

# Competitive Dialogue Procedure

## OGC guidance on the Competitive Dialogue Procedure in the new Procurement Regulations

January 2006



## OGC Guidance on the Competitive Dialogue Procedure

### The Competitive Dialogue Procedure in the new Public Contracts Regulations

#### Contents

1. Introduction
2. Why use competitive dialogue for complex projects?
3. The competitive dialogue provisions in Directive 2004/18/EC
4. Under what circumstances can competitive dialogue be used?
5. Technical complexity
6. Legal or financial complexity
7. Structure of the competitive dialogue process
8. Post-tender discussions
9. Post-tender discussions with candidates who have submitted final tenders
10. Post-tender discussion with the preferred bidder
11. Commercial confidentiality (Article 29(3))
12. Payment of bid costs
13. Training module on the new Directives  
Annex A

## **1. Introduction**

- 1.1 The competitive dialogue procedure is a new procedure introduced in the public sector procurement directive (2004/18/EC), which has been implemented in the Public Contracts Regulations (SI 2006/5) with effect from 31 January 2006. It is for use in the award of complex contracts, where there is a need for the contracting authorities to discuss all aspects of the proposed contract with candidates. Such dialogue would not be possible under open and restricted procedures.
- 1.2 The structure of the procedure changed considerably during the course of the negotiations leading to the adoption of 2004/18/EC. Lobbying by UK stakeholders, both public and private sector, helped to ensure that the final text fitted better with existing UK PFI practice. The end result is a structured negotiated procedure, which is similar in many ways to the existing practice of letting PFI contracts.
- 1.3 The main features of the new procedure are:
- dialogue is allowed with selected suppliers to identify and define solutions to meet the needs and requirements of the contracting authority;
  - the award is made only on the most economically advantageous tender criteria;
  - dialogue may be conducted in successive stages, with the aim of reducing the number of solutions/bidders, and
  - there are explicit rules on post-tender discussion.
- 1.4 The main differences from the competitive negotiated procedure are that a structured tendering approach is provided for and, as mentioned above, there are rules on the conduct of discussions at the post tender stage both with tenderers who have submitted final bids and subsequently with the tenderer who has provided the most economically advantageous tender (preferred bidder).

## **2. Why use competitive dialogue for complex projects?**

The new procedure was negotiated for use in complex projects. It is for use where the open or restricted procedures would not allow the award of such contracts. It has a wider application than existing PFI/PPP projects, for instance for use in complex IT projects. The current practice is to use the competitive negotiated procedure, where available, for such projects. This will not be possible with the availability of the competitive dialogue procedure. The European Commission, when discussions were held with the UK on the Pimlico schools case, cast doubt on the use of the negotiated procedure for this PFI works contract (arguing that the use of prior overall pricing as a reason for using the negotiated procedure was not justified in this case). It is likely in future there will be a close examination of the use of the competitive negotiated procedure for complex contracts, whereas the Commission will expect the use of the competitive dialogue procedure. So, the negotiated procedure should only be used in very exceptional circumstances. The London Underground PPP would be such an example. The fact that a contracting authority was undertaking a complex procurement for the first time would not justify the use of the negotiated procedure. In the exceptional circumstances where the competitive negotiated procedure is used a full audit trail should be maintained and appropriate legal advice sought.

## **3. The competitive dialogue provisions in Directive 2004/18/EC**

These are set out in recital 31, in Article 1 (definition) and in Article 29, which covers the competitive dialogue process. The definition and Article 29 have been transposed into the new Public Contracts Regulations 2006 as Regulation 18 (the competitive dialogue procedure).

## **4. Under what circumstances can competitive dialogue be used?**

4.1 Article 1(11)(c) sets out that contracts can be considered as particularly complex where contracting authorities:

- are not objectively able to define the technical means capable of satisfying their needs or objectives and/or
- are not objectively able to specify the legal and/or financial make-up of a project.

4.2 This definition is given further context in the first sentence of recital 31 which states:

*"Contracting authorities which carry out particularly complex projects may without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the in the way of technical solutions and/or financial/legal solutions."*

4.3 Recital 31 goes on to use integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing, the financial and legal make up of which cannot be defined in advance, as examples of complex projects where the contracting authority might not be in a position to be clear about their requirement or be able to know what the market could offer.

## **5. Technical complexity**

In many complex contracts, contracting authorities will seek to explore what the best solution might be to fit its needs. (For complex IT projects, a variety of technical solutions might be possible.) As a result, the contracting authority would not be able to define the technical means of satisfying their needs at the outset and consequently the use of the competitive dialogue procedure is justified as technical complexity exists.

## **6. Legal or financial complexity**

For PPP/PFI contracts, it is often the case that the financial or legal make-up cannot be defined in advance, because issues such as risk allocation, how the project is going to be carried out and financed and who is going to be responsible for which services, will be the subject of discussions with the potential providers. The European Commission regard the Pimlico Schools case, where the contracting authority sought proposals, which offered different ways or combinations of ways of meeting the need, such as rebuilding the school on the existing or new site, refurbishing the school and/or the sale of all or part of the school's land, as an example of legal or financial complexity. The same applies to many asset based PFI projects, where services are also provided, such as schools, hospitals and prisons, where the legal and financial make up is not able to be determined in advance. In such circumstances the use of the competitive dialogue procedure is justified.

## **7. Structure of the competitive dialogue process**

7.1 A flow chart of the process is provided at annex A. Contracting authorities are required to publish a contract notice setting out their needs and requirements, which are defined in the notice itself and/or in a descriptive document. The term "descriptive document" is used here in contrast to the use of "specification", to cover the broader approach in competitive dialogue of setting out needs and requirements for which different solutions will be proposed.

7.2 The selection process, following expressions of interest, is carried out in accordance with the relevant provisions of Articles 44 to 52; these articles also cover the selection process for

restricted and negotiated procedures. Following the selection of candidates there is an invitation to dialogue. The aim of the dialogue/iteration phase is "to identify and define the means best suited to satisfying [the contracting authorities] needs." These needs should have been set out by contracting authorities before engaging in procurement. Competitive dialogue should not be regarded as a free option for authorities to market test ideas.

- 7.3 Contracting authorities can reduce to three the number of candidates they intend to invite to dialogue provided this is sufficient to ensure effective competition. Where there is not a sufficient number meeting the selection criteria, the authority can proceed with the candidate(s) which do meet these criteria.
- 7.4 The Directive does not set out in detail how the dialogue should be conducted, but says that contracting authorities may discuss all aspects of the contract with the chosen candidates as long as the principle of equal treatment is followed. Following existing practice, it is likely that discussions will mostly be between the contracting authority and the providers about their own solutions. The issue of commercial confidentiality or cherry picking is discussed further at paragraph 11 below. During the course of the dialogue contracting authorities may ask the participants to specify their proposals in writing. On the basis of written proposals, (these could be "outline solutions," "projects proposals" or "tenders," the number of solutions can be reduced by applying the award criteria in the contract notice or the descriptive document. The number of bidders is likely to be reduced as a consequence of reducing the number of solutions. The adoption of this approach needs to be set out in the contract notice or the descriptive document.
- 7.5 When the contracting authority is in a position to identify the solution or solutions, which may meet its requirement, the candidates are asked to submit their final offer on the basis of the solutions discussed and presented during the dialogue. These final tenders need to contain all the elements required and necessary for the performance of the contract. It is sensible for these tenders to be as complete as possible, because although there is scope for post-tender discussion with the candidates who have submitted final tenders, limits are placed on these discussions as set out below.
- 7.6 The tenders are evaluated against pre-determined award criteria, which allow for the most economically advantageous tender to be selected. The award criteria need to be given relative weighting. This is in line with best practice and ECJ case law. Where it is not possible to establish weighting in advance, the order of importance of the award criteria in descending order should be listed, rather than relative weighting.

## **8. Post-tender discussions**

- 8.1 The provisions on post-tender discussions, firstly with the candidates who have submitted final tenders and subsequently with the tenderer or preferred bidder, who has submitted the most economically advantageous tender, are set out in Article 29(6) and 29(7) and are referred to in recital 31. A similar approach in emphasising that these discussions should not distort competition or cause discrimination is adopted in both cases.
- 8.2 The provisions drew on the Council Minutes Statement of 21 July 1989, concerning the scope for the clarification of tenders, but go further. As only some detail is provided, the provisions are open to interpretation, as indeed are the provisions in the original Minutes Statement, which said:

*"The Council and the Commission state that in open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders of the requirements of the contracting authorities and providing that this does not involve discrimination".*

## **9. Post-tender discussions with candidates who have submitted final tenders**

- 9.1 In looking at final tenders, contracting authorities can ask tenderers to clarify, specify and fine tune, and provide additional information, as long as this does not involve changes to the basic features of the tender, which are likely to distort competition or have a discriminatory effect. Recital 31 adds that fundamental aspects of the offers should not be altered.
- 9.2 From this it is clear that discussions can lead to changes to the tenders to clarify, fine tune and provide additional information, as long as fundamental aspects of the offer, such as price and risk allocation, are not altered.

## **10. Post-tender discussion with the preferred bidder**

- 10.1 In working with the tenderer selected as providing the most economically advantageous tender, the contracting authority can ask the preferred bidder to clarify aspects of the tender or confirm commitments contained in the tender as long as this does not have the effect of distorting competition. Recital 31 also says that competition should not be distorted or restricted by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous tenderer. This makes clear that the practice of keeping a reserved bidder in play is discouraged.
- 10.2 The context furnished in the recital to the effect that substantial new requirements should not be imposed on the preferred bidder, shows that some change is expected at this stage. Traditionally, for PFI contracts, work is done with the preferred bidder to make sure that extraneous bid costs are not imposed on all the candidates. This work would be done with whoever were to be chosen as the preferred bidder and so should not be regarded as distorting competition. Examples of this work include the fleshing out of design, finalising the contract documents, due diligence for financial backers and final consultation with the workforce and its representatives.

## **11. Commercial confidentiality (Article 29(3))**

Contracting authorities may reveal solutions or aspects of solutions of other candidates on condition that the candidate agrees to such disclosure. This means that where an authority identifies a particular solution or aspects of one or more solutions as being of real interest, the possibility exists for other candidates to submit tenders including that element. The possibility of sharing information is probably best addressed at the outset of the dialogue phase.

## **12. Payment of bid costs**

The ability to pay bid costs (Article 29(8)) is not limited to the competitive dialogue procedure, but is included explicitly here in recognition that complex contracts require a lengthy procurement and engender significant bid costs. Undoubtedly, high bid costs and long procurement times can represent a concern for both the public and private sector. However, the competitive dialogue procedure should not lead to an increase in bid costs. Regardless of this, during all procurements contracting authorities should work in partnership with bidders to ensure that bid costs are kept to a minimum, ensuring value for money.

### **13. Training module on the new Directives**

The training module, which can be found on the procurement policy section of the OGC web site ([www.ogc.gov.uk](http://www.ogc.gov.uk)), contains additional information on competitive dialogue, such as timescales, differences from negotiated procedures and a case study.

**OGC**  
January 2006

Annex A

**Competitive dialogue flowchart**

