

What next for Competitive Dialogue after the recent European Commission consultations?

In early 2011 European Commission launched two consultations with a potential impact on the future use of Competitive Dialogue ie the consultation by DG Markt on possible future changes to the European public procurement rules and the consultation by DG ECFIN on the Europe 2020 Project Bond initiative.

Two aspects of the public procurement reform consultation could potentially impact significantly on Competitive Dialogue ie:

- The public procurement consultation (Q17) raised the possibility that Competitive Dialogue might be modified or abolished
- The summary of the results of the public procurement consultation refers to the fact that "there is broad support for the suggestion to allow more negotiation in public procurement procedures and/or generalising the use of the Negotiated Procedure with prior publication of a contract notice". Generalising the use of the Negotiated Procedure with notice would in effect render Competitive Dialogue redundant.

If Competitive Dialogue is not abolished or rendered redundant, could it be substantially modified? This possibility has arisen because of a parallel consultation undertaken by the Commission in the context of the Europe 2020 Project Bond initiative.

Public procurement aspects were not specifically addressed in the questions to stakeholders as part of the Europe 2020 Project Bond consultation. However, at the consultative conference on 11 April 2011, public procurement issues, and, in particular, the use of Competitive Dialogue, were addressed by the service provider, investor and lender community. In its summary of the results of the consultation, the Commission referred to the fact that "procurement process...obstacles in terms of requiring fully funded and committed fixed price offers to a tight timeline generally does not favour or even allow bond solutions. The process differs across Member States, but in general the demand was that the procurement process should be more flexible to allow bond solutions with their different benchmark, volatility of spread and timing requirements".

The focus of discussion in the context of the Europe 2020 Project Bond initiative was thus to amend either the legal text or the implementation of key parts of Article 29(6) and Article 29(7).

These regulate the conduct of the award procedure after the submission of final tenders which, according to Article 29(6), "shall contain all the elements required and necessary for the performance of the project" and thus should not need to be significantly modified.

Article 29(6) provides that "these tenders may be clarified, specified and fine-tuned at the request of the Contracting Authority. However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect".

Article 29(7) provides that "at the request of the Contracting Authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination".

The main focus of this discussion appears to be to widen the scope of the changes which are legally permissible in the post-tender phase ie to:

- Widen the definition of what is permissible as “clarifying, specifying and fine-tuning” tenders
- Widen the definition of what is permissible as “clarifying aspects of the (winning) tender or confirming commitments contained in the (winning) tender
- Restrict the definition of what are “changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect”
- Restrict the definition of what has the effect of “modifying substantial aspects of the tender or of the call for tender and (risks) distorting competition or causing discrimination.

Does the possibility of abolition or substantial modification of Competitive Dialogue merit serious consideration? Is the original logic for introducing Competitive Dialogue still relevant ie. as a means to both improve the conduct of public procurement procedures for complex projects and to solve the particular challenges arising from the award of complex contracts in a way which is transparent, competitive and minimises legal uncertainty?

Two recent studies have highlighted the benefits which have resulted from the use of Competitive Dialogue when applied effectively.

In November 2010, HM Treasury published a review of the implementation of Competitive Dialogue in the UK which identified several positive aspects of its application, ie that:

- “Both (the public and private sectors) are in agreement that the process is capable of maintaining sufficient competition. Over 90% of public sector respondents felt their procurements maintained competitive tension throughout the process. When the private sector respondents were asked the comparable question, the percentage remained above 90%”
- “Competitive Dialogue has successfully addressed the issue of protracted post-preferred bidder discussions. Based on evidence received during the review, the period from Preferred Bidder stage to Financial Close for PFI projects is shorter under Competitive Dialogue and the practice of making late changes to contracts appears to be much reduced”
- “In addition to reducing the scope for significant changes to be made to contracts following the completion of the competitive stage of the process, the introduction of the Competitive Dialogue procedure has brought valuable discipline to the post-preferred bidder period, introducing a clear and structured process, with a contracted deadline for closing projects
- “The introduction of Competitive Dialogue has improved procurement outcomes by enabling the public and private sectors to develop and deliver more appropriate, bespoke, value for money outcomes. 78% of respondents to our general survey agree bidders have an increased or significantly increased ability to deliver improved solutions when compared to the Negotiated Procedure (with notice)”.

The practical implementation of Competitive Dialogue across the EU has also been addressed in a recent study by the European PPP Expertise Centre, published in July 2011. This highlighted the following positive aspects of the Competitive Dialogue procedure, based on input from the countries that use it relatively frequently compared to alternative procurement procedures:

- Improved communication between the Contracting Authority and the bidders during the dialogue, which allows to better define the Contracting Authority's needs and come up with better design and innovative solutions
- Enhanced competitive tension during the dialogue period which allows the Contracting Authority to achieve better value for money and agree on all vital commercial issues while there is still competition among participating bidders

- Better price discipline which leaves less room for “price creep” at the post-preferred bidder stage
- A general perception that Competitive Dialogue does not expose the Contracting Authority to greater risk of legal challenges than alternative procurement procedures.

Competitive Dialogue was created to address a specific public procurement challenge - the award of complex contracts in a way which is transparent, competitive and minimises legal uncertainty - which is unlikely to cease to be relevant as an issue. The reasons for its creation are still valid and the abolition or substantial modification of Competitive Dialogue would return Contracting Authorities to the same unsatisfactory choices which they faced prior to its creation.

Competitive Dialogue has been shown to bring benefits when effectively applied, though even if the benefits were less clear cut, a maximum of five years of experience with Competitive Dialogue would be insufficient to act as a basis for abolition or substantial modification at this stage and thus it would be more appropriate to optimise and make more consistent the effective application of Competitive Dialogue. The failure of Contracting Authorities to implement Competitive Dialogue effectively in individual procurements is not a reason for abolishing or significantly modifying Competitive Dialogue. The difficult credit conditions of the financial crisis have created challenges for the application of Competitive Dialogue but these difficult conditions will not be permanent. It is thus not appropriate to respond to any temporary challenges in application by amendments to the public procurement rules which could undermine the reasons for the creation of Competitive Dialogue and have an effect which lasts beyond the current crisis. Amendments to the public procurement rules are in any event only one of several potential instruments to facilitate the award of complex privately financed contracts in the current crisis.

In its recently published evaluation of the public procurement Directives, the Commission highlights the fact the benefits of European public procurement rules amount to approximately €20 billion per year, as compared to costs of approximately €5 billion per year. The generalisation of the Negotiated Procedure with prior publication in the public contracts sector potentially places these benefits at risk.

Furthermore, as the Commission has pointed out, “stakeholders are well aware that an increased use of negotiated procedures can have negative consequences in terms of transparency, non-discrimination and fair and objective proceedings. A clear majority of respondents share the view that a generalised use of the negotiated procedure might entail risks of abuse and discrimination and that additional safeguards for transparency and non-discrimination would be necessary in order to compensate for the higher level of discretion”.

In short, Competitive Dialogue remains a key element of the means by which the public sector can secure value for money in the award of public contracts.

Rather than talking about changing or undermining Competitive Dialogue, surely it makes more sense to enshrine value for money as a public procurement principle by referring to value for money specifically in the Directives?

Michael Burnett – November 2011