

WING TIPS

Invitations to Tender for Telecoms and Technology Services and Outsourcings

Invitations to Tender (ITTs), have traditionally marked the first stage of any long term IT or telecoms services procurement process. Over time the ability of this document to influence the outcome of the process has changed and increasingly the ITT plays a critical role in the procurement process, determining the strength of a company's negotiating position. The ITT, (sometimes also known instead as a "Request for Proposal", or "Request for Quotation") describes the services the customer requires and invites potential suppliers to submit detailed bids. Kemp Little's Commercial team regularly advise clients on producing ITTs and share below some of the lessons learnt on the approach that can be taken with this document, in order to improve the customer's position, and to try to reduce the difficulty of the contract negotiation process later.

Generally

Use of technical consultants. The ITT's specification and service levels need be sufficiently detailed to allow the suppliers to put forward an accurate price for the contract. This means that, especially if complex or cutting edge technology is to be used, consideration should be given as to whether technical input is needed. This could come from individuals within the business or from external consultants where the necessary expertise is not available internally.

Including Customer's Ts and Cs. A common approach in some situations is to include the customer's standard procurement terms and conditions, asking the bidder to indicate whether there are any provisions with which they cannot agree or inviting them to include a mark-up as part of their response. The advantage of this of course is that the customer's standard terms will be drafted to suit their own business. It will not always, however, be appropriate – if the service is complex or if it requires a bespoke solution then the supplier may be best placed to provide the first draft of the terms since they will fit with the solution being proposed. In the latter case it will be important in the ITT to set out the customer's key legal terms (perhaps by way of "termsheet") relating, for example, to the term, revenue guarantees, indemnification, service credits and remedies. This will ensure

that the customer will be in a much stronger position from the outset as negotiations take place.

Other information.

For completeness, the customer could request in the ITT that the bidder submits again with their bid other information which has already been provided to the customer. This can make evaluation of the bids easier, as well as fairer. It will also prevent any problems which may arise where different people within the customer's business have been involved in gathering information from suppliers, prior to issuing the ITT.

Possible ITT provisions

Awarding contracts. The case of *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] makes clear that the customer must follow any tender process set out in the ITT. For this reason it is important to set out that the ITT does not constitute a legally binding offer or agreement, and that the customer will not be committed to accept the cheapest, or indeed any proposal which is submitted. If the customer places a significant value on the service being provided and if there is a real prospect of competition, it may be worth setting out in the ITT that the customer may downselect to two "preferred bidders" and negotiate with both simultaneously, until choosing one only at a later stage. The approach will often result in a better deal for the customer, but the disadvantage is that doing this will involve much more of a cost and management overhead.

A customer may also wish to set out in the ITT that reasons will not be given for rejecting a bid, to avoid the management time this would involve. This is also particularly useful in avoiding debate with a supplier where the customer has set out criteria against which bidders are to be judged - but where criteria are set out, it is advisable to state that the customer may amend them at any time. The customer should also include to the effect that they can change or cease the tender process at any time.

Warranting the accuracy of responses.

One potentially very helpful tip is to state in the ITT that bidders will be expected in any resulting contract to warrant that all representations they make in their response to the ITT are true, accurate and not misleading. This is often a point on which the parties struggle to agree during negotiations - so including it in the ITT can prove a useful negotiating lever later on.

Having this warranty contained in the ultimate contract can be extremely useful if problems develop with the service. It can, for example, be very helpful when difficulties arise to be able to point to sections of a supplier's original ITT response making promises about what the solution would do and how it would work.

Information in the ITT.

Conversely, the customer should clarify that the ITT does not purport to contain all the information the bidder may require and that no warranty is given as to the accuracy of the information within it. This has the advantage of putting the onus on the bidder to rely on their own information from the outset. It is often the case that bidders try to obtain a warranty from customers in a resulting contract that the information they have provided in the ITT is correct.

Service levels.

If timing is important then the ITT should set out that the customer expects the chosen supplier to commit to a deadline for getting the service up and running, and will require service credits (or liquidated damages) for failure to hit the deadline. If this is included, it may be advantageous to include in the ITT a statement that service credits or liquidated damages will not be the customer's sole remedy.

This issue is often the subject of much negotiation so stating the requirement up front can be very helpful. Similarly, the ITT should state that the customer, and not the supplier, will determine the severity level of any faults that develop with the service.

Confidentiality and IPR.

If the ITT is likely to contain valuable information belonging to the customer, the customer should consider only providing the ITT to bidders who have signed an NDA. Alternatively, the ITT could state that by submitting a response the bidder agrees to treat the ITT and any other information provided by the customer as confidential. The former approach of course offers more protection as without an NDA it would be difficult to bring a claim against a potential bidder who receives the ITT but does not go on to submit a bid.

The customer could also state that the intellectual property in the ITT and other documents or materials provided as part of the bid will remain the property of the customer. Again this puts the bidder on notice early on as to the customer's views. The customer could also set out in the ITT that the information the bidder submits may be used for any purpose, including in relation to discussions with other bidders, but that the customer will not disclose the identity of the bidder originating the information. This can allow the customer to use creative ideas and other elements from unsuccessful bids in order to improve further the more attractive offers from other suppliers.

Parent company guarantees.

A parent company guarantee may be appropriate for a supplier without a proven track record, or where there is any doubt as to their financial standing. If this is likely to be relevant then it would be sensible to state in the ITT that such a guarantee will be required. Often the provision of a parent company guarantee must be authorised by the

board and the legal department of the supplier and this may take time so putting a supplier on notice of this in the ITT should help prevent delays.

Exit management.

If the customer is likely to require assistance with the transition to a new supplier (or back in-house) at the end of the term of the contract, the customer should consider stating in the ITT that the bidder on termination or expiry of any resulting contract will co-operate with the customer and/or the replacement supplier to the extent reasonably required to facilitate the migration. The advantage of including such a provision in the ITT is that this can be another contentious provision - the outgoing supplier of course has little incentive to co-operate at the end of the contract's life.

Summary

It is often at the ITT stage that a customer's negotiation position is strongest. A well drafted, clear, concise ITT will offer the best possible start to the procurement process – it will indicate a professional approach and so establish the bidders' expectations from the outset - which can itself be a considerable asset in negotiations.

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