



Local Content in the Formulation of Invitations to Tender and Tender Evaluation for Major Contracts

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Summary

A high proportion of total expenditure on goods and services for major construction projects and operations is frequently procured through a small number of large contracts. This Briefing Paper describes how to formulate invitations to tender and tender evaluation criteria, with the aim of incentivising major engineering and management services contractors to play a pivotal role in local content management.

Why Focus on Major Contracts?

For the effective management of local content first tier service contractors and suppliers play an important role.

For example, it is common for the client company of a **major project** (such as power plant, highway or LNG facility), involving proven engineering, to grant responsibility for the procurement of goods and services to a handful of main contractors (sometimes a single contractor). These contractors usually have international experience, and an ability to access global supply chains and leverage their size to secure cost advantages. Design-and-Build and EPC/EPCm/EPIC contracts typically govern the contractual arrangements for this type of 'indirect' procurement; and client oversight can be either light, in the case of a lump sum contracts, or substantial, for example contracts based on Project Partnering principles or where compensation is dominated by unit rates.

In the **operation and maintenance** of major facilities and infrastructure, the extent to which the client devolves responsibility for procurement is more likely to vary. In some cases the client may have an in-house Contracts Department and exert direct control over the majority of procurement. At the other end of the spectrum, the client may elect to outsource the entire operation

of a plant or facility (common in the power generation sector). Alternatively, the client may parcel procurement into a series of individual long-term contracts (eg three to five years, with extensions awarded on performance), passing responsibility for lower tier supply chains to the contractor. Facilities Management contracts and Equipment Leasing and Maintenance contracts fall into this category.

To illustrate the importance of major contracts in local content management: in one typical large scale capital project for an international integrated energy company' 81% of the total value of expenditure on goods and services was procured through seven lead contractors; and in another example, 69% of procurement expenditure through eight lead contractors.

It is the formulation of tender documents and tender evaluation criteria for high-value and long-term contracts that is the subject of this Briefing Paper. Our central proposition is that for major construction and operations contracts, the formulation of invitations to tender (ITTs) and tender evaluation criteria, and the choice of the basis for contract award, offer considerable scope to incentivise first tier contractors to play a pivotal role in hiring and training national workers, local sourcing and local supplier development.

Given that such large proportions of capital and operational expenditure can be procured through such a small number of major contracts, it is perhaps surprising that clients and regulators have not made more use of the associated tendering processes to support their policies and strategies on Local Content. Instead, client's have tended to focus on the procurement process primarily with a mind to meeting minimal concession and regulatory compliance requirements for Local Content, whilst relying on philanthropic (social investment) projects and programmes to develop local suppliers (for example, through dedicated SME technical and business management training, and, on occasions, access to finance¹).

Likewise, state regulators rarely require the basis for contract award to be more sophisticated than to satisfy minimum policy targets for Local Content, or to grant domestic suppliers a price advantage.

Application of Briefing Paper

This Briefing Paper proposes enhancements to the tendering process to support delivery of a client or Government's Local Content strategy or policy. The enhancements are applicable to contested tenders for major capital project contracts and operations and maintenance contracts, ie contracts in which a substantial part of the contract value is to be managed by the winning contractor to procure goods and services from sub-contractors and suppliers, be they domestic or foreign.

The focus is on enhancing ITTs and tender evaluation criteria for major contracts, rather than at ITTs and RFQs for minor contracts and purchase agreements.

The remainder of this paper gives guidance in the following areas of ITT formulation and tender evaluation:

- options for integrating Local Content considerations within the **basis of contract award**, (technical vs commercial, use of a K-Factor);

- whether to adopt dedicated **instructions to tenderers** on Local Content in the ITT or integrate questions on Local Content within existing instructions, eg on sub-contractors;
- how to include Local Content considerations in **tender evaluation plans** (scoring, weightings, mandatory thresholds); and
- formulation of a pro-forma **contract provisions** (Articles of Agreement) for Local Content.

Local Content and Contract Award

It is perhaps surprising that clients and regulators have not made more use of tendering processes to manage Local Content

The first consideration in making enhancements to tender procedures to accommodate Local Content is to decide on what basis Local Content (local employment and skills development, local sourcing and local supplier development) will impact contract award. A key decision is whether Local Content is to be a factor in the tenderer's Technical or Commercial submission.

Commonly contracts are awarded either on the basis of lowest price (assuming satisfaction of technical requirements), or on the basis of the 'most economically advantageous tender'. Applying 'lowest technically acceptable price' carries an obvious disadvantage with regard to Local Content. Where the tenderer proposes a high quality programme of local recruitment and training, combined with maximum local sourcing and targeted supplier support and development, this will likely cost the client more than a low quality offer, where the tenderer might propose little more than to train its national staff in health and safety. Inviting a tenderer to make a high quality offer on Local Content carries the risk of reducing the its price competitiveness. There are essentially three ways to manage this perverse impact, as follows:

The first option is to establish clear, quantified, requirements for what the tender is being asked to deliver on Local Content, and require all tenderers to achieve the same level of performance. One way to do this is to expand the list of minimum

technical requirements on Local Content (eg using mandatory pass/fail thresholds), similar to the way in which tenderer's are obliged to meet health, safety and environmental minimum standards. So, for example, the technical requirements in the tender document may ask for a description and quantification of how a pre-set number of hours of training will be conducted for national workers; or to commit to pre-established targets for sourcing from domestic suppliers, eg suppliers of certain categories of goods or services, or suppliers geographically proximate to a project or operation, or suppliers owned by disadvantaged or indigenous groups.

However, locking down expectations on Local Content in this way carries some clear disadvantages. For example, with regard to supporting domestic suppliers to develop their capabilities and competitiveness during contract execution (sometimes a priority of the host Government), it is difficult to pre-establish what level of support the winning contractor should give. Different tenderer's will have different prior relationships with local suppliers, and if the contract includes the finalisation of engineering design, the tenderer may not yet know precisely what services or goods it will need to procure.

More importantly perhaps, stipulating the expected quality of Local Content prior to tendering can be considered a wasted opportunity for soliciting innovation from tenderers. Given the considerable experience many international and large domestic contractors have in developing the capability and competitiveness of local supply chains, the process of competitive tendering is an opportunity to apply this experience to gain competitive advantage. If the expectations on Local Content are already fully codified in the Scope of Work and Articles of Agreement, then the only area left for competition is price.

A second option is to implicitly recognise that what constitutes a high quality offer on Local Content is uncertain, and so instead treat this part of the bid as provisional. There are a number of ways to do this within the tender documents, as follows:

- Provide tenderer's with a **ring fenced budget**, and invite their proposals for a comprehensive Local Content Development Plan that most cost-effectively utilises this sum, framed either by performance expectations (eg % nationals trained in particular skills such as welding, or sub-contractors of named services brought up to ISO14001, ISO9001 and OHSAS 19001 standards by end of contract period), or by generalised headings (eg Training of Nationals; Local Sourcing; Facilitation of Joint Ventures).
- Invite tenderers to provide a comprehensive Local Content Development Plan, but **separate the price** of the Plan from the final bid price. In this case the quality of the Plan continues to be assessed as part of bid evaluation, with the price component left optional. Once a preferred bidder is identified (based on lowest technically-acceptable price), the client can enter pre-award negotiations with the bidder to decide whether to include the Plan, or certain best parts of it, within the Scope of Work. This approach makes two important assumptions: (i) that the client's estimated contract price accommodates such a budget line; and (ii) that the applicable procurement rules allow clients to negotiate with bidders on price post the opening of tenders.
- Invite tenderers to submit a comprehensive Local Content Development Plan as an entirely **alternative proposal**. This proposal does not form part of the formal tender evaluation, but the client would be entitled to include all or parts of the proposal in the Scope of Work, either as a negotiated lump sum or on a cost plus basis, or some combination.

A third option is to decide to award the contract on the basis of what is most economically advantageous, ie to bring together within a single award formula the quality and price of the tenderer's offer on Local Content.

One method is to take the variance in technical scores on Local Content between

the tenderers (where the tenderer with the highest score sets the baseline) and apply this variance to the tenderer's Estimated Contract Price (this will be a combination of the fixed bid priced elements plus estimates against the tendered unit rates). Then to apply a corrective K-factor to generate an overall technical value that reflects this original variance. This Technical Variance Value is then added to the Estimated Contract Price to give an overall Integrated Contract Value.

Figure 2 demonstrates how a K-Factor might be applied to the Local Content components of a technical submission. Assuming that the intention of a client to apply a K-factor to Local Content is communicated to all tenderers prior to tender submission, its impact would be to reduce the disincentive faced by tenderers on price competitiveness when considering to submit a high quality proposal on Local Content.

In summary, the first option - incorporating precise expectations on Local Content into the Technical submission - levels the playing field between tenderers on price, but risks stifling innovation by the bidding contractors (this is an important consideration because it is a well informed lead contractor, and not the client, who is often best placed to understand what is possible with regard to local employment and supplier market.

The second option - of treating the tenderer's proposals on Local Content as provisional (through ring fenced budget, separated pricing or alternative proposal) - removes the disincentive on price competitiveness of the first option, but carries a potentially higher overall cost to the client.

The third option - applying a K-Factor - introduces the discipline of 'cost-effectiveness' by bringing together the quality and price of the tenderer's proposals on Local Content. There is however a risk here that the choice of K-Factor is open to manipulation to give advantage to (or temper the impact on) particular bidders, for example, regulators using a K-Factor to preference domestic contractors over foreign contractors.

Fig 2 Illustration of K-Factor on Bid Price

	Score	Max	
Technical Submission of Tenderer A			
Health and Safety	40	50	
Local Content			
Employment of nationals	5	10	
Training for nationals	5	10	
Communication of local supplier opportunities	5	10	
Support to domestic suppliers	10	10	
Local Content as % of contract value	5	10	
Total Technical Score (as %)	70	100	
Estimated Contract Price of Tenderer A		\$220	
Technical Score Variance (Max Tech - A Tech, as % of Max Tech)		9.1%	
Technical Submission of Tenderer B			
Health and Safety	42	50	
Local Content			
Employment of nationals	7	10	
Training for nationals	7	10	
Communication of local supplier opportunities	6	10	
Support to domestic suppliers	9	10	
Local Content as % of contract value	6	10	
Total Technical Score (as %)	77	100	
Estimated Contract Price of Tenderer B		\$230	
Technical Score Variance (Max Tech - B Tech, as % of Max Tech)		0.0%	
Technical Submission of Tenderer C			
Health and Safety	38	50	
Local Content			
Employment of nationals	4	10	
Training for nationals	4	10	
Communication of local supplier opportunities	3	10	
Support to domestic suppliers	8	10	
Local Content as % of contract value	2	10	
Total Technical Score (as %)	59	100	
Estimated Contract Price of Tenderer C		\$210	
Technical Score Variance (Max Tech - C Tech, as % of Max Tech)		23.4%	
Application of K-Factor (0.65)			
	Estimated Contract Price	Technical Variance Value	Integrated Contract Value
A	\$220	\$13.0	\$233.0
B	\$230	\$0.0	\$230.0
C	\$210	\$31.9	\$241.9

Instructions to Tenderers – A Dedicated or Integrated Questionnaire?

When providing instructions to tenderers on what information to submit on Local Content, should these instructions form a dedicated questionnaire or 'Schedule' on Local Content, or should such questions be integrated within existing instructions?

If adopting an integrated approach, the most obvious candidates for adaptation to the existing instructions on:

- infrastructure and plant
- human resources
- sub-contracting
- risk management

A disadvantage of adapting the existing common suite of instructions is that this may lead to muddled responses. Many such instructions are model questions, and tenderers have standardised policies and

codes they use to provide responses. Tenderers may also have personnel dedicated to answering each type of questionnaire and draw on performance or market data readily accessible within their company. Adding one or two additional questions on Local Content to such standardised tender questions may cause confusion. In addition, there are certain questions on Local Content that do not readily fall under existing questionnaires. Further, without a dedicated set of instructions on Local Content the message that this aspect is to play a significant part in tender evaluation may be lost.

Assuming that a dedicated set of instructions on Local Content is beneficial for the reasons cited above, its principal disadvantage is the risk of repetition. For example, asking a tenderer for information on its infrastructure in-country, proposals for the training of nationals, and how he intends to communicate subcontracting opportunities to domestic suppliers, could appear repetitious when the tenderer is concurrently asked to provide details of its operational infrastructure in a questionnaire on Infrastructure, of training on health and safety in an HSE questionnaire, and of its sub-contracting practices in a questionnaire on Sub-Contracting.

More worrying perhaps, such duplication runs the risk of inadvertent double-counting on price, for example on training costs.

On balance though, if the client wishes to communicate to tenderers the seriousness with which proposals on Local Content will contribute towards contract award, and such instructions on Local Content within ITTs are relatively new for the client or contractor, then providing a dedicated Local Content Schedule is well advised.

The more complicated this Local Content questionnaire, the more important it will be to offer guidance to the tenderer in how to respond. This may include not only additional guidance and examples with the document itself, but orientation meetings with those on the bid list.

The next section provides advice on preparing a dedicated set of instructions to tenderers on Local Content.

Preparing Local Content Instructions to Tenderers

The range of Local Content requirements and activities that might be included in a dedicated instructions to tenderer (or 'Schedule'), are well documentedⁱⁱⁱ. In the first instance, consideration needs to be given to legal, regulatory and contractual requirements on Local Content, including reporting obligations (see Box 1).

Box 1 Examples of Requirements on Local Content for Inclusion in Instructions to Tenderers

Hiring and Training of Nationals

- minimum number or proportion of national workers involved in contract execution (sometimes disaggregated by skill or management level of worker)
- minimum training provided to national workers, either by absolute monetary value, proportion of contract value, or number of training hours (total or per person)
- obligations arising from Environmental and Social Impact Assessment studies required as part of statutory approvals, eg on employment or training of persons from project-affected communities or specified indigenous peoples

Local sourcing

- information on capabilities of domestic supplier market
- requirements to disclose procurement opportunities to domestic supplier market
- preference in the acquisition of goods and services from domestic suppliers (provided they are offered on competitive terms and conditions)
- price advantage to domestic suppliers if able to meet technical requirements, eg 10%
- minimum targets for % of contract value to be procured from domestic suppliers located in the host country or owned by nationals, or sourced as goods and services of Domestic Origin
- obligations on local sourcing arising from Environmental and Social Impact Assessment studies required as part of statutory approvals (eg obligations to use suppliers owned by indigenous groups or based in project-affected communities)

Reporting requirements

- reporting on performance against the above compliance requirements
- additional reporting on Local Content that is not necessarily a legal obligation but committed to by the client, eg GRI^{iv} reporting on economic impacts.

Beyond transposing the applicable compliance requirements on Local Content within instructions to tenderer, the client may elect to solicit additional proposals on Local Content that are not mandated but form part of its strategy. A selection of these are given in Box 2.

Box 2. Proposals on Local Content Beyond Compliance, for Instructions to Tenderers

Tenderer's Capabilities

- Tenderer's general capabilities and infrastructure in the host-country
- Tenderer's capabilities and infrastructure relevant to contract execution
- New capital investments to be brought into the host-country to execute the contract
- New alliances, partnerships and joint ventures with national firms to execute contract and transfer technology

Hiring and Training

- outreach activities and procedures for maximising the direct hiring of nationals
- national worker development programme linked to gaps in local skills that carry risks to contract performance
- anticipated levels of national workers in sub-contracts
- proposals for demobilisation of national workers and retrenchment to alternative employment

Local Sourcing

- classification of sub-contracts and supplier opportunities based on domestic capability, risks to contract performance and opportunities to align with Government priorities for industrial competitiveness and economic diversification
- outreach support to domestic suppliers to access procurement opportunities, eg pre-qualification, navigation of tendering process

Supplier Development and Competitiveness

- support for domestic suppliers and sub-contractors to deliver contract performance
- support for specific domestic suppliers and sub-contractors to expand and market their business post contract completion, eg those industrial categories that present long-term cost saving to the client, or are of high importance to national, regional or local economic development, or offer compensation to communities adversely affected by a project.

Public Access to Operational Infrastructure

- Expectations for public access to operational infrastructure, eg transport, utilities

Principles for Structuring Instructions to Tenderers on Local Content

The process of formulating dedicated instructions to tenderers on Local Content should follow certain principles, as follows:

- in the opening 'General Instructions':
 - give guidance as to the relative important the client is intending to place on Local Content compared to other parts of the tender
 - draw attention to the need to quantify proposals and complete template tables, as appropriate
 - where relevant, provide clarity that the proposals may be directly included as contract provisions
- instructions to tenderers should broadly reflect subsequent tender evaluation criteria, and not leave the tenderer guessing as to which parts of their submission on Local Content carry the most weight;
- if asking tenderers to provide information not usually solicited in conventional tenders (which can be the majority of questions on Local Content, especially those in Box 2), provide examples and additional guidance within the instructions, and, as noted, if necessary convene orientation meetings with tenderers to clarify expectations;
- if soliciting qualitative information (eg descriptions of training programmes for nationals or programmes of support for domestic suppliers) sub-divide these instructions and clearly itemise. This will reduce subjectivity in the subsequent evaluation process, and enable more targeted follow-up clarification questions should tenderers omit certain information;
- where possible, ask for the quantification of the tenderers proposals and provide the expected parameters (for example as tabulated templates). This reduces the use of different metrics by different tenderers (for example, the training of nationals by one tenderer being

quantified as 'average training hours per national worker', and by another tenderer as 'total training hours across contract period'. Further, providing the metrics forms the basis for establishing subsequent milestones and targets against which contract performance can be measured and contract payments made.

- invite tenderers to bring their proposals on different aspects of Local Content into a single document, for example a Local Content Development Plan.

Tender Evaluation of Local Content

As with conventional tender evaluation, there are essentially four considerations in the formulation of criteria to evaluate responses to instructions on Local Content.

First is the **range of scores** – usually zero to three or zero to five. 'One' can be omitted, so that the range is '0-2-3-4-5'. A score of '0' (not '1') should be assigned in cases where the tenderer has failed to submit any information. (Note that failure to submit the requested information may require the evaluator to clarify with the tenderer whether the omission is intentional, especially if the questions are unfamiliar to the tenderer).

Second, is the **relative weighting** to be given to each item being evaluated. For example, the client may wish to weight the entire section on Local Content on parity with that for health, safety and environment (HSE), or may consider Local Content to be a less overall consideration in the Technical (or Unpriced Commercial) submission.

Within the suite of questions being evaluated, the client may wish to give more or less importance to certain questions, such as investment in technology transfer, or the anticipated proportion of goods or domestic origin. This logic applies equally to sub-questions within one category of Local Content, for example to the hiring of nationals from the region where a project is located, compared to hiring of nationals from other regions.

Third is to consider whether there should be **mandatory thresholds**, below which the

tenderer is considered to have failed, and thus is not eligible for consideration for award. For example, if the basis of contract award is to be 'technically acceptable, lowest price', then some threshold for overall lowest acceptable score on the Technical submission may be needed. Sixty percent is not uncommon. However, such a generalised threshold may pass tenderers on their Technical submission even if they have low scores in areas of contract performance considered important to the successful execution of the contract, which increasingly includes Local Content. (It is for this reason that tender evaluation of different health, safety and environmental items are frequently subject to individual mandatory thresholds.)

Mandatory thresholds for Local Content are most likely for responses to questions in the following areas:

- legal and contractual **obligations** on the client for hiring and local sourcing, eg a minimum score of '3' (out of '5') assigned to the minimum obligation, and scores of '4' and '5' assigned if the tenderer exceeds the minimum;
- training for national workers and support for domestic suppliers in those particular categories of skills or goods/services that carry particular **risk** for the client if not performed or delivered to requirements;
- support for domestic suppliers to expand their business post contract for goods and services most closely aligned with either (i) the **clients needs** for long-term cost savings or cost, or (ii) **Government priorities** for industrial competitiveness or economic diversification.

Table 1 provides an example of how scoring, weighting and mandatory thresholds might be applied to a tenderer's tender submission on Local Content. *Table 1 is an illustration only.*

A fourth consideration is the **choice of tender evaluation criteria**, be these quantitative or qualitative. For each normative scale (0 to 5, or 0 to 5) the criteria applicable to a score of '5' should be such that not all tenderers would be expected to reach that

Table 1 Illustration of Scoring, Weighting and Mandatory Thresholds in Evaluation of Tender Submissions on Local Content

Instructions to tenderer	Mandatory thresholds	Score (0, 2, 3, 4, 5)	Weightings	Weight adjusted
1 HEALTH AND SAFETY			40.0%	28.6%
2 QUALITY MANAGEMENT			10.0%	6.2%
3 CONTRACTOR EXPERIENCE			10.0%	5.9%
4 LOCAL CONTENT			40.0%	23.6%
4.1 Tenderer's Capabilities in-country			10.0%	
4.1a Prior investment over last three years in country relevant to contract performance		0	3.0%	0.0%
4.1b Capital investment in country if awarded contract		2	3.0%	1.2%
4.1c Proposals for joint ventures or alliances with national contractors		3	4.0%	2.4%
4.2 National Labour in contract execution			4.0%	
4.2a National workers in management positions		1	2.0%	0.4%
4.2b Total national workers utilised in contract	3	3	2.0%	1.2%
4.3 Training of National Labour			4.0%	
4.3a Average training hours per national		4	2.0%	1.6%
4.3b Average training hours in skill shortage areas critical to contract	3	5	2.0%	2.0%
4.4 Local Sourcing			8.0%	
4.4a Communication of procurement opportunities to domestic suppliers, incl navigation of tendering procedures	3	3	3.0%	1.8%
4.4b Proportion of contract value on goods and services of domestic origin	3	3	5.0%	3.0%
4.5 Domestic Suppliers Development and Competitiveness			11.0%	
4.5a Support for suppliers and sub-contractors to execute contract	3	4	6.0%	4.8%
4.5b Support for suppliers and sub-contractors to improve competitiveness and align with technology transfer priorities of Government		4	5.0%	4.0%
4.6 Operational Infrastructure for Public Use			3.0%	
4.6a Proposals for public access to operational infrastructure, eg transport, utilities		2	3.0%	1.2%
			TOTAL WEIGHTED SCORE	64.3%
			MINIMUM PASS	60.0%

level. To this end, key questions to frame formulation of the criteria are: (i) what does a poor response look like? (ii) what is likely to be a just adequate or satisfactory response (including mandatory thresholds if applicable)? and (iii) what does excellence look like?

For quantitative criteria, these need to match the metrics used in the instructions to tenderers. Likewise, for qualitative criteria, these should largely be based on the language and examples used to inform the tenderer to prepare their submission. They should not introduce new concepts.

A common practice in the formulation of qualitative criteria is to list the range of expectations that, in combination, would constitute a score of '5'; then refer in the criteria for lower scores to a sub-set of these items. An example might be to assign a

score of '3' for submissions that cover three of six requested items, or two if one of these is described in particular detail.

Proforma Contract Provisions for Local Content

It is convention for the principal Articles of Agreement that the winning tenderer will be obliged to meet be included in Invitations to Tenderers as model contract provisions, along with further provisions in dedicated pro-forma Exhibits, eg Administrative Procedures Exhibit, HSE Exhibit.

If an ITT has included a dedicated set of instructions to tenderers on Local Content, it is logical to include a corresponding contract Exhibit on Local Content. First and foremost this Exhibit will include the compliance requirements that the client is obliged to pass to the contractor in order to comply with its own legal and regulatory commitments. This might include, for example, training of nationals or minimum proportion of contract value spent on goods and services of domestic origin.

Regarding the tenderer's proposals on Local Content that go beyond these minimum requirements, the client essentially has three options in formulating a Local Content Exhibit, as follows:

- Option #1 - simply carry the tenderer's proposals through to the contract as **unaltered obligations**. This requires the Local Content Exhibit to be little more than a 'place holder' for the details of the winning tenderer's proposal. The disadvantage of this approach is that the winning proposals on Local Content may not be sufficiently developed to be contractual binding or to provide for performance reporting. There may be omissions in the required responses, or some responses may be unsatisfactory to the client but against which there was no mandatory threshold in the tender evaluation.
- Option #2 - is for the pro-forma Exhibit to provide the **main headings** and some limited information of what is expected, similar to the headings and supporting text in columns 1 and 2 of

Table 2. The advantage of this approach is that it reinforces to the tenderer the importance of providing responses to all the instructions in the Local Content Schedule. Further, if the winning bid still has omissions, the Exhibit can be used to guide the pre-award negotiations so that gaps are filled.

- Option #3 – the third option is to **fully codify** in the Scope of Work and Exhibit what the contractor will be expected to deliver on all aspects of Local Content, both the transposed compliance requirements and activities that go beyond compliance. This approach reduces, and potentially negates, the need for dedicated instructions to tenderers on Local Content. It also level's the playing field on the pricing of Local Content (see discussion earlier). A disadvantage is that it may stifle innovation and reduce competition between tenderers on Local Content. It also assumes that the client fully understands what the local skill gaps are, the training needs of nationals, what levels of local sourcing are possible and how suppliers and sub-contracts might best be supported during contract execution – knowledge more likely than not to be in the hands of major contractors than the client.

Two other key considerations in formulating a Local Content Exhibit are payment arrangements and reporting requirements.

Whether incorporated directly in the Local Content Exhibit, or cross referenced to the Compensation provisions in the main proforma contract, a decision is needed on how performance by the contractor in meeting its obligations on Local Content will be tied to compensation payments. The obvious consideration in making this decision is to be clear what the implication for the contract and commercial and reputational interest of the client are should the obligations on Local Content not be met. Referencing back to the overarching Procurement Strategy for the Project (see Solutions Briefing # 2) should be helpful. For example, will poor performance on Local Content by the main contractor lead to material costs or risks, such as fines or rejection of cost recovery claims if Local

Content targets are missed; or delays to the project schedule or risks to operational quality if the contractor's support to local suppliers fails to ensure contract execution to international standards.

It is more likely that those aspects of a tenderer's proposal on Local Content that carry such material commercial risks and costs (or form part of the reputation of the company with Government or other stakeholders), would need to be tied directly to compensation payments. In contrast, where the risks and costs are manageable or low, it may make more sense to bring compensation for these activities under the umbrella of other similar lower risk activities and make payments against broader milestones of contract delivery.

In either case, the proforma Local Content Exhibit will need to clarify (either directly or by citing the relevant compensation provisions) the consequences for non-conformance.

Regardless of whether the Local Content Exhibit is based on 'dropping-in' the tenderer's proposals or provides specific headings and guidance, the Exhibit will need to codify the clients expectations for reporting on Local Content performance. The reporting metrics to be used will largely be taken from the quantitative information tenderers are asked to provide in their bids, eg on training, local sourcing, supplier development. But there may be additional reporting that the client wishes to include, for example on how contract execution has improved local supplier competitiveness, such as labour productivity, service delivery and product quality, or metrics that the client's parent company needs to prepare its annual Sustainability Report.

Finally, there is the question of how to handle incomplete proposals on Local Content. Unless all expectations on Local Content are fully mandated (either through minimum thresholds in tender evaluation or through explicit expectations in the Scope of Work and contract provisions), it is likely that the proposal on Local Content of the winning tender will not be complete. There are three main ways to handle this challenge:

- use the period of negotiation with the preferred bidder to finalise the proposal (this may be unrealistic given the time available and/or regulatory prohibition on pre-award negotiations on price);
- use this same period to mature the proposal, but sufficient only to clarify the price of the proposals, any capital investment and alliance commitments by the contractor, and the reporting and compensation arrangements including milestones; but allowing the contractor to finalise further details in a defined period post contract award, eg 30 days. (this is more manageable than the first option, yet ensures that the tenderer's formulation of an offer on Local Content still coincides with the client's maximum period of influence);
- agree a provisional sum, then allow the winning contractor a defined period after contract award to finalise proposals (this is potentially more palatable to the contractor, but may reduce the client's leverage to solicit the best deal on Local Content).

Conclusions

Table 2 summarises key decisions that need to be taken when incorporating Local Content into Invitations to Tender and tender evaluation criteria for major contracts. The main options, and their advantages and disadvantages, have been discussed in this Briefing Paper. In taking the right decisions, due consideration should be given to the importance placed on Local Content in the relevant Procurement Strategy (see Solutions Briefing #2). In addition, professional advice must be sought from contract managers with oversight of the entire tendering process, as well as legal advice on the proposed contract provisions and applicable competition and anti-discrimination law.

End Notes

ⁱ Warner, M. (2009) Building International Competitiveness of Domestic Suppliers: Policy and Experience in BG Group, presentation at 5th Global Summit on Local Content, 30th September, 2009, London

^l see, for example, the 'Zimele' risk finance facility managed by Anglo American

ⁱⁱ See for example, (i) ODI (2004) Extractive Industries and Local Economic Development: Incentivising Innovation by Lead Contractors through Contract Tendering, London: Overseas Development Institute;

^{iv} Global Reporting Initiative on corporate reporting of governance, environmental and social indicators.

Table 2 Key Decisions for Incorporating Local Content within ITTs and Tender Evaluation Criteria for Major Contracts

Key Decisions
Basis of contract award
1. Should Local Content proposals be solicited from tenderers as part of their technical or commercial submissions?
2. How to manage the effect of high quality Local Content proposals on the tenderer's price competitiveness (codification, provisional sums, K-Factor etc)?
Instructions to Tenderers
3. Should instructions to tenderer on Local Content be integrated within other questionnaires (eg resource planning or sub-contracting), or separated as a dedicated Local Content schedule?
4. How to transform Local Content legal and regulatory compliance requirements on the client into instructions to tender?
5. How far should instructions to tenders go beyond compliance requirements, eg for reasons of risk management, long-term cost saving, or reputation differentiation?
6. What principles apply in the formulation of instructions to tenderer on Local Content, including linking questions to subsequent tender evaluation criteria, quantitative vs qualitative questions, ad hoc responses vs combined Local Content Development Plan?
Tender Evaluation
7. What relative weightings to assign to different topics on Local Content, eg meeting local content targets vs support to domestic suppliers?
8. Should mandatory threshold be introduced to certain Local Content topics?
Pro Forma Contract Provisions
9. Should pro-forma contract provisions in the ITT be: (i) place-holder, (ii) headings with guidance, (iii) codified contractual obligations?
10. Are Local Content considerations sufficiently material to the client to warrant linking compensation payments to contractor's Local Content performance?
11. If linked, should compensation be combined with performance in other areas of the scope of work, or restricted to Local Content?
12. What sanctions should apply for non-conformance or under-performance by the contractor on its Local Content obligations?
13. What reporting metrics should be included as contractual obligations?
14. What to do if the quality of the winning contractor's proposals on Local Content is insufficient to be incorporated as contractual obligations?

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