



Competitive Dialogue – is there is a better way?"

Competitive Dialogue, the new procedure for awarding public contracts introduced by Directive 2004/18 (the Public Contracts Directive), has now started to be used to implement PPP projects within the EU.

The Public Contracts Directive leaves Contracting Authorities with significant discretion in the implementation of the Competitive Dialogue procedure, subject to the need to comply with the need for confidentiality and equality of treatment, and different approaches are starting to emerge.

Are all the emerging approaches all equally valid? And how should their fit with the key criterion of achieving value for money through transparent and competitive procurement be assessed?

One of the key areas in the implementation of the procedure is the conduct of the dialogue phase - the discussions with short listed bidders prior to the call for final tenders to identify and define the best means of achieving the Contracting Authority's needs. The Contracting Authority can decide what elements of the contract it wishes to discuss and process issues such as the number of stages in the dialogue, the objective of each stage, the timescale and how it wants to receive information from bidders etc.

The dialogue phase is crucial to the achievement of value for money by the public sector because:

- At that stage there is still competition for the contract, a key weapon in the armoury of a Contracting Authority seeking to achieve value for money
- The way the dialogue phase is conducted can significantly influence the likelihood of the Contracting Authority receiving substantially unconditional tenders from bidders, thus maximising the effect of competitive pressure. Anchoring required outcomes and key contract terms in the dialogue phase before tenders are called for can help to limit the need to "clarify", "specify" and "fine-tune" tenders and limit the need to "clarify aspects" of the (winning) tender" and "confirm commitments" in it.

The early indications are that two types of approach are emerging to the implementation of the dialogue phase ie:

- A consultative approach, based on the Contracting Authority's solution(s). The dialogue is based on a solution or solutions already developed by the Contracting Authority and launched by them as their provisionally preferred solution(s) at the opening of the dialogue phase. In practice, this means that the dialogue phase will start with the marking up (proposed amendments/comments) by bidders of the Contracting Authority's preferred solution(s)

- An investigative approach, based on bidder-driven solutions. This starts from a definition by the Contracting Authority of its objectives and desired outcomes but less definition of the preferred solution(s). In this method, the dialogue phase will typically start with the submission of outline solutions by the bidders.

Clearly, using a consultative approach, the dialogue phase can only be launched when the Contracting Authority has a clear understanding of the technical solutions to be proposed, the strengths and weaknesses of those solutions, the optimal allocation of risks, and the approximate cost of the solutions. But ultimately the Contracting Authority will, as part of the process of determining the final form of the contract and of evaluating the tenders, have to form judgments on these matters, so this approach is likely to represent a shift in the timing of work by the Contracting Authority (and thus the timetable for different phases of the procedure) rather than an increase in its overall workload or increase in the overall elapsed time for the procedure. And it should be able to do so, if it has conducted a rigorous market assessment before launching the opportunity, supplemented, if necessary by pre-dialogue discussions with the short list. Such pre-dialogue discussions are not forbidden by the Public Contracts Directive.

The advantage of addressing key issues before launching the dialogue phase is that it minimises the risk of insufficiently rigorous planning by the Contracting Authority and helps it set the agenda for the dialogue, steering the dialogue towards the matters the Contracting Authority wants to discuss. This need not constrain innovation in the design and delivery of the project but it is intended to ensure that as far as possible the Contracting Authority maximises the extent of that innovation before the start of the dialogue phase.

In effect the Competitive Dialogue procedure would then become a flexible form of the restricted procedure, or, to put it another way, a well-structured form of the negotiated procedure, incorporating best practice from the current use of that procedure.

Two other issues are also key to the conduct of the dialogue phase.

Firstly, bringing in the lenders to the dialogue, so that they too are signed up to the key terms of the contract before tenders are called for. This avoids the all too frequent situation where there are significant changes to projects at a late stage to meet lenders' needs, in a situation where the Contracting Authorities have lost the weapon of competitive pressure. But there are those who still argue that best way to implement Competitive Dialogue is to interpret the legal framework in such a way as to recreate the approach often used in practice in the negotiated procedure ie the "preferred bidder syndrome", with lengthy post-tender negotiations with the winning bidder. This may mean that significant elements of the contract are thus not finalised until after competition has been eliminated.

Secondly, not eliminating solutions during the dialogue phase, again to maintain competitive pressure in the process. Assuming that there are sufficient suitable candidates, four candidates is likely to be the optimal number to take forward to a dialogue based on the consultative approach. Short listing five could be too time consuming for both sides and carries risks of the "lottery effect" ie of bidders not regarding the process as one which gives them a reasonable chance of winning. Short listing three carries the risk of being left with insufficient competition if one bidder withdraws during the dialogue phase or fails to submit an offer. But this approach needs to be underpinned by the inclusion of all bidders who enter into the dialogue phase in the call for tenders, even if is not certain that they will actually bid. The dialogue will have been conducted separately with each bidder, so competitive pressure on other bidders will be maintained by this uncertainty.

In summary, there is a clear need for a best practice to emerge as the use of the Competitive Dialogue procedure spreads. But it is already clear that the flexibility given by the procedure

cannot be a substitute for effective planning and clear definition of desired outcomes by Contracting Authorities.

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