the validity of their cost estimate, explaining why there were not more Bids received and demonstrating that returning to market, with appropriate changes to the Bidding, contractual or technical requirements, would be unlikely to result in greater competition and, as a result, yield better value for money.

[1/] See CDB's Guidance Note: Evaluation Criteria for the Procurement of Goods, Works and Non-Consulting Services (December, 2021).

Case Study 1: Reduction of Scope of a Contract for Civil Works for Installation of Submarine Cable

As part of an Open Competitive Bidding process conducted by International Competitive Bidding for a civil Works contract for the installation of a submarine cable, estimated to cost US$2.0 million, a Caribbean Purchaser advertised the procurement opportunity in accordance with the requirements of the Procedures, as well as in relevant international technical journals. Since the Purchaser's market analysis had suggested that there were a limited number of available and interested suppliers in the region and that, should re-bidding prove necessary, it would be unlikely to elicit a more favourable response from the market, the Purchaser took additional notification steps, including sending the Specific Procurement Notice for the contract to all 14 prospective bidders who had expressed interest in the contract in response to the earlier publication of the General Procurement Notice.

While 11 companies purchased the bidding documents, 3 of them, having read the bidding documents, indicated their intention not to bid. By the deadline for submission of bids, only one bid was submitted. Its bid price was US$5.1m, exceeding the Purchaser's cost estimate by more than 150%. The single bid submitted did not include either a signed Form of Bid or the required bid security. The bid was, therefore, substantially non-responsive.

Faced with an urgent need to proceed with the laying of the undersea cable, the Purchaser requested the CDB's clearance to enter into contract negotiations with the single bidder with a view to substantially reducing the scope of the Works to bring the price down to within or at least closer to, the Purchaser's estimate. The Purchaser identified the following components of the Works as the principal areas where scope reductions might yield significant reductions of the bid price and proposed them to the CDB as areas for negotiation with the bidder:

- project management, including monthly meetings, progress reporting and data reporting;
- proposed methodology for installation of the submarine cable;
- proposed design of the landing sites and connections at both terminal points of the cable;
- mobilisation of cable installation vessels, including required trials; and
- demobilisation of installation vessels, including offloading of spare cable and accessories.

With respect to Case Study 1, it should be noted that the factors which may result in the submission of only one Bid are often situational to the Purchaser, the country or the nature of the national and regional market for the type of Goods, Works or Non-consulting services required. As such, a similar Works procurement undertaken by another Purchaser in a different country may result in a competitive market response. Also, the conduct of better research, of early market engagement or of more extensive notification and advertising measures may produce a competitive market response, thus making contract negotiations unnecessary.

Scenario 3: Procurement from Duopolistic and Oligopolistic Markets

Some product markets are structurally duopolistic or oligopolistic in nature, that is, the market comprises only two or a limited number of contractors, suppliers or manufacturers and, as a result, competition is limited. Examples of such markets may include markets for air transportation services, telecommunication services, pharmaceuticals or certain electric vehicles. Under such conditions, markets are characterised by high barriers to entry, a lack of substitute products or of new suppliers entering the market, increased bargaining power of suppliers with concomitant weak bargaining power of buyers and distortions in the nature of competition between existing suppliers in the market.[2/]

Given the structure of such supply markets, it may not be possible for a Purchaser to generate a high level of competition by conducting an OCB process. In these markets, there is often an elevated risk of collusive practice[3/] or of price gouging by contractors, suppliers or manufacturers who abuse their duopolistic or oligopolistic position of power to drive up Bid prices above prevailing market levels. In such exceptional circumstances, where few Bids are submitted and their prices considerably exceed the Purchaser's cost estimate, entering into post-Bidding negotiations with the lowest-evaluated, substantially responsive Bidder may be the Purchaser's most appropriate course of action for arriving at the award of a satisfactory contract.

In duopolistic or oligopolistic markets, the Procurement Strategy developed by the Purchaser in advance of the competitive Bidding process affords the Purchaser an invaluable opportunity to research the structure and competitive dynamics within the market and, thereby, to develop some foresight into which Bidders may submit Bids and how competition between them may be reflected in their respective Bids, including in terms of pricing. Under such circumstances, and particularly where the threat of collusion or price gouging is present, it would serve the Core Procurement Principle of transparency for the Purchaser to indicate to potential Bidders in advance, through the Bidding documents, that the Purchaser may execute the available option of entering into negotiations with the recommended Bidder.

[2/] See Michael E. Porter: Competitive Strategy - Techniques for Analyzing Industries and Competitors.
[3/] See: Procurement Procedures, Section 5, paragraph 5.25.(a) (iii) for definition.

Case Study 2: Procurement from Oligopolistic Markets

In an Open Competitive Bidding process for the supply and installation of complex electrical plant, given the oligopolistic structure of the global supply market, only two major international firms bid. Both were globally renowned companies and dominant players in the manufacturing market for the technology the Purchaser intended to procure. Both bids were priced significantly higher than the Purchaser's cost estimate and, through their bids, both bidders sought to impose a number of conditions of contract which constituted major reservations from the conditions offered by the Purchaser in the bidding documents.

In these exceptional circumstances, rejecting both bids and going back to the market through re-bidding was not a feasible option, as it would likely have resulted in a similar outcome or a failed procurement process. Therefore, the financier – an MDB other than CDB - cleared the Purchaser's request to enter into negotiations with the lowest-priced bidder of the two, with safeguards to be put in place and to be prior-reviewed by the financier.

These safeguards included: (i) the Purchaser establishing a negotiation strategy and parameters defining those attributes of the bid that could be negotiated; (ii) identification of areas of negotiation that might be acceptable to the financier, including a revision of the scope of the contract or reallocation of selected risks from the bidder to the Purchaser, without affecting the required performance and functionality of the plant, as originally defined in the bidding documents; and (iii) independent, expert assessment of the price implications of such negotiations, including price benchmarking to protect the Purchaser from the risk of price gouging.

In this case, allowing negotiations resulted in a contract that was cleared by the financier and successfully implemented.

Scenario 4: Where multiple Bids have been submitted, several of the Bids, but not all, are substantially responsive but the prices of all the substantially responsive Bids are significantly higher than the Purchaser's cost estimate.

In this situation, Bids which are not substantially responsive shall be rejected. In accordance with 6.59 of the Procedures, it may be possible to negotiate with the most advantageous Bidder to revise the scope of services or roles and responsibilities of the parties to permit a contract to be awarded within the available budget. Equally, should negotiations prove to be unsuccessful, rejection of all Bids, including those that are substantially responsive but whose prices are substantially higher than the cost estimate, may also be justified. In the latter circumstance, the Purchaser shall review the causes that may justify rejection of all Bids and consider revising the conditions of contract, design and specifications, the scope of the contract or a combination of these before going back to the market and inviting new Bids. In exceptional circumstances, such as in response to a natural disaster or a national emergency declared by the country in question and recognised by CDB, where significant price increases are observed reflecting a mismatch between supply and demand in the emergency situation in question, the Bank may consider a request from the Purchaser to enter into contract price negotiations with the Bidder which submitted the lowest-evaluated, substantially responsive Bid in an attempt to reduce unit rates and agree an acceptable contract.

Case Study 3: Procurement of Medical Supplies during the COVID-19 Pandemic

During the COVID-19 pandemic, disruptions to global supply chains resulted in rapidly escalating costs for the international shipment of Goods by sea and air. Combined with higher prices offered by bidders for the supply of medical equipment, Caribbean governments found that bid prices for the supply of medical supplies were exceeding their cost estimates to more than 100% and, at the height of the pandemic, by even greater percentages.

One Caribbean Ministry of Health, faced with an outcome where the price of the lowest-evaluated bid, submitted by a European bidder and offering Goods to be imported from Europe, found that the freight component of the bid price constituted more than 50% of the total bid price, that is, more than the cost of the Goods themselves.

Faced with this situation, the Ministry, having obtained the Bank's prior clearance, entered into negotiations with the lowest-evaluated bidder during which the two parties agreed to exclude the cost of carriage and insurance from the bid price and change the Incoterm on which the contract was based from CIP to FOB. This change resulted in a reduction in the bid price of more than 50% but did so in a transparent, predictable manner by reducing the scope of the contract and by transferring part of the performance of the contract from the supplier to the Purchaser.

Subsequently, the Ministry conducted a separate procurement process for freight and insurance services from a different supplier, the cost of which was much lower than that offered in the recommended bid, thus resulting in a procurement outcome which better served the core procurement principle of economy.

Scenario 5: Where multiple Bids have been submitted but all are substantially non-responsive.

In such a case, the rejection of all Bids and re-Bidding is usually the Purchaser's only option for awarding a contract (see also Scenario 4).[4] The Procedures foresee that the Purchaser may, with the Bank's clearance, re-Bid only among those Bidders that submitted Bids in the first instance. However, the Procedures also preclude rejection of all Bids and re-Bidding on the basis of the same Bidding documents and form of contract solely for the purpose of obtaining lower prices. It should be noted here that the same provisions of the Procedures also apply in the circumstances described in Scenario 4.

As re-Bidding invariably involves a loss of time, the Bank may, in exceptional circumstances where time is the most pressing constraint on the Purchaser, agree to a request from the Purchaser to enter into contract negotiations with the Bidder who, if they had been substantively responsive, would have submitted the lowest-evaluated Bid. Such circumstances may include, for example, a response to a natural disaster or national emergency or when repairs to a structurally unsafe public building are urgently needed to protect public safety.

[4/] See: Procurement Procedures, Section 6, paragraphs 6.57 through 6.60.

The Probity Assurance Provider

As provided by paragraphs 6.62 through 65 of the Procedures, all negotiations, other than those defined under paragraph 6.60, shall be held in the presence of a Probity Assurance Provider, who shall be an independent third party, either an individual or an appropriately qualified institution, and who shall be independent of the Purchaser and the Bidder. A Probity Assurance, financed by CDB, would be procured in accordance with CDB's Procurement Framework and CDB is able to recommend suitable individuals from its roster of procurement specialists.

The Probity Assurance Provider brings independent scrutiny over the negotiations process and provides an objective, written opinion as to whether the applicable probity standards have been adhered to by both parties during the negotiations. The independence of the Probity Assurance Provider from the parties to the contract negotiations is essential to ensuring that the opinion provided by the Provider represents an objective, impartial opinion of the probity aspects of the negotiations. In this context, the Provider's independence means that they must be free from bias in favour or against either of the parties and that they are unaffected by interests, influences or relationships that may compromise their professional judgement or that may be perceived as doing so.

SECTION 5 – WHAT CAN BE NEGOTIATED

Which attributes of a Bid may be negotiated and which may not?

The general rule is that, where Bidders have been required to compete on the basis of price, their unit prices may not be negotiated down during contract negotiations. In this context, unit prices refer to the price that a Bidder has offered in its Bid for each unit of Goods to be supplied or, in the case of Works, for each item included in a Bill of Quantities or Schedule of Activities.

The logic behind this general rule is that, given that the unit prices quoted by the lowest-evaluated, substantially responsive Bidder have been market-tested through an OCB process, they are deemed to reflect prevailing market prices. Exceptions to this rule are, rare. The principal exceptions that may be contemplated would be that described under Scenario 3: procurement from duopolistic and oligopolistic markets, where Bids submitted include indicators of suspected price gouging and that detailed in Scenario 4: in relation to a response to a natural disaster or a national emergency scenario. In such instances, CDB may provide its clearance to the Purchaser to negotiate with the recommended Bidder with the intention of negotiating its unit prices downwards. However, even in these instances, prices should be negotiated with reference to an empirical yardstick, such as publicly available indices, regulated prices for commodities such as fuel or gas, price benchmarking or prevailing market prices.

This caveat notwithstanding, there are many options at the disposal of the Purchaser for reducing the price of a contract without attempting to negotiate down the unit prices in the lowest-evaluated Bid. These include eliminating certain elements of the scope of supply or works from the contract, reducing the quantities of the Goods, Works or Services to be supplied, without altering their unit prices, or redistributing some of the risks and responsibilities, as allocated in the draft contract, from the Bidder to the Purchaser, thus enabling the price of the contract to be reduced in a transparent, predicable manner. However, the Purchaser should take care to avoid such a substantive reduction in the scope of Goods, Works or Non-consulting Services or modification to the contract that it alters the intended purpose of the contract to such an extent that it risks diminishing the wider development outcomes sought under the project.

Case studies 1 and 3 provide pertinent examples of where a significant reduction in the scope of the contract offers the Purchaser an effective way to reduce the price of contract yet to do it in an objective, empirical way without having to resort to negotiating a decrease in the Bidder’s unit prices.

Referring again to Case Study 1, CDB found, when reviewing the Purchaser’s request to negotiate with the single Bidder, that the original cost estimate had been difficult to establish due to the absence of relevant cost data for similar Works in the Purchaser’s country. Also, significant increases in prices between when the Purchaser prepared the cost estimate and when Bids were submitted contributed to the wide disparity between the cost estimate and the Bid prices.

Following its review, CDB cleared the Purchaser’s request to make a number of significant scope changes and reductions in the Works under the contract, including:

- removing some design works and land-side structures from the contract;
- revisiting the methodology for laying the cable;
- amending the project management and reporting structures and requirements; and
- using local rather than foreign vessels for surveying and installation operations, which resulted in lower vehicle operating costs and in reduced demobilisation and offloading costs.

Taken together, these scope reductions offered the Purchaser the opportunity to achieve an estimated reduction in the contract price of 63% by comparison with the submitted Bid price. This price reduction, when considered with an updated and increased price estimate for the remaining scope, provided the Purchaser with the opportunity to conclude a contract.

CARIBBEAN DEVELOPMENT BANK

P.O. Box 408, Wildey, St. Michael

Barbados BB 11000

246-539-1600

246-426-7269

www.caribank.org