

Clarification Phase of Best Value Procurement

Discussion between client and intended contractor in the clarification phase of Best Value Procurement

Clarification Phase of Best Value Procurement

Discussion between client and intended contractor in the clarification phase of Best Value Procurement

Colofon

Date: 26 April 2016
Author: ir. G.A.C. Schaap
christian.schaap@dh-m.nl

Co-reader: ing. E.S. Kommeren
erwin.kommeren@dh-m.nl

DHM
Kerklaan 5
3645 ES Vinkeveen
The Netherlands

Contact
Phone: +31 297 266354
Email: info@dh-m.nl

© De Haan & Martojo 2016

Clarification Phase of Best Value Procurement

Discussion between client and intended contractor in the clarification phase of Best Value Procurement

This document describes the discussions which take place between the client and the intended contractor in the clarification phase of Best Value Procurement. The most discussed document within this phase is the In/Out List. The focus of this document will be on explaining this list including several examples that show the kind of discussions that typically take place.

First there will be an introduction on Best Value Procurement and the Clarification Phase, the documents used, and the role of the client. Subsequently 5 examples are used to show the discussions that take place.

Best Value approach

The Best Value approach is a procurement, project management and risk management strategy which focuses on gaining the highest value against the lowest cost. Best Value procurement consists of three phases: the selection, clarification, and the execution phase.

Clarification phase

In the clarification phase the intended contractor clarifies its proposal to the client in terms of:

- 'what is in' and 'what is out' of the project scope,
- 'identifying if the proposal is acceptable for the client,
- 'creating a clear definition of the contractor's expectations through the identification of areas of risk by the client.

In this phase several documents are exchanged and discussed between the client and the intended contractor. Before our focus will shift to the In/Out list, we will first provide a short overview of the other documents and their relation with the In/Out list.

Documents provided by the client

The client will reveal its own areas of risk (Risk Management File). Until now these areas of risk were unknown for the intended contractor, because identifying areas of risk has been a selection filter in the previous 'Selection' phase. Now, the client wants to know whether measurements to manage these areas of risk are a part of the proposal of the intended contractor. In other words, for the measurements included in this proposal, the client wants to understand the assumptions made by the intended contractor (expectations, nr 3).

Document provided by the intended contractor.

The intended contractor has to provide the following documents:

- Project Management Plan
- Mile stone schedule
- Financial tender document
- In-out list

(A) Project Management Plan

The Project Management Plan (including the Risk Management Plan) describes the quality control system applied by the intended contractor. This plan gives the client insight in the processes (Risk Management, Safety, Environment, Financial, Contract, Planning, etc.) and the management of these processes by the contractor. **Based on this document the client can judge if the quality control system of the contractor can be trusted and if the proposal is therefore acceptable (nr. 2).** The Project Management Plan will be formally accepted after the contract is signed.

(B) Milestone schedule

In the milestone schedule the contractor shows the planning of the project. The client has to determine if the planning is acceptable (nr 2) and whether it is in line with the tender specification.

When making a planning, there is always information that is unknown. Therefore, to create the planning the contractor needs to make assumptions, based on expectations (nr 3) and past experience.

It is important that the contractor specifies the assumptions made in the In/Out list.

(C) Financial tender document

In the financial tender document the contractor specifies all calculated costs. These costs are based on quantities, volumes, duration and product- or labour prices. The contractor has to make a number of assumptions in specifying what is necessary for a successful project. These assumptions have a direct relationship with intended activities and the assumed circumstances. These intended activities and the related assumptions have to be clarified in the In-Out list.

(D) In/Out List.

The In/Out list is the main document in this phase and it is the most discussed document. It describes 'what is in' and 'what is out' of the project scope.

The goal of the list is that the client and the intended contractor are on the same page regarding the intended activities/measurements and any related assumptions that were used in writing the proposal.

The In/Out list is not a replacement of the tender specification. All requirements and demands in the specification will still be applicable. The In/Out list is rather a further specification, but it can never be in conflict with the tender specification.

Because the clarification phase is part of the entire Best Value Procurement procedure, the client can not alter the specification of the tender after receiving the offers from all bidders. A change in the tender specification will influence the offers of all bidders. That is why, discussions with the intended contractor in this phase can never lead to changing the tender specification.

The In/Out List consist of a table with 3 coloms:

- In's – activities which are in the scope
- Out's – activities which are not in the scope
- Assumptions

(1) In's

In the tender specification the client describes the requirements. In the In-list the contractor describes in a more detailed way how these requirements of the tender specification are met.

EXAMPLE

Requirement in tender specification:

- Monitoring and report vegetation structure during the year.

Description of the In-list:

- Monitoring vegetation with drones (6 times a year during the growing season)
- Report 2 times a year the development of the vegetation structure.

The client demands sufficient monitoring (functional requirement). The contractor describes 'how' he will meet this requirement.

(2) Out's

When the contractor describes in a more detailed way what is in the project scope, it will be come clear that the contractor will not do everything. To manage expectations and prevent future contract discussions it is therefore important to also write down what is not in the project scope.

EXAMPLE

Requirement in tender specification:

- Monitoring vegetation structure.

Description of the Out-list:

- Adjusting or recovery of the vegetation structure

(3) Assumptions

To fulfill a certain requirement in the tender specification the contractor has to undertake a certain action. An action has a start and an end and is limited by location, timing, pricing, conditions, etc.

When putting together the proposal the contractor makes assumptions in respect to these subjects. By writing down these assumptions it is clear for the client and contractor, that what is stated in the columns In and Out is valid as long as the assumptions are met.

The contractor has to argue, preferably with past performance information, that the assumption made is based on the scenario most likely to happen.

EXAMPLE

Requirement in tender specification:

- Monitoring and report vegetation structure.

Assumption:

- At the start of the project there will be a map of the vegetation structure.

The intended contractor can argue that in 95% of past completed projects these kinds of maps were available. In this case it is reasonable to expect that a certain map will also be available for this project.

The role of the client

The role of the client (often Contract Manager and Senior Buyer) in the clarification phase is **to check** the proposal of the intended contractor and the assumptions that are included.

- Are all issues on the In list in line with the tender specification?
- Are all issues on the Out list not conflicting with the tender specification?
- Are the assumptions made by the intended contractor indeed the scenario's most likely to expect?

All three questions should be answered positive at the end of the clarification phase. If not, then the proposal of the intended contractor is invalid.

The goal of the discussions taking place in this phase is to create a sound understanding (the same picture) of the project between the client and the intended contractor. There will be several versions of the document. The activities listed in the In/Out list can not be altered in essence, because this would change the scope of the offer. It is allowed to rephrase an activity in order to make it clearer for the client, as long as the essence of the activity stays the same.

Especially when BVP is new for the client and the contractor, things that are logical for the contractor, might be new/special for the client. The contractor might not mention assumptions in the list, because to him they are common knowledge. While discussing the list, it becomes clear for the contractor that these things are not common knowledge for the client at all.

Assumptions can be added and rephrased by the contractor to make his offer more clear for the client. The client can not ask the contractor to add or change assumptions in his favor. The scope of the offer is based on these assumptions.

The client cannot change the tender specification or ask the intended contractor to change assumptions or activities, because this would change the essence of the proposal.

The discussions between the client and contractor will be mainly about the assumptions made by the contractor. The client is using questions to check whether the assumptions of the contractor are valid. The goal of these discussions is not to alter the list, but to make it SMART (Specific, Measurable, Achievable, Realistic, Time limited).

Depoldering Noordwaard

The first five examples in this document are based on the maintenance project Depoldering Noordwaard. More information about the Depoldering Noordwaard can be found here:

www.ruimtevoorderivier.nl/depoldering-noordwaard/

When the procurement for the maintenance project started the asbuilt file was not yet available. For the bidders this was a huge limitation, which forced them to make a lot of assumptions. The project is now in the 6th month of it's execution phase and certain conditions changed or were not as initially expected.

Example 1: MALFUNCTION OF PUMPING STATION

In the Noordwaard area are 4 new pumping stations. The maintenance contractor will be responsible to maintain these pumping stations and solve malfunctions. The contractor can bill his hours and materials used to solve a malfunction of a pumping station.

To prevent that the contractor will wait for a malfunction and will not perform preventive maintenance, the contractor has a own-risk of € 5000,- for each malfunction.

In the tender specification the client did not define the time limit the contractor had to solve a malfunction. The client left this for the contractor to define (as an expert).

The contractor included the following in the In-Out list.

In:

- Cost for solving and inquiry of the cause of a malfunction of a pumping station up to €10.000,-.

Out:

- Replacement of big components of the pumping station.

Assumptions:

- The pumping stations are new and are designed for the local situation.
- The pumping stations are thoroughly tested (no malfunctions were found during these test).
- The malfunctions may be solved within 72 hours (no 24-hours or weekend shifts necessary).

The client did not expect the limit up to € 10.000,- for malfunctions of pumping stations because in other agreements with said contractor, he always had own risk. After checking the tender specification the client had to conclude that limiting the scope by the contractor in this case was allowed.

The Best Value approach is a procurement, project management and risk management strategy which focuses on gaining the highest value for the lowest cost. Scope minimalization is an important part in reaching one of the goals of best value (lowest cost).

The contractor has to guarantee that these pumping stations work. The contractor in this case has to argue, that 2 malfunctions of a pumping station a year is the average number to expect and the scope is limited to what is necessary. The advantage for the client is that he is not paying for possible malfunctions (risk factor in the proposal price) which will, most likely, never happen.

The contractor in this case argued that it was likely that a pumping station would not have a malfunction more than twice a year ($2 * € 5.000,-$) and that replacing big components should not be expected. The pumping stations were brand new, designed for the local situation and thoroughly tested. The assumption of the contractor was reasonable.

The last assumption (The malfunctions may be solved within 72 hours) made by the contractor directly influence the costs. if it would be necessary to solve malfunctions withing 24 hours, the contractor has to calculate with night- and weekend shifts. This is another example of scope / cost minimalisation.

In this case there was no risks that a pumping station would not work for 72 hours. Also there were no conflicting requirements in the tender specification. This assumption was accepted.

Example 2: BROKEN FENCES CAUSED BY INUNDATION

The area of Noordwaard designed to flood (inundation) a few times a year. In the tender specification the client stated that the grass in the maintained plots has a maximum length of 10 cm on the first of November each year. High vegetation will have a negative effect on the flow of the water. Because of the expected inundations the land will be wet a long time of the year obstructing heavy machinery. The contractor proposed a maintenance concept with herds (hoarses, cows,...). To control these herds the contractor had to place a fence.

The question was 'who' (client or contractor) would be responsible for broken fences causes by inundation?

The fence in this case was a result of the maintenance concept of the contractor. There were no requirements in the tender specification of the client. The first reaction of the client was to deny any responsibility.

Dutch construction law knows 'redelijkheid en billijkheid'. In English this can be translated to 'reasonability'. This means that a contractor is responsible until a certain limit. This limit is determined by reason. Could the contractor foresee what happened? Was it likely to expect this situation? Could the contractor influence the situation (big inundation) or did it just happen? When a certain situation is not 'reasonable', then the client is (partially) financially responsible.

In this case the contractor had to argue until which limit it was reasonable for the contractor to carry the risk of broken fences.

Based on the length of the fence and the expected number and size of inundations the contractor could argue a number of 20%. In 'normal' situations the risk of broken fences would be carried by the contractor. Only in unexpected situations (extreme inundations, scenarios once each 1000 years) the client will have to contribute.

Example 3: DRIFTING WAIST

The plots that have to be maintained will inundate several times a year. After the inundation a lot of waste (plants, grasses, plastic,...) will be left on the plots.

In the tender specification it is stated that: Contractor has to clean any drifting waste (plastic,...) each year after the 1st of April.

It is not clear if the area will develop into a touristic area. It is possible that there will be a lot of garbage / waste in the area.

The contractor wrote the In/Out list

In:

- Cleaning up the drifting waste (plastic) each year after the 1st of April.
- Cleaning up (drifting) waste one additional time within the contract period (3 years).

Out:

- Cleaning up waste more then stated in the in-list.

Assumptions:

- Organic waist (plants, grass, etc.) does not have to be cleaned.

In the selection phase the contractor offered as a risk measurement: 1 time additional cleaning of waste, because there is a chance that there will be an inundation outside the regular season (1 November - 1 April).

The client did not specifically define “waste” in the tender specification (plastics and such). To minimize the scope of the proposal (and cost) the contractor argued that organic waste did not have to be cleaned. The client accepted this assumption because the Noordwaard is a natural reserve.

Example 4: MONITORING WELL

The contractor has to measure the water level in a number of monitoring wells in line with the tender specification.

In:

- To measure the water level in 10 monitoring wells. Twice a month from 01-10-2015 to 31-12-2016.
- Replacement of one monitoring well during the contract period.

Out:

- Replacement of more than one monitoring well during the contract period.

Assumptions:

- No special instruments are necessary to measure the water level in the monitoring well.
- Monitoring wells are protected in such a way that there is no risk on damages.

The client only described the number of monitoring wells and the activity of measurements. The kind of monitoring wells used in the construction phase and the kind of protection of the wells was, at this moment, unknown for the client and the intended contractor.

There are several different kinds of monitoring wells used in The Netherlands. With the kind commonly used it is possible to measure the water level without special instruments. The contractor could argue that this assumption would apply to the project at hand.

It is common that heavy machinery (tractor, bulldozer, ..) working on a plot damage monitoring wells when they are not protected. That is why it is logical to say that the monitoring wells would be protected. If the protection is in place the chance that a monitoring well will get damaged and needs to be replaced is low. The replacement of 1 monitoring well in the contract period is sufficient to manage this risk.

Example 5: CULVERT

In the procurement phase not all as built drawings were available for the client and the contractor. The precise number of culverts in the area were unknown. According to the tender specification the contractor has to clean all the culverts in the contract area each year.

In:

- Once a year cleaning of 33 culverts.

Out:

- Cleaning of more than 33 culverts a year.

Assumptions:

- According to the design drawing (number, date) 33 culverts should be present in the area.

The intended contractor based the number of culverts on the design drawing. This was the most reliable document to base this number on, in spite of other document mentioning other numbers.

By specifying the number of culverts in the In/Out list, a possible future discussion about the number present in the area is prevented. For both client and contractor it is clear which number is within the contract and when the client has to place an order for an additional assignment.

Bridge renovation

The following 5 examples in this document are based on a bridge renovation. The height of the bridge had to be made bigger, so that it would be possible for higher ships to pass. This involved the adjustment of the foundation and the pillars of the bridge.

Example 6: UNDERGROUND INFRASTRUCTURE

For the renovation of a bridge the intended contractor is responsible for the inventory of the underground infrastructure in the field. The client provided in his tender specifications a drawing of the known underground infrastructure. Because of the duration of the procurement procedures this drawing was more than 1 year old.

The contractor included the following in the In-Out list.

In:

- Inventory of the present underground infrastructure in the field (cables and pipelines).

Out:

- Differences between the drawing and the actual situation of underground infrastructure in the field.

Assumptions:

- Adjusting the design is not in the scope of the contractor, when the difference between the drawing and the actual situation is more than 0.3 m (vertical or horizontal).

For the renovation of the bridge the contractor had to make a design. In this design the contractor took in account that the position of cables and pipelines could vary (maximum 0.3 m).

When the variation would be within the boundaries, there would be no consequences for the design. If the variation would be more than 0.3 meter, adjustment of the design would be necessary. These adjustments were not in the scope of the contractor.

Example 7: PERMITS

For the renovation of a bridge the intended contractor is responsible for acquiring the necessary permits.

The contractor included the following in the In-Out list.

In:

- Apply and obtain permits.

Out:

- Additional activities demanded in these permits.
- When a permit is not obtained and the process of obtaining the permit is delayed more than 4 weeks and the contractor can prove that he fulfilled his obligations and has no blame.

Assumptions:

- No assumption was described in this case.

The contractor will be held responsible when a permit is not on time (maximum 4 weeks). If the delay of the permit is more than 4 weeks, the contractor must prove that he fulfilled his obligations and has no blame. If he can do this, the client is responsible.

A multitude of reasons can delay a permit. Not all of these reasons can be managed by the contractor. In this case the contractor is responsible for a delay of maximum 4 weeks. When the delay exceeds the period of 4 weeks and the contractor proves that he fulfilled his obligations and has no blame, the client will be responsible for the consequences of the delay.

In the out-list the contractor wrote that additional activities demanded in these permits, were out of the scope. Permits has several conditions, which lead to certain activities by the contractor. In general these are conditions that the contractor can know ahead. In certain situations additional conditions are demanded. This is very often done by governments for political reasons to please stakeholders. These additional conditions then often focus on avoiding nuisance for these stakeholders. In this case the contractor is not responsible for the activities necessary to meet these conditions.

Example 8: GROUND POLLUTION

For the renovation of a bridge the intended contractor had to remove several layers of ground for the foundation. In the tender specification it was mentioned that certain ground pollution could be present.

The contractor included the following in the In-Out list.

In:

- All the work related to the described ground pollution in the tender specification.

Out:

- Additional inventory of the present ground pollution.
- To check the accuracy of the known reports about ground pollution in these plots.

Assumptions:

- There is no more ground pollution than stated in the known reports.

The contractor based his work totally on the accuracy of the known reports and assumed that an additional inventory was not necessary. In this case the contractor could do this because the reports were drafted according the standards and accepted by authorized supervision (government).

Example 9: TRAFFIC MANAGEMENT

For the renovation of a bridge it is necessary to close down the road for a few weeks. To inform the traffic that the road is closed the contractor has to make a traffic plan.

For this purpose the contractor can use traditional road signs, but also digital text cars or mobile traffic line signalization.

Road sign



Text car



Mobile traffic signalisation



The contractor included the following in the In-Out list.

In:

- Making a traffic plan.

Out:

- A Mobile Traffic Signalisation and more text cars than necessary to meet the requirements of the standards will be out of scope.

Assumption:

- The road is 11,5 meter wide, according the Tender Specification.

For redirecting traffic the contractor will use traditional road signage and the specified number of text cars by the standards. In the tender specification the client only wrote that the contractor has to meet the standards for redirecting the traffic. The client did not demand Mobile Traffic Signalisation. Because of the wideness of the road, Mobile Traffic Signalisation is not a requirement according to the standards.

Example 10: EMERGENCY SERVICES

For the renovation of a bridge it is necessary to close down the road a few times. Bridges are essential for emergency services (police, fire department, ambulances). For this the contractor had to make a plan.

The contractor included the following in the In-Out list.

In:

- Making a plan for the emergency services.
- During the renovation emergency services have guaranteed passage over the bridge.

Out:

- During the specified period in the tender specification there will be no passage for the emergency services, except for the ambulance between 06:00 - 18:00.

Assumption:

- For the ambulance the bridge is an essential connection. Other emergency services have a local alternative.

In the tender specification the client demanded the passage of the emergency services, but gave the contractor the possibility to close down the road totally (limited in time). In the list the contractor specified this timeframe and could argue that this timeframe is necessary for the work that has to be done.