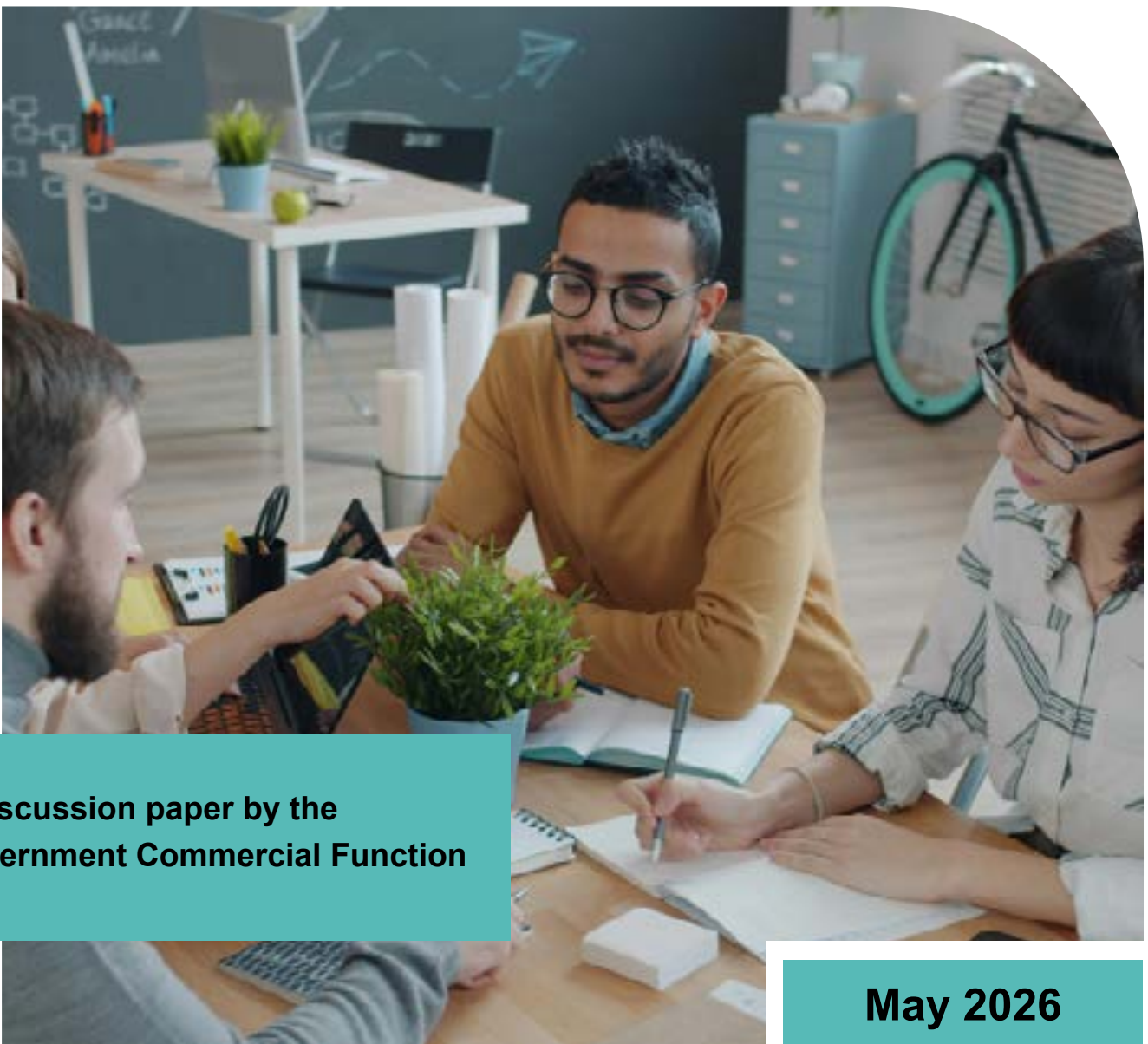




Government  
Commercial  
Function

# The Procurement Act 2023: The Competitive Flexible Procedure and Negotiation



A discussion paper by the  
Government Commercial Function

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# Contents

Introduction	3
The Procurement Act 2023	4
How do I use Negotiation during a CFP?	5
Top Tips	7

## Introduction

1. This paper discusses the use of negotiation as part of a competitive flexible procedure (CFP), under the Procurement Act 2023 (the Act). **Please note:** This document is a discussion paper intended to support colleagues in their commercial role and does not constitute policy or legal advice.
2. What is negotiation? Negotiation is the process of aiming to reach a mutual agreement through structured discussion. During a CFP, negotiation is most likely to be used to:
  - 2.1. Seek lower prices and whole life cost;
  - 2.2. Improve quality; and/or
  - 2.3. Improve contractual terms and conditions



## The Procurement Act 2023

3. The Act does not prescribe what negotiation is or how it should be used. The Act does, however, expect:
  - 3.1. **A Clear Procedure:** A contracting authority should clearly set out the stages involved in a CFP within the tender notice or associated tender documents. This includes stating whether negotiation will take place or if the right to conduct negotiation is reserved and, if so, in what circumstances it will be utilised.
  - 3.2. **Equal Treatment:** All suppliers should be treated equally (unless a difference between the suppliers justifies different treatment), meaning in most situations all suppliers should be provided with the same opportunity to negotiate.
  - 3.3. **Proportionality:** CFPs must be kept proportionate. Any stages included in a CFP should have a commercial purpose.
  - 3.4. **No Undue Advantage:** All reasonable steps must be taken to ensure a supplier is not put at an unfair advantage or disadvantage. For example, this could occur by not allowing all suppliers the same opportunity to participate in the negotiation process.



## How do I use negotiation during a CFP?

4. **When can negotiation take place?** A negotiation can occur at any stage of a CFP regardless of the number of suppliers. Most commonly it will take place after an initial down-selection of suppliers (e.g. following conditions of participation and the subsequent receipt and evaluation of initial or outline tenders). Negotiation can also take place once a preferred supplier has been identified, for example, to improve their final tender. When it will occur should be set out in the tender notice or associated tender documents.
5. **How long do negotiations take?** The Act does not prescribe a time limit, other than that the procurement procedure should be kept proportionate. Negotiation length should be driven by the commercial strategy, commercial opportunity, and the risks and issues involved. Negotiations could last a few hours on a single topic or take many months for multiple, complex topics. The objective should be to keep negotiations proportionate and focussed on achieving your commercial outcomes.
6. **How many suppliers should I invite to negotiate?** The Act does not set a maximum or minimum number. While strong competition is beneficial for your negotiation position, you should also consider the time, resource, and cost involved for both the contracting authority and suppliers. For instance, suppliers may be unwilling to participate in a lengthy negotiation if their assessed odds of winning are poor. The commercial strategy should determine the appropriate number of suppliers to invite and this (or the objective method for determining it) should be set out in the tender notice or associated tender documents.
7. **What can be negotiated?** Any subject can be negotiated, provided it is proportionate and relevant. The subjects will most likely be driven by the objectives outlined in paragraph 2 of the Introduction (e.g., price, quality, terms). The contracting authority should decide on the negotiation topics, while also being conscious of what suppliers may need to negotiate to reach a position that will pass their own internal governance. Preliminary market engagement can be used to help identify what does and what does not need negotiation. The specific elements that will be open for negotiation should be set out in the tender notice or associated tender documents.
8. **Do I need to negotiate the same subjects with all participating suppliers?** While the negotiated subjects are likely to link back to the objectives in paragraph 2, offering all suppliers the same opportunity to negotiate does not mean the negotiations must cover exactly the same subjects, provided the subjects that are negotiated are consistent with those identified in the tender notice or associated tender documents. For example, it may be necessary to negotiate improvements related to the unique characteristics of a supplier's proposal. Crucially, you must exercise care not to use information from one

## THE COMPETITIVE FLEXIBLE PROCEDURE AND NEGOTIATION

supplier's proposals to inform negotiations with a competitor. The subjects chosen should be driven by the commercial strategy.

9. **What is a negotiation strategy?** A negotiation strategy supports and informs the delivery of the wider commercial strategy. A negotiation strategy consists of matters such as:
  - 9.1. The Authority's or governance mandate or negotiation parameters. This sets the guardrails around the degree to which topics such as cost, quality and time can be negotiated with potential suppliers;
  - 9.2. The specific subjects to be negotiated;
  - 9.3. Authority interests. This may include pre-approved concessions and trade-offs and include the Best Alternative to a Negotiated Agreement (BATNA); and
  - 9.4. The logistics of running negotiations, including individual roles, responsibilities, meeting locations and administration.
10. **Should I keep notes of negotiations?** Yes. As a minimum it is good practice to capture issues, actions and agreements. Any clarifications given to suppliers should also be captured so they can be shared with other suppliers, if appropriate to do so. These notes will form part of your record of how the procurement process was carried out. Under the Act, contracting authorities must keep records that they consider sufficient to explain material decisions made for the purposes of awarding a contract.
11. **Should I share the output of negotiations with the suppliers?** There is no general obligation to share the outputs. However, you should consider if sharing any output, such as agreed actions, would be beneficial.
12. **What skills and resources are needed for a successful negotiation?** There is no one size fits all in terms of the skills and resources required to conduct a successful negotiation. As part of the programme management function it would be good practice to carry out a skills and resource audit, ensuring the appropriate skills and resources are in place for the procurement. You are likely to want to ensure that your skillsets, resources and seniority are matched to those of the supplier's negotiating team. Remember, negotiations do not need to be long, complex and resource intensive.

## Top Tips

- **Capability:** Negotiation is a skill. Ensure you have the right capability, experience, and team capacity.
- **Roles:** All members of a negotiation team should be clear on their respective roles.
- **Management:** Manage time and cost effectively.
- **Know Your Counterparty:** Research who you are up against. Use public sources like LinkedIn, speak to a Crown Representative (if applicable), and consult with other contracting authorities. However, you should take care to ensure that any information gained this way does not form part of the evaluation.
- **Internal Alignment:** Follow the chairperson. If there is a disagreement within the team, take the discussion outside of the meeting.
- **Purpose:** Every negotiation should have a defined purpose and objective.
- **Authority:** Use the negotiation strategy to provide the authority to negotiate. All parties present should have the authority to reach an agreement.
- **Review:** Take stock after each meeting. Is your negotiation strategy working? Does it need adjusting?
- **Team Wellbeing:** Negotiations can be intense and stressful. Look after your team's wellbeing as a key priority.
- **Closing:** Know when to close negotiations. Tell suppliers in writing that negotiations have closed and remind them of what will happen next.