

On the advantages of negotiation

A partial response to Kjell Tjensvoll

This article offers a partial response to and personal reflection on Kjell Tjensvoll's March 2011 article on the benefits of the procurement process to the Norwegian Electronic Health Library. It considers Tjensvoll's assertions on the basis of the author's own experience of licensing, negotiation and procurement with the UK's academic library consortium, JISC Collections, over the last decade.

It argues that whilst there are undoubtedly benefits to be had from tender processes, there are also a number of potential pitfalls and unintended consequences and questions whether a procurement exercise is always the most appropriate way to go about licensing unique electronic resources.

It is further suggested that for essential procurements at the consortia level a well-structured negotiation can deliver superior results more finely attuned to the needs of the consortium.



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Introduction

In the March 2011 issue of *Serials*, Kjell Tjensvoll from the Norwegian Electronic Health Library provided an overview of the benefit of the tender process and its use as a 'powerful tool for acquisitions'.¹

In this article, I will offer a partial response to and personal reflection on Tjensvoll's assertions based on my own experience of licensing, negotiation and procurement with the UK's academic library consortium, JISC Collections. Whilst there are undoubtedly benefits to be had from tender processes, the article will ask whether these tenders and the resulting procurements always deliver the intended results and whether a procurement exercise is always the most appropriate way to go about licensing unique resources.

It is further suggested that for essential procurements at the consortia level, a well-structured negotiation can deliver superior results more finely attuned to the needs of the consortium.

Background

JISC Collections is the national e-resource negotiating body for universities, colleges and

research councils in the United Kingdom. It has a diverse membership of over 600 academic institutions from small specialist agricultural colleges to very large multi-disciplinary research institutions.

It licenses a wide variety of digital content on behalf of its membership, for example e-books, e-journals, databases, multimedia and geospatial data.

Furthermore, these e-resources are licensed in a variety of ways and for a number of different purposes:

■ National agreements

JISC Collections receives a small content grant from JISC which it uses to license e-resources nationally in perpetuity and where access is made freely available to all UK universities, colleges and research councils. Over 20 e-resources, such as *Early English Books Online*, *Eighteenth Century Collections Online* and the *Royal Society of Chemistry Journal Archive*, have been licensed in this way.²

■ Opt-in agreements

The vast majority of JISC Collections' licensing activity involves negotiating agreements on behalf of our members. These agreements tend to be for

subscription resources such as e-journals, e-books and databases. They also tend to be multi-year agreements, and increasingly they are offered with a variety of options to take account of the diverse nature and requirements of JISC Collections membership. Well over 100 e-resources are available through JISC Collections agreements³.

■ Projects

JISC Collections also undertakes a variety of projects on behalf of the UK academic community, especially to investigate the academic market for e-books, and it has been necessary to license collections of e-books as part of those projects.

Licensing methods

To license all of these resources, JISC Collections has employed a variety of methods such as direct negotiation with the publisher, framework agreements, competitive dialogues and open procedures. As far as possible, the method selected is appropriate to the e-resources being licensed and the rationale for their licensing, which is explored further below.

Advantages to the tendering process

In my opinion there are a number of occasions when the process of preparing for and undertaking a tender can bring considerable value, the main benefit being that it requires the purchaser(s) to consider exactly what it is that they wish to procure and requires all suppliers to respond to the same criteria on the same timetable:

1) New resources and format types

There are occasions, and I would suggest that Tjensvoll's point-of-care databases are a good example, where purchasers do not have access to all the information they require in order to negotiate effectively. This is especially the case with new types of e-resource. Here one may be unfamiliar with the different offerings available for purchase, the business models under which those e-resources are licensed, or indeed what exactly a high quality product will include.

In such situations, it is undoubtedly sensible to consider and attempt to define what one wishes to procure in advance and seek proposals from all of the available suppliers at the same time to facilitate the process of comparison and review.

2) Capital purchases

As mentioned above, JISC Collections is fortunate enough to receive funding which sometimes allows us to procure content on behalf of all of our members. Sometimes there have been particular resources available which are so unique and important to our membership that direct negotiations have been entered into. However, there have also been occasions, especially when lots of publishers started making their digital back-files available and the responses of our membership to prioritization were so varied, when there was no other option than an open tender to ensure that the selection was fair, and delivered value for money.

3) Prioritization of licensing

There have been occasions in JISC Collections where the licensing team has been overwhelmed by proposals for new and existing products from suppliers. Whilst there is nothing to stop one negotiating for all of these unique resources individually, it is not necessarily an effective or sensible use of limited human resources and expertise. In such circumstances, the issuing of a framework agreement provides an opportunity to receive and review a large number of proposals in an efficient way, reduces the likelihood of becoming involved in protracted negotiations for resources which may not have widespread appeal and requires all suppliers to meet the purchasers' criteria as a prerequisite for inclusion in the framework.

Disadvantages in comparison to negotiation

Against these advantages, I would argue there are a wide range of disadvantages, which should be considered before one embarks on the tender process or when selecting which type of tendering process to use. After all, as Tjensvoll notes, 'It is legal to negotiate directly if the product in question is truly unique and without competition in the market'⁴. I believe it is certainly possible within the scholarly communications environment to apply this rationale to almost all products on the market.

■ Essential resources

Whether one likes it or not, there are certain resources which for now at least are considered essential by their users and for which there is no adequate substitute. Furthermore, the reality of this means that one can have unsatisfactory

negotiations which nevertheless mean institutions will have to renew their subscriptions.

If these resources fail to progress in a tender process, one of two things can happen. Either institutions end up having to select another resource instead that may be inferior, or even worse, the product fails to be selected under a tender process, but individual institutions have to go out and negotiate for it themselves, losing whatever benefits may have come to them from collective bargaining and negotiation.

■ Unforeseen outcomes

Linked to the issues outlined above is the problem of unforeseen outcomes in procurements. There are situations where, despite the best efforts of all involved and despite considerable effort and intellect being expended in the drafting of the best possible criteria, when the marks come back one ends up selecting a resource which, whilst very good, is not the one everyone hoped for or anticipated at the outset. Now, it may well be that those undertaking the procurement were prejudiced in their initial inclinations and that the tender process has provided a service by rectifying this, but there is also the concern that tender processes can be gamed in such a way that good but not great resources will rise to the top.

■ Failure to participate in the tender process

Again linked to the challenge posed by essential resources which fail to progress in a tender is the decision of suppliers not to submit certain resources under a tender. There may be a number of reasons for this – some good and some not so good – but if a resource that your institution requires is not submitted to a tender then one is thrown back on the problem of having to enter into negotiations regardless, or ignore it entirely.

As one unimpressed librarian recently remarked to me, being told that they would just have to buy another book because the one they wanted was not available under their framework agreement did not really give them much faith in the ability of that framework to adequately meet the needs of their institution and its users.

Whilst no one wants to be in a situation of having to bow to the will of a supplier, one needs to have decided in advance what one's position will be in this eventuality, and the potential consequences – which may be better in the long run!

The additional risk here is that one ends up in a situation where one's selections are based not on

what one's members demand, but what suppliers have put forward. This is hardly ideal and even if the tender process overall is saving time and money on the effort that could have been expended in individual negotiations, it is unlikely to have the same savings over no negotiations.

In my view, these three are the most important concerns when considering a tender process. If one absolutely must have the resource, why not negotiate directly for it? To enter into negotiations does not mean one cannot plan in advance, drawing up criteria and priorities. Indeed it would be foolhardy to enter into any set of negotiations without a clear set of criteria drawn up in advance.

One needs also to consider the impact on one's members and their attitude towards those negotiating on their behalf. In each of the cases above, there is a possibility of reputational risk to the consortium from having failed to meet the demands of its members and requiring then to shoulder a greater responsibility in negotiation themselves.

However, these are not the only risks to take into account when considering embarking on a tender process. As discussed earlier, one of the key advantages of the tendering process is the importance it places on identifying common criteria and requiring all suppliers to meet those criteria. This does presuppose, though, that in an environment of (increasingly) diverse institutions and publishers or suppliers offering a wide variety of resources under a variety of business models, one can even identify common criteria or refine criteria to the extent that they take account of the specific aspects of different publishers' models that one wishes to address. Within JISC Collections we have discovered that it pays to adopt a different approach with different publishers and I am not sure that a tender would always have given us the flexibility we required to reach an acceptable outcome.

It is undoubtedly a source of great frustration that different publishers may require such different approaches, but that is the reality of licensing e-resources and, whilst we may also seek changes over the medium and longer term, there are needs to be met in the short term as well.

Finally, I would like to discuss Tjensvoll's comments on the time savings that arise from tenders: 'Many comment that tenders are more time consuming than direct negotiations. This may be true for simple acquisitions where there are not too many difficult issues. When the picture is a bit more complicated, much time can be saved by

issuing a tender where requirements are not up for discussion.⁵

I would suggest that in fact the opposite is true and that a tender is better suited to simpler acquisitions rather than more complicated ones where for all of the reasons discussed above, such as the complexity of publisher offerings, the difficulty identifying commonly relevant criteria or the risk of an essential resource not being selected through a tender process, one may wish to engage much more actively with the publisher or supplier.

A negotiated approach does not necessarily mean that the purchaser has to discuss all of its key requirements. What it can mean, though, is that both sides have an opportunity to explore how apparently irresolvable issues can be overcome to mutual advantage.

Conclusion

Clearly, there are times when undertaking a tender is the most effective and efficient way of procuring resources, but as I hope I have shown, it is worth considering the possible drawbacks before starting what can be a very long process.

I am reminded of Maslow's maxim that if the only tool you have is a hammer, your problems will start to look like nails.⁶ As purchasers of resources we should be ensuring that we have a range of tools at our disposal when it comes to licensing those resources. If you have negotiation expertise, why not make use of it, and the same for tendering. Surely, that is more likely to deliver the desired result than focusing in on the process at the expense of the outcome.

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