

Joint Tendering and Collective Bidding

Small Business Guide Part 2

Customer Confidence, Legal and Financial
Protection, Members Agreements and Governance
for Consortiums





Purpose of this Guide

This series of three handbooks are designed as a quick guide for sole traders and micro businesses working in the built environment sector who wish to work together in order to joint tender for public or private contracts or work collaboratively on shared bids.

There could be benefits for small traders from collective bidding, such as:

- the opportunity to get involved in larger contracts
- the opportunity to widen the pool of resources and skills available
- sharing of costs, burden, hassle
- being able to look and act bigger
- ability to focus on your core strengths
- more eyes to spot opportunities
- future proofing - gain awareness, skills, experience, qualifications
- networking opportunities
- lessen the necessity of employing its own staff, particularly if there is a local shortage of expertise

In this, Part 2 of the series, we examine customer confidence, agreements between member businesses, the legal and financial protections consortiums need to have in place and governance of the organisation as a whole.

What You'll Find in this Guide

- ◉ Instilling customer confidence in your newly formed collective
- ◉ Collaboration Agreements - what they are and why you need one
- ◉ Legal and Financial Protections
- ◉ Members Agreements and Governance

Instilling Customer Confidence

Customer confidence in an SME consortium bidder starts with the pre-contract award relationship. It will be important for the consortium to show that it is organised, with one point of contact who will undertake tasks such as submitting questions regarding the tender, and responding to any clarification or information requests from the customer. Then when the tender is submitted, customer confidence will be easier to instil if the tender shows a clear, thought out organisation structure.

Even if the consortium has elected to maintain an informal structure prior to contract award, the group should submit their **Collaboration Agreement** (see next page) with the bid, showing how the informal structure will transition seamlessly into concrete contractual form as between the consortium entity and the group members upon contract award.

The customer will wish to see clear evidence of factors such as:

- Clear communications with a single point of contact
- Uncomplicated responsibility chain for contract performance
- Economy - there will not be additional customer time/resources required because it is a consortium as opposed to a single bidder

The consortium should also consider:

- Providing the consortium's Continuity Plan (or a link to this), showing how the customer's project will be protected
- Including explicit assurance of joint & several liability agreement for all partners/members of a consortium
- Including the formal project management plan (even in draft)
- Highlighting the timely performance & supply of deliverables
- Demonstrating agreements in place, including on deliverables timing and payment

What is a Collaboration Agreement?

Essentially a Collaboration Agreement is a written record of how the parties are going to work together to achieve the goal which would have been beyond them individually, the goal of winning the tender. It will cover the details of the tender preparation in response to the ITT, but also address the post-contract award arrangements. In both cases, this will include details of roles and responsibilities as well as the rules governing the relationship, for example:

- Confidentiality
- Responsibilities – especially who will be leader: different perspectives
- Communications with the customer
- No independent bidding
- Publicity – release of publicity without prior agreement
- Dispute resolution
- Assignment (without agreement – eg takeover, merger, new company created, transfer to team member's spouse's consultancy business etc
- Termination – when the agreement would come to an end (it is replaced by subcontracts; contract is awarded to somebody else; tender requirement cancelled; insolvency; debarment (criminal act); time).

In addition to these, members of the group may wish to have certain duties & responsibilities discussed and then incorporated into the Agreement. One of the member companies would be the 'team leader'. The team leader would have to be entrusted with being the 'face' of the group with the customer but not to act unilaterally except if that had been agreed. The team leader has responsibilities to the rest of the group but the rest of the group also have responsibilities to pull their weight.

Characteristics of a Collaboration Agreement

- Pre-award exposure - the agreement itself probably not legally binding
- No significant expenses incurred by relationship
- Contractual terms of relationship need to be agreed
- Can be used as a bidding vehicle for specific tender(s) with option to incorporate/formalise later if desired
- A 'Team Leader' will need to be appointed, as discussed above
- Separate binding Confidentiality Agreement required

Management and Governance - Think Big!

Public and private sector customers are basically highly risk averse. It is much less risky for them to go with larger companies they would have more confidence in. There is perceived to be less risk of them failing and then the customer suffering reputation damage.

The Customer will also be looking to the management of the contract which flows from the tender – they will not want to have any extra administration caused by giving the job to a grouping of different small companies. They will want to have one point of contact and a clear line of responsibility if things go wrong.

The consortium has to effectively, act like a single big company. A big company would have clear structure and reporting lines and clear legal & contractual responsibility. There would be no doubt about who is going to be doing what on contract award, no doubt about who is going to do what in the course of putting the tender together, who will lead negotiations with the customer etc – at the end of the day it is about mimicking the characteristics of a big company.



Legal and Financial Protections

Pre-Contract

The initial legal protection to SMEs and any other collaborating partners will be provided by a Confidentiality Agreement.

A Confidentiality Agreement, also known as a non-disclosure agreement (NDA) should be entered into at an early stage. The parties (SME's and any facilitator or umbrella organisation) will need to have quite detailed discussions with other parties before an assessment can be made as to their suitability. Each party may need to disclose potentially commercially sensitive information, so it is important that a confidentiality agreement/NDA is in place from the outset. The confidentiality agreement will be legally binding agreement defining confidential information and the limits on its use by the parties and disclosure to third parties. There can be a multi-party confidentiality agreement, or a series of 1-2-1 confidentiality agreements

If the discussions are positive, the next step would be likely to be a non-binding head of terms or a letter of intent recording the principles of what has been agreed and what actions are to ensue.

Then at a later stage there would be either a collaboration agreement, if the pre-contract award relationship is to be informal, or the establishment of the formal legal entity such as a Consortium Co-operative - Company Limited by Guarantee (CCLG).

Formal Contract Relationships Following Award of Contract

Consideration of the points addressed below will contribute significantly to the cohesion and long-term viability of the consortium. Evidence that this has all been thought through and planned for will also be an important factor in convincing the customer of the viability of the consortium tender - i.e. helping to instil customer confidence.

- The consortium is the legal entity and all contracts, responsibilities, liabilities and invoices are undertaken and issued by the consortium
- The consortium 'sub contracts' work to its members (the businesses involved in the consortium)
- There needs to be legal clarity between consortium members on terms and
- timing of payments, costs, revenues and warranties built into the consortium's bid design and project plan

Members Agreement

A Members Agreement is a private contract which is exclusively for the sight of the consortium members.

A Members Agreement can evolve from a Collaboration Agreement, where there has been an informal relationship in the early stages of a group's collaboration. Alternatively, it can be drafted from scratch if a group has decided to go for a formal structure at the outset.

The Members Agreement focuses more on the rules which they agree to cover the relationship between the members themselves – it is essentially a private contract between the members, containing details which the members are not required to – and would in many cases not want to – have in the public domain. However, it is also entered into on behalf of the consortium itself, so does bind the consortium (and therefore the directors) in some areas as well. There may therefore be some areas of overlap between the Members Agreement and the Articles of Association and any inconsistency or conflict which results from that will normally be agreed to be settled in favour of the Members Agreement having priority.

Examples of topics in a Members Agreement which you would not see in Articles of Association would be:

- Applications by new members
- Membership subscriptions
- Duties of members to one another and to the consortium
- Duties of the consortium towards its members
- Limitations on important decisions being made without the agreement of all the members; what happens when a member leaves - circumstances, process and consequences



Governance

Well thought out governance is important for a number of reasons including your customer, team members and third party confidence, as well as the viability of the group in the medium and longer term. Governance will cover items such as:

Commercial Management

How will revenues from the consortium's customer contract be apportioned? Will the different members have a common approach to pricing their services? Will there be any funds retained centrally, for example as contingency or for the Lead Member's project/risk management and on-going insurance costs? How will staff secondments be handled, and pre-work costs being carried by one member on behalf of the team? Good records, audited timesheets and open book information on such costs all help design and demonstrate a fair system.

Consortium Membership

What are the criteria for somebody being a member of the Consortium? How will requests from potential new members to join be dealt with? How will the consortium ensure compliance with the key points of competition law? What impact might this have on any existing tenders or contracts that are underway at that time?

Decision Making

How will decisions be made? Decision making meetings and processes must cover both your operational, day to day, decisions and strategic decisions impacting the consortium. Decision making processes must strike a balance between inclusiveness, governance and the ability to make decisions very quickly when required.

Document Control

How will key documents be managed and controlled? This does not just cover crucial project documentation but also documents and correspondence between consortium members (e.g. on commercial agreements). Sometimes setting up new email addresses and managing documents within an e-portal can help.

Quality Management Procedures and Project Management

How will the consortium ensure that all the consortium's members are following the required systems and that all activity, documentation and output is being managed in the appropriate way sufficient to satisfy an external auditor?

In Part 3 of our handbook series we outline the considerations small businesses need to address regarding finance, insurance and accreditations when forming a consortium.



This handbook series is a quick guide version of the report:

TRADES CONSORTIUM AND COLLECTIVE BIDDING
A report for Scottish Borders Construction Forum
by Gavin Tosh, Clerwood Business Support Ltd
and Gill Joy, Mackerris Consulting
2024

Read full document here:

<https://sup.org.uk/wp-content/uploads/SBCF-SUP-Report-Trades-Consortium-and-Collective-Bidding-July-2024.pdf>

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