

## Appendix I Contract negotiation processes for bus public transport units

### Overview

Under the partnering delivery model, negotiation is used to determine the price in the following circumstances:

- The direct appointment of a supplier for a public transport unit contract, as specified in section 10.27 *Direct appointment of a supplier for a public transport unit*
- Gross price resets for public transport unit contracts procured through an open supplier selection process with a contract term of more than six years, as specified in section 10.28 *Gross price resets for public transport units*.

This appendix provides guidance on the processes that are to be used to support public transport contract negotiations for bus public transport units under sections 10.27 and 10.28.

Where an approved organisation is considering directly appointing a supplier for a ferry or rail public transport unit contract, the approved organisation will develop a negotiation process for inclusion in its procurement procedure for the service.

### Benchmarking to support negotiation

Benchmark information will be used to obtain an estimate of the efficient market price, to inform the contract negotiation process. The benchmark price is the value that the contract would be expected to receive if it was procured under a competitive market process (ie tendering). The selection of a benchmarking method will depend on the scale of the market.

#### Large bus markets

In large bus markets, benchmarking will be based on a benchmark price range derived from winning tender contract prices using data envelopment analysis (DEA). It is assumed that large bus markets will have sufficient winning tender contract price information to use DEA.

DEA utilises linear programming techniques to analyse the tradeoffs between efficiency on multiple outputs. In this context, DEA will use winning tender contract price inputs, and peak vehicle, service kilometre and service hour outputs, to assess the estimated maximum of each output that can be produced for a given level of price input. This identifies a benchmark 'most efficient' market price that can deliver the negotiated unit outputs.

The benchmark price range extends from:

- a lower bound: the 'most efficient' market price that can deliver the negotiated unit outputs, as identified by DEA to
- an upper bound: the 'least efficient' market price, which is based on the efficiency level of the least efficient contract in the benchmarking set.

DEA will be used for direct appointments under section 10.27 *Direct appointment of a supplier for a public transport unit* and to reset the gross price of tendered contracts after six years under section 10.28 *Gross price resets for public transport units*.

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Approved organisations are to use the following process to set up and use benchmarking:

- Design units, procurement strategy and procurement procedures for tendered units to ensure that an appropriate mix of tendered units (eg size, growth and commerciality) will be available for benchmarking when required.
- Select a representative set of contract data for benchmarking when preparing to directly appoint a supplier (the benchmarking set). The benchmarking set will include contracts that have been competitively tendered during the previous six years in accordance with the LTMA (as amended in 2013). Tendered contracts that do not meet the above criteria may be included in the benchmarking set where agreed between the approved organisation and the Transport Agency, where they are determined to be generally consistent with the contract to be negotiated. Group tender contracts may be included in the benchmarking set, but will be clearly identified as such.
- Provide the benchmarking set to a benchmarking advisor, who will be appointed and funded by the Transport Agency and carry out the DEA. The benchmarking advisor will:
  - Undertake DEA to define the benchmark price range, utilising the peak vehicle, service kilometre and service hour requirements for the contract to be negotiated and each of the contracts in the benchmarking set, and the winning tender contract prices (adjusted for inflation) for each of the contracts in the benchmarking set.
  - Supply the benchmark price range to the approved organisation, noting the likely impact of any group tenders that are larger than the individual units in the benchmarking set. The benchmark range will not be disclosed to the potential supplier by either the benchmarking advisor or the approved organisation unless negotiation commences, as noted in the negotiation sections of this appendix.

Supplementary information may be used to provide additional benchmarking information to the negotiating parties if the price offered by the supplier falls outside the range and negotiation commences. Supplementary information might include component price ranges, the outputs of regional cost models and details of variables that may affect the price of the individual unit in question, such as dead-running, topography, congestion or location near other units contracted to the same operator.

### Other bus markets

Where it is not possible to use DEA, benchmarking will be based on an alternative approach, to be determined in discussions with the Transport Agency and set out in the procurement strategy. Potential alternatives include unit rates, cost model outputs or cost indexation.

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## Appendix I Contract negotiation processes for bus public transport units continued

### Negotiation for the direct appointment of a supplier

The following process must be used when selecting the supplier of bus public transport unit contracts using direct appointment under section 10.27 *Direct appointment of a supplier for a public transport unit*.

Note: A Transport Agency representative will be present at negotiations for direct appointments under section 10.30 *One-off transition for like-for-like public transport units* (and at other direct appointment negotiations at the Transport Agency's discretion) to provide the Transport Agency and the Crown with the assurance that the agreed price achieved in negotiations is efficient (best value for money in the circumstances).

The following stages will apply to the process:

- The approved organisation will advise the Transport Agency of the intention to commence negotiation, with sufficient notice to allow a representative to participate in the negotiation process.
- The approved organisation will identify a benchmark price range for a public transport unit contract to be directly negotiated using the process specified in the benchmarking section of this appendix.
- The supplier will submit a best and final price offer for that public transport unit contract to the approved organisation.
- The approved organisation will consider the offered contract price in light of the market price range, and will generally accept the offer if it is within the range.
- Where the offered contract price is below the market price range, the approved organisation will advise the supplier and the price will be checked to ensure that it is sustainable. If it is considered to be unsustainable, negotiation will commence.
- Where the offered contract price is above the market price range, the approved organisation will advise the supplier and negotiation will commence.
- The approved organisation may reveal the market price range to the supplier once negotiation commences. This information should be used along with other supplementary information, as identified in the benchmarking section of this appendix, to inform the negotiation process.
- Negotiation, and any processes to provide resolution where agreement cannot be reached, should be concluded within a reasonable time frame. The procurement strategy should take account of the time implications of the process.
- Where agreement cannot be reached, and the contract is for a like-for-like unit, the parties will jointly appoint an arbitrator and proceed to arbitration. The procurement strategy will include a process to appoint an arbitrator where one cannot be agreed by the parties. The decision of the arbitrator will be binding.
- Where agreement cannot be reached and the contract is for a directly appointed unit other than a like-for-like unit, the parties will jointly appoint a mediator. If agreement cannot be reached through the mediation process, then the approved organisation may choose to proceed to arbitration, using the process noted above, or to competitively tender the contract, as specified in the procurement strategy.

## Appendix I Contract negotiation processes for bus public transport units continued

### Negotiation for gross price resets

The following processes must be used when resetting the gross price of a tendered contract at the end of the sixth year, under section 10.28 *Gross price resets for public transport units*.

Larger bus markets (as identified in the benchmarking section of this appendix):

- The approved organisation will identify a benchmark price range for a unit contract using the process specified in the benchmarking section of this appendix.
- The approved organisation will compare the inflation-adjusted gross price of the contract against the market price range. No change will be made to the inflation-adjusted gross price where it is within the benchmark range.
- Where the inflation adjusted gross price is outside the market price range, the parties will enter into a negotiation process following the direct appointment process specified in the preceding section of this appendix.
- The reset price will apply for the start of year seven of the contract, and if necessary paid in arrears.

Other bus markets (as identified in the benchmarking section of this appendix):

- Where there is insufficient winning tender contract price information to derive a market price range, the reset of gross prices will be based on alternative benchmarks, as identified in the benchmarking section of this appendix.

### Further assistance

Contact the Transport Agency for further guidance on contract negotiation processes for bus services.