

## Competitive Dialogue – A practical guide

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# **Competitive Dialogue – A practical guide**

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**with Martin Oder**

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## **Note on the Authors**

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He created EIPA's European PPP Forum, is currently directing their international training programmes in PPP and is a member of the editorial board of the European PPP Law Review.

He is the author of Public-Private Partnerships (PPP) – A decision maker's guide published by the European Institute of Public Administration in 2007. His previous publications include Basic Bookkeeping – A self study guide (Institute of Chartered Accountants in England and Wales, 1984), Management Accounting – A guide for civil servants in Estonia (EU PHARE project publication, 1996) and (with Eugen Palade) Public Procurement in FYR Macedonia – A self study manual (EU CARDS project publication, 2006).

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He was admitted as an attorney (Rechtsanwalt) at the Vienna Bar in 1999. He specialises in EC and Austrian public procurement law, PPP projects in Austria and CEE countries, European Community law, EC competition law and state aid and energy law. Formerly, he worked as a lawyer with the European Commission (DG Competition) and with international law firms in Vienna and Brussels from 1995 to 2002.

## Foreword

The relative lack to date of published literature on the practical implementation of Competitive Dialogue, which in part emerges from the relatively recent introduction of the procedure into the framework of European law, has created an opportunity to shape best practice in this important area of public procurement practice. This has particular relevance for the use of Public-Private Partnerships (PPP) for infrastructure projects across the EU, whose effective implementation is one of the key aims of the book.

Anyone who has written a book of this kind knows that it almost always derives from the collective effort of several individuals. This book is no exception, and has been shaped by the sharing of ideas between the authors and with colleagues inside and outside EIPA. These processes have undoubtedly made it a better book.

The debt of gratitude, includes, in particular, Pavlina Stoykova at EIPA, whose diligent research included an analysis of all contract notices for Competitive Dialogue contract notices issued between 2004 and June 2009 and the public authorities who took the time to respond to requests for information on how, in practice, they are implementing the Competitive Dialogue Procedure. The benefit of open access to the contract documentation and methodologies used by 4Ps and Partnerships for Schools in the United Kingdom is also gratefully acknowledged. These are a well-developed indicator of current practice in the United Kingdom, which, along with France, is one of the two EU Member States predominant in the use of Competitive Dialogue.

On a purely personal basis, I would also like to thank Tore Malterud, Head of EIPA's European Public Management Unit, who has created the conditions in which this book could be written and Denise Grew (again) for her diligent and highly skilled efforts in editing and production.

Without their help this book could not have been written but, of course, final responsibility for the opinions expressed remains with the authors.

Michael Burnett, Maastricht, the Netherlands  
November 2009

## Introduction

Competitive Dialogue is a procedure for awarding public contracts,<sup>1</sup> introduced by the latest EU Public Procurement Directives<sup>2,3</sup> (the Public Procurement Directives).

It has started to be used within the EU, following the transposition of the Public Procurement Directives into national law, which was due to be completed by 31 January 2006 and has by now been completed in all EU Member States.<sup>4</sup>

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<sup>1</sup> For the avoidance of doubt, the authors here recognise that the procedure may also be used for concession contracts and is of particular value where a public sector entity is not sure at the commencement of the award procedure whether or not the allocation of risk will lead the transaction to be classified as a public contract or a concession contract. These and other terms relevant to Directive 2004/18— see below, Note 2 – are defined in Art 1 of that Directive.

<sup>2</sup> “Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts” and “Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector”. This book deals with the issues arising in the Directive relating to public contracts (hereafter referred to as Directive 2004/18) since the option to use the Competitive Dialogue is not provided for in Directive 2004/17 and is not needed because there is the freedom in the Directive to use the Negotiated Procedure without the need for special justification.

<sup>3</sup> The book is not intended to be a definite textbook on all aspects of the Public Procurement Directives. This need is more than adequately met elsewhere. See, for example, Christopher Bovis, “EC Public Procurement case law and regulation”, Oxford University Press, 2006 and Sue Arrowsmith, “Law of Public and Utilities Procurement”, Sweet and Maxwell, 2005. The wider content and context of the Public Procurement Directives are explained and discussed, however, to the extent necessary to understand the particular application of the Competitive Dialogue Procedure.

<sup>4</sup> In Directive 2004/18 the transposition of the Competitive Dialogue was left to the option of Member States, though in practice all have chosen to exercise this option.

The use of Competitive Dialogue by public authorities<sup>5</sup> wishing to award “particularly complex” contracts<sup>6</sup> is very explicitly linked with the implementation of PPP and is likely to be used extensively for the award of PPP contracts.<sup>7,8</sup>

The importance of the effective application of PPP in meeting the infrastructure needs and service delivery objectives of the public administrations across Europe, and the implementation of key EU policies, can hardly be overstated.

There are strong pressures both in old and new EU Member States driving public authorities to use PPP as a means of delivering public services e.g. budgetary pressures (whether in or out of the euro zone) leading to the need for cost reduction, better revenue collection and financing of infrastructure investment and pressures from citizens as consumers with ever higher service expectations. In some cases public entities seek also to use PPP as a way of introducing private sector management skills for different methods of service delivery and use public assets more effectively.

One consequence of the budgetary pressures facing EU Member States is a “funding gap” between the financing needed to implement the policies and the public funds available e.g. by completing the Trans-European Networks (TENs), and enabling Member States, and particularly the new Member States, to comply with EU environmental legislation, which often have specific deadlines for implementation.

So the book examines some of the challenges to ensure that Competi-

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<sup>5</sup> The term widely used in the EU context (including in Directive 2004/18) is “Contracting Authority”.

<sup>6</sup> See Art 29 and Recital 31, Directive 2004/18.

<sup>7</sup> The book is not intended to be a definite textbook on PPP. This need is more than adequately met elsewhere. See, for example, Michael Burnett, “PPP – A decision maker’s guide”, European Institute of Public Administration, 2007 ((see pp. 7-15 in particular) and Gerd Schwartz *et al* (ed), “Public Investment and Public-Private Partnerships – Addressing infrastructure challenges and managing fiscal risks”, Palgrave Macmillan, 2008 and two detailed operational guides to PPP which the authors have found useful are Michel Kerf *et al*, “Concessions for infrastructure – A guide to their design and award” World Bank Technical Paper No. 399, 1998 and Akintola Akintoye *et al* (ed), “Public-Private Partnerships – Managing risks and opportunities”, Blackwell Sciences, 2003. PPP are, however, explained to the extent necessary to understand how Competitive Dialogue can be effectively applied in the award of PPP contracts.

<sup>8</sup> The authors are aware that there is no universally agreed definition of what constitutes a PPP. The key features, described by Burnett (*op. cit.*, p. 9) may be summarised as being that of a single contract embracing both the construction of infrastructure and its availability for, or use in, the provision of services. PPP contracts are typically longer term than normal service contracts, of higher value and often complex and high profile. Remuneration for the private party derives from the provision of the service, or making the asset available for use, rather than from the construction of the asset.

tive Dialogue is used effectively for PPP transactions, though, of course, the use of the Competitive Dialogue procedure is not confined to PPP and much of the content will be relevant to complex projects which are not PPP.

The Competitive Dialogue Procedure has been designed to make PPP easier to implement<sup>9</sup> but opinions are divided about how far it will achieve this effect and how it can be implemented effectively. The legal framework as set out in the Public Procurement Directives is, however, considered to need further interpretation and there is an on-going debate about how to apply it in a manner likely to optimise value for money for the public sector.<sup>10</sup>

As will be clear from the title the authors of this book approach the implementation of Competitive Dialogue from an essentially practical perspective, bringing together legal, financial and operational experience.<sup>11</sup> It aims to provide an overall description of different aspects of Competitive Dialogue as a procurement procedure but focuses on the three areas where, in the authors' experience, there is likely to be most need for clarification, and thus most debate, given that it is a new procedure, namely:

- How a public authority should conduct the dialogue phase of the Competitive Dialogue procedure
- How to finalise the contract in the post-tender phase (after the receipt of

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<sup>9</sup> See "Green Paper on public-private partnerships and Community law on public contracts and concessions" COM(2004) 327, European Commission, April 2004, (the PPP Green Paper), p. 10, where the Commission states, at para 26, that "the Competitive Dialogue procedure should provide the necessary flexibility in the discussions with the candidates on all aspects of the contract during the set-up phase, while ensuring that these discussions are conducted in compliance with the principles of transparency and equality of treatment, and do not endanger the rights which the Treaty confers on economic operators".

<sup>10</sup> See "Report on the public consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions", Commission Staff Working Paper, SEC (2005) 629, p. 6, pp. 8-11, where, in its summary of the consultation arising from the PPP Green Paper, the Commission makes it clear that "many commentators consider that the transposition of the new procurement procedure known as Competitive Dialogue into national law will provide interested parties with a procedure which is particularly well suited to awarding contracts designated as public contracts, while at the same time safeguarding the fundamental rights of economic operators. However, a large majority of stakeholders point to practical problems with applying this procedure and ask the Commission to provide clarification".

<sup>11</sup> It should be noted that, though introducing greater legal certainty into the Competitive Dialogue procedure is important, the key issues highlighted in this book primarily relate to the exercise of the commercial and operational choices available to Contracting Authorities in the conduct of an award process. Put simply, what is legally permissible is not necessarily a sufficient guide to what is optimal in the pursuit of value for money by the public sector.

- final offers and after the selection of the winning bidder)
- What if any clarification is needed in the legal framework for the dialogue and post-tender phases of the Competitive Dialogue procedure to reduce legal uncertainty and to implement it in a way which promotes value for money.<sup>12</sup>

It aims to:

- Describe and analyse different emerging approaches to the dialogue phase, aiming to draw conclusions about how an optimal approach might be developed
- Highlight the key issues for the optimal conduct of the post-tender phase
- Draw conclusions about how the existing legal framework could be better defined and enforced to facilitate the effective implementation of Competitive Dialogue i.e. in a way which reduces legal uncertainty and promotes transparent and competitive procurement.

The book has two main audiences, i.e. European decision makers and politicians, public officials and their advisers in EU Member States, though of course it may also be of value to others, such as private sector operators and financiers, who interact with decision makers.

Firstly, it is written for European decision makers both from the legislative and judicial branch of government responsible for creating and implementing an appropriate legal framework at EU level for Competitive Dialogue and its impact on how the procedure will be implemented.

Secondly, it is written for politicians, public officials and their professional advisers in EU Member States currently facing choices about when and how to use Competitive Dialogue in a way which provides both legal certainty and maximises the likelihood of achieving value for money.

It is a book which the authors consider to be timely because of relative absence of literature in this field and the need to provide Contracting Authorities with guidance about how to exercise the significant range of choices (legal, financial and operational) which are available to them. Much of the emerging practice in the use of Competitive Dialogue is experimental. And the need for guidance is highly relevant in the context of the long term nature of commitments entered into when a public authority engages a partner for a PPP – often by means of a contract for 25-30 years or more.

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<sup>12</sup> This is not to say that the other elements of a Competitive Dialogue procedure are unimportant – it merely reflects the focus of the book on the areas of the process which are both new and which, as the authors argue, are likely to be crucial to the effective implementation of the procedure.

Many of the decisions being made now will influence the delivery of public services in Europe for the foreseeable future (and well beyond the shelf life of today's political leaders).

In the authors' experience, one of the key issues facing politicians and public officials in understanding the application of Competitive Dialogue is the difficulty in obtaining balanced guidance on how to implement it. Much of what is available both in books and on the conference and seminar circuit is the product of those with either a commercial interest in promoting excessive complexity in the application of Competitive Dialogue because they wish to be engaged in it as professional advisers or service providers who preferred the advantage conferred upon them by the way the Negotiated Procedure has often been applied in practice.

So this is a book which aims to try to fill this gap in the literature and is based on the need for the public sector to stay in control of an award procedure.

The book challenges two propositions which have begun to emerge i.e. that:

- All methods of implementing Competitive Dialogue, and in particular the dialogue phase, are of equal effectiveness from the perspective of obtaining value for money for the public sector<sup>13</sup>
- The 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 i.e. lengthy post-tender negotiations with the winning bidder after competition has been eliminated covering significant elements of the contract not finalised i.e. the "preferred bidder syndrome".<sup>14</sup>

The book is ambitious in the sense that seeks to develop an optimal methodology<sup>15</sup> for the use of Competitive Dialogue, based on a blend of existing good practice in the Negotiated Procedure, emerging practice in

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<sup>13</sup> It is not, of course, the intention of the book to presume to tell Contracting Authorities how they should exercise all the choices available to them such as, for example, what the objectives of the contract should be, what performance standards they should expect and what short listing or offer evaluation criteria should be applied. It is, however, a given that the Contracting Authority will be clear about these matters and others such as how the service provider's performance in achieving the solutions will be measured, the extent of market interest in the contract and the optimal timing for bringing the contract to market etc. The optimal methodology proposed does however aim to highlight the processes to be followed in making the choices and the factors to be taken into account in exercising those choices.

<sup>14</sup> For this reason, the entity which is successful in the award process will generally be referred to in this book as the "winning bidder" or "winning tenderer".

the application of Competitive Dialogue and the authors' experience. In short, the aim of the book is not merely to describe how currently Competitive Dialogue is being implemented but it also aims to shape the development of an optimal model of its implementation in PPP projects.

The authors are of the firm conviction that there needs to be clarity on the part of the public sector, matching that almost always demonstrated by the private sector in pursuit of its objectives, about the most effective way of exercising the choices available to Contracting Authorities in the Competitive Dialogue Procedure i.e. the process to be applied in achieving the objectives of the contract being awarded.

Put simply, the fact that flexibility is accorded by legislation in the exercise of choices is a sufficient reason for attempting to define means of exercising those choices in a way which is likely to optimise value for money for the public sector. If the public sector does not do so, it is likely that the procedure will effectively be driven by the needs of its potential private partners, to the possible detriment of value for money.

Finally, the book is a deliberate attempt to place Competitive Dialogue firmly in the context of the Public Procurement Directives, applied, of course, in the different national, legal and administrative contexts for public procurement. It aims to highlight very clearly both where the Competitive Dialogue Procedure is similar to and different from the experiences with which the reader may be familiar from an understanding of the application of the Public Procurement Directives generally i.e. in the application of the legislative framework for public procurement prior to the enactment of Directive 2004/18 and the application of other award procedures currently available. In particular, the book reflects the authors' experience that many of the mistakes made or likely to be made in the implementation of Competitive Dialogue are ones which ought reasonably to have been obvious at the time and could have been avoided by effective application of existing good public procurement practice. To be specific, the effective application of the Competitive Dialogue procedure has more similarities with existing good practice in the Negotiated Procedure with notice than is sometimes admitted.

All writers come to the process of writing with some of their own well formulated opinions. The authors are no exception to this.

In this context, it will become obvious to readers that these include:

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<sup>15</sup> The idea of an "optimal methodology" is that the approach should generally be followed except when there are particular special circumstances relevant to the Contracting Authority and/or the award process which are duly justified or when major market shifts occur during the award process leading to the need for modification, such as the current global financial crisis or events such as September 11th.

- **The importance of legal certainty** i.e. the assurance that the process for the award of a contract will, if conducted according to known and well defined rules, lead to an outcome which is less likely to be successfully challenged<sup>16</sup>
- **The need for public procurement procedures to be primarily driven by the need to secure value for money for the public sector**, defined, for example, by the Treasury in the UK, as “the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user’s requirement”. In this context, whole-life costs can include, in addition to the costs of design and construction, the costs of service operation, asset repair and maintenance, user support, user training, supply of materials and cost of decommissioning/disposal<sup>17</sup>
- **The principle that value for money can best be secured by using a transparent and competitive form of procurement appropriate to the significance of the transaction.** In the case of complex and high value contracts for which Competitive Dialogue is likely to be used, a transparent and competitive form of procurement means EU-wide advertising and the definition of requirements calculated to stimulate potential interest from the maximum number of potential providers with the capability to fulfil those requirements in a manner which does not discriminate against non-national providers<sup>18</sup>
- **The idea that legislative provisions, administrative regulations and good practice procedural guidance should underpin the public sector’s pursuit of value for money**<sup>19</sup>
- **The idea that more extensive use of the Competitive Dialogue proce-**

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<sup>16</sup> The qualification here is necessary because of the propensity in some jurisdictions, such as, for example, Germany and Austria, for challenges to public procurement procedures relating to large infrastructure projects (such as PPP tend to be) to be the rule rather than the exception.

<sup>17</sup> By way of explanation, in the authors’ view, the idea that the objective of public procurement, and hence PPP, should be anything other than value for money for the public sector needs no justification.

<sup>18</sup> If further justification is required for the case for transparent and competitive procurement, it can be amply provided by a European Commission study which highlighted the fact that prices paid for contracts were 30% higher where the Public Procurement Directives were not applied than when they were applied. See “A report on the functioning of public procurement markets in the EU: benefits from the application of the EU directives and challenges for the future”, European Commission, February 2004.

<sup>19</sup> For the avoidance of doubt this does not, as is evident from the conclusions (see Chapter 6), mean that the authors are advocating new legislative provisions or administrative regulations at EU level. But it does argue for more detailed good practice guidance by Member States to give practical effect to the optimal methodology explained here by giving direction to the exercise of discretion by Contracting Authorities.

**ture as compared to the Negotiated Procedure with notice is desirable to achieve the aim of securing value for money for the public sector.<sup>20</sup>**

Writing this book primarily from a public sector perspective does not, in the authors' view, require any justification. It is a reflection of their experience that priority needs to be given to improving the capability of the public sector to commission and manage PPP using the Competitive Dialogue Procedure. But, in this focus on the public sector, there is no intention to fail to recognise the needs of private sector partners and of lenders who finance PPP. No public authority wishing to enter into a PPP should forget that there will be no transaction unless:

- The private sector partner can make a profit commensurate to the risks it is assuming
- Lenders are willing to lend to the private sector partner
- The process is conducted in a manner which enables the private sector to express, and the public sector to benefit from, the innovation which the private sector is capable of offering
- The timetable for the process is brisk but realistic such that:
  - The costs and time incurred by both parties is minimised
  - The private sector can obtain the information necessary to understand and respond to the Contracting Authority's needs
  - The Contracting Authority can give due consideration to the selection of the winning bidder and the resolution of issues arising during the process.

The book falls into six parts.

Chapter 1 is a brief introduction to the legal framework for Competitive Dialogue.

Chapter 2 then analyses the legal framework and sets the context for the use of Competitive Dialogue. It explains how it emerged, how it compares to the Negotiated Procedure, the legal challenges in applying Competitive Dialogue, when it is appropriate to use it and where it is being used in the EU.

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<sup>20</sup> As one of the authors has written elsewhere (see Burnett, *op. cit.*, pp. 18-19), the extent to which many PPP contracts, for which the Negotiated Procedure with notice has been used extensively in the United Kingdom, have actually delivered value for money over the whole life cycle of long and complex contracts is as yet unproven. This casts doubt on claims sometimes advanced that there is a tangible and realised benefit derived from continuing to use the Negotiated Procedure with notice on the grounds of additional flexibility as compared to the Competitive Dialogue Procedure.

Chapter 3 then summarises the key issues arising in the implementation of Competitive Dialogue at each stage of the process and how they should be addressed and explains the ideas behind the optimal approach proposed.

Chapters 4 and 5 provide more detailed practical guidance for the implementation of different phases of the Competitive Dialogue Procedure.

Chapter 4 covers the period up to the end of the dialogue phase i.e. pre-launch planning, the launch of a Competitive Dialogue Procedure, short listing and the conduct of the dialogue phase. It sets out the different stages of the Competitive Dialogue Procedure and explains where the dialogue phase fits into the procedure and why it is key to the effective implementation of the procedure. It describes how the pre-launch planning, the launch of the procedure and the short listing phase should be conducted to facilitate the optimal conduct of the dialogue phase. It then assesses the emerging methods being used in the conduct of the dialogue phase and then explains in detail the optimal approach to conducting it, combining practice currently in use and an assessment of how this might be developed and improved. This is consistent with the aim of the book.

Chapter 5 addresses the later phases of the Competitive Dialogue procedure – the post-tender phase and the phase following the selection of the winning bidder, considering the scope for action by the Contracting Authority and emerging trends in applying the legislation in a way most likely to achieve value for money. Again, it then aims to develop a best practice approach to the conduct of these phases i.e. to finalise the contract after the receipt of bids and after the selection of the winning bidder.

Finally, Chapter 6 attempts to draw together the key conclusions for the future of Competitive Dialogue and the actions needed to implement them at EU and national level. Taken together, they add up to an agenda for the future effective use of Competitive Dialogue.



# **CHAPTER 1 – Competitive Dialogue – Introduction to Legal Framework**

## **OVERVIEW**

Chapter 1 contains a summary of the current legal framework for Competitive Dialogue and recent developments which may have an impact on its use, as a necessary basis for an analysis of the legal framework and the context within which Competitive Dialogue is being used.

## **CURRENT LEGAL PROVISIONS**

Prior to 2004, the Public Procurement Directives then in force offered two possible award procedures potentially suitable for PPP i.e. the Restricted Procedure and the Negotiated Procedure with and without publication of a contract notice.<sup>21</sup> The latest Public Procurement Directive retains these procedures but also introduced a new contract award procedure known as Competitive Dialogue,<sup>22</sup> designed to make the use of PPP easier. Hence the expectation that it is likely to be used extensively for the award of PPP contracts.

Art 1(11)(c), Directive 2004/18 defines Competitive Dialogue as “a procedure in which any economic operator may request to participate and whereby the Contracting Authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender”.

Competitive Dialogue is meant to allow a public entity which knows

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<sup>21</sup> The key elements relevant to the use of these procedures are set out in Arts 28, 38-40 and Art 44, Directive 2004/18.

<sup>22</sup> See Art 29, Directive 2004/18.

what outcome it wants to achieve but does not know how best to achieve it to discuss, in confidence, the means by which its needs can be met in the dialogue phase of the tender process with short listed candidates before calling for final bids.<sup>23</sup>

Recital 31, Directive 2004/18 describes Competitive Dialogue “a flexible procedure...which preserves not only competition between economic operators but also the need for Contracting Authorities to discuss all aspects of the contract with each candidate” and adds that “this procedure must not be used in such a way as to restrict or distort competition...” It envisages that the Competitive Dialogue Procedure could, for example, be used to award contracts for integrated transport infrastructure projects or large IT projects or with complex financial and legal structures which cannot be determined in advance of the tender process.

The stages in the Competitive Dialogue Procedure are:

- A short-listing phase, in which suitable tenderers are selected who meet the minimum eligibility standards for financial, economic and technical criteria. This is the only part of the process for which timescales are specified i.e. 37 days, with a reduction permitted where electronic means are used to draw up and transmit contract notices to OJEU
- A dialogue phase with tenderers where the means of meeting the project objectives are discussed and negotiation is permitted. This phase is crucial to the successful application of the Competitive Dialogue Procedure
- A final tender phase with the submission of tenders after which clarification, specification and fine tuning are permitted provided that they do not change the basic features of the tenders or the contract’s key terms and does not risk distorting competition. Further clarification of aspects of the winning tender and/or confirmation of commitments in it can then be sought if required, provided that it does not have the effect of modifying substantial aspects of the tender and, again, does not risk distorting competition.

Though intended to be easier to justify than the Negotiated Procedure, the use of the Competitive Dialogue Procedure must still be objectively justified.<sup>24</sup> It can be used when a contract is “particularly complex” i.e. where

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<sup>23</sup> One example cited in the “Explanatory Note on Competitive Dialogue in the Classic Sector”, European Commission, January 2006 (at pp. 2-3) (the Explanatory Note on Competitive Dialogue) is that of a Contracting Authority which wants to provide for a river crossing but does not know if a bridge or a tunnel, or which construction methods for either, would be best suited to satisfying its needs. As will be clear below, the authors’ view is that this matter should in fact be resolved by the Contracting Authority before the dialogue phase is launched for such a project.

a Contracting Authority considers<sup>25</sup> that use of the Open or Restricted Procedures (requiring pre-determined specifications) will not allow the award of the contract and:

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

The concept of objective impossibility is qualified in the Directive<sup>26</sup> by reference to the fact that this has to be “*without this being due to any fault on their part*” i.e. on the part of the Contracting Authority.<sup>27</sup>

The main legal requirements of the implementation of the procedure are that:

- The Contracting Authority can only use “most economically advantageous tender” award basis
- The process is launched by publication of a contract notice. This must state the minimum capacity levels needed to be invited to participate in the dialogue phase
- Either the contract notice and/or the descriptive document must set out the needs and requirements of the Contracting Authority
- The number of candidates to be selected for the dialogue phase must be indicated in the contract notice. There must be at least three candidates selected for the dialogue phase, assuming that at least three meet the minimum capability requirements. There is an overriding test that the number selected must be sufficient to provide genuine competition<sup>28</sup>
- The award criteria, either weighted, or, in certain circumstances (which require specific justification) in descending order of importance, should appear in the contract notice or in the descriptive document and may not be changed during the award procedure
- The purpose of the dialogue phase is to identify and define the means best suited to satisfying their needs<sup>29</sup>

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<sup>24</sup> See The Explanatory Note on Competitive Dialogue, p. 2.

<sup>25</sup> Authors’ emphasis, taken from the Directive.

<sup>26</sup> Recital 31, Directive 2004/18.

<sup>27</sup> The summary decision making process is thus:

- Could the Open or Restricted Procedures be used?
- If no, does the project satisfy the test(s) for a particularly complex project?
- If yes, Competitive Dialogue can be used.

There is no hierarchy as between the Competitive Dialogue Procedure or the Negotiated Procedure i.e. a Contracting Authority wishing to use either is free to justify their choice without considering the other.

<sup>28</sup> Art 44(3), Directive 2004/18.

- The dialogue phase must be launched with an invitation to participate in the dialogue sent simultaneously and in writing to short listed entities selected in accordance with provisions of Directive 2004/18. This will be generally done by means of the issue of a document named the “Invitation to Participate in Competitive Dialogue” (“ITPD”) or a similarly named document, which must include:<sup>30</sup>
  - A copy of the specifications or of the descriptive document and any supporting documents, or
  - A reference to accessing the specifications and the other documents indicated in the above bullet point, when they are made directly available by electronic means in accordance with Article 38(6), Directive 2004/18In addition, the ITPD must also include:<sup>31</sup>
  - A reference to the published OJEU notice (including the publication reference number and date)
  - The date for the start of the consultation<sup>32</sup>
  - The address relevant to the consultation<sup>33</sup>
  - The language or languages to be used for the purpose of the dialogue
  - The criteria for the award of the contract
  - Information on weighting of the award criteria (unless, for demonstrable reasons, weighting is not possible, in which case the criteria must be listed in descending order of importance)
  - A reference to any additional documents required from short listed entities as proof of, or in support of the information on financial or technical standing which was submitted with the Pre Qualification Questionnaire (PQQ)<sup>34</sup>

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<sup>29</sup> Art 29(3), Directive 2004/18.

<sup>30</sup> Art 40, Directive 2004/18.

<sup>31</sup> Art 40(5), Directive 2004/18.

<sup>32</sup> The date of the start of the consultation is the first date when any form of interaction between short listed entities and the Contracting Authority occurs. In the optimal approach this could be the date that the ITPD is issued or the date for submission by short listed entities of comments on the provisionally preferred solution.

<sup>33</sup> In the optimal approach this could be the address to which short listed entities’ comments on the provisionally preferred solution should be submitted.

<sup>34</sup> These are documents which the tenderer needs to submit to verify information supplied in respect of the suitability and choice of participants in accordance with Article 44, or to supplement the information referred to in that Article. This is not for the purpose of revisiting issues considered at PQQ stage but, where necessary, to verify the accuracy of the information previously supplied.

- Where an entity other than the Contracting Authority responsible for the award procedure has the specifications, the descriptive document and/or any supporting documents, the invitation shall state the address from which the specifications, the descriptive document and the supporting documents may be requested and, if appropriate, the deadline for requesting such documents, and the sum payable for obtaining them and any payment procedures. This documentation must be sent to the short listed entity without delay upon receipt of a request<sup>35</sup>
- Contracting Authorities may discuss all aspects of the contract with the chosen candidates during this dialogue<sup>36</sup>
- The dialogue may be conducted in successive stages. Those unable to meet the need or provide value for money (as measured against the published award criteria) may be eliminated at each stage
- If a Contracting Authority intends to gradually reduce the number of solutions during the dialogue phase, this should be indicated in the contract notice or the descriptive document
- All candidates and tenderers must be treated equally and commercial confidentiality must be maintained unless the candidate agrees that information may be passed to others. Specifically, the Contracting Authority may not:<sup>37</sup>
  - Provide information in a discriminatory manner which may give some tenderers an advantage over others, or
  - Reveal to the other candidates solutions proposed or other confidential information communicated by candidates participating in the dialogue without their consent
- The dialogue phase ends when the Contracting Authority declares to be at an end, tells the short listed entities in writing that this is the case and calls for final tenders from them on the basis of the solution or solutions presented and specified during the dialogue<sup>38</sup>
- The call for final tenders must contain:<sup>39</sup>
  - The deadline for receipt of tenders, which must take account of the complexity of the contract and the time required for drawing up of tenders<sup>40</sup> and comply with the principles of equality of treatment and non-discrimination<sup>41</sup>
  - The address to which tenders must be sent
  - The language or languages in which the tenders must be drawn up

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<sup>35</sup> Art 40(3) and 40(4), Directive 2004/18.

<sup>36</sup> Art 29, Directive 2004/18.

<sup>37</sup> Art 29(3), Directive 2004/18.

<sup>38</sup> Art 29(6), Directive 2004/18.

- The final tenders submitted must contain all the elements required and necessary for the performance of the project
- Once the final tenders have been received, the Contracting Authority is permitted to ask the bidders to “clarify”, “specify” and “fine tune” tenders but not change their basic features, which may distort competition or have a discriminatory effect
- The final tenders are assessed against the criteria stated in the contract notice or the descriptive document
- The Contracting Authority is permitted to ask the winning bidder to “clarify aspects of the (winning) tender and “confirm commitments contained in the (winning) tender” provided that it does not have the effect of modifying substantial aspects of the tender and does not risk distorting competition or having a discriminatory effect
- Contracting Authorities may, but are not obliged to, specify that payments are to be made to participants in the dialogue.

## **RECENT DEVELOPMENTS IN THE EU LEGAL FRAMEWORK**

The main developments at EU level relevant to the Competitive Dialogue Procedure since the enactment of 2004/18 have been:

- The publication by the European Commission (the Commission) of a consultative Green Paper in April 2004<sup>42</sup>

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<sup>39</sup> Art 29(5), Directive 2004/18. It is not clear from Art 29 if the call for final tenders must also again include all the information required to provided at the time that the ITPD was issued i.e.

- A reference to the published OJEU notice (including the publication reference number and date)
- The criteria for the award of the contract and information on weighting of those criteria (unless weighting is not possible, in which case the criteria must be listed in descending order of importance) which should not vary from those previously stated in the OJEU/descriptive document)
- The information to be included in the final bid
- The procedural requirements for the submission of final bids
- The deadline for receipt of final tenders
- The address to which final tenders must be sent
- The language(s) for the tenders.

If the descriptive document or specification has been updated or revised in the course of the dialogue then a final descriptive document or specification should be issued.

<sup>40</sup> Art 38(1), Directive 2004/18.

<sup>41</sup> The Commission’s Explanatory Note on Competitive Dialogue, p. 8, Note 28.

<sup>42</sup> “Green Paper on public-private partnerships and Community law on public contracts and concessions” COM(2004) 327, European Commission, April 2004.

- The publication of the results of the consultation in May 2005<sup>43</sup>
- The publication of the political conclusions arising from the consultation in a Commission Communication in November 2005<sup>44</sup>
- An Explanatory Note from the Commission on Competitive Dialogue published in January 2006.

The PPP Green Paper published by the European Commission launched a consultation (at the request of stakeholders as well as the European Parliament and EU Economic and Social Committee) designed to launch a debate on the application of EU law on public contracts and concessions to PPP. The PPP Green Paper analysed the current legal position of PPP in Community law and posed a number of questions on which it invited the opinion of stakeholders, which included asking if the use of the Competitive Dialogue Procedure would prove to be well adapted for use in award processes of public contracts involving PPP.

One of the key conclusions of the stakeholder consultation was that Competitive Dialogue was expected to be well suited to awarding public contracts, while safeguarding the rights of economic operators, though a large majority of stakeholders pointed to practical problems with its application and sought Commission clarification.

The political conclusions arising from the stakeholder consultation were set out in the Commission Communication in November 2005 and included a commitment to provide the requested Commission clarification. This came in the form of the Commission's Explanatory Note on Competitive Dialogue published in January 2006.

This Explanatory Note was, in the authors' view, a useful contribution to the application of the procedure though it did not answer all the questions which have arisen in practice about the implementation of Competitive Dialogue. But there were some particularly useful pointers to the application of the procedure e.g. Note 21, which drew attention to a way in which Contracting Authorities can create the conditions for developing hybrid solutions,<sup>45</sup> Note 23, which could be taken to mean that the fears of the supplier market of the impact of cherry picking are in some cases exaggerated and Note 35, which could be interpreted as highlighting the distorting effect

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<sup>43</sup> "Report on the public consultation on the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions", Commission Staff Working Paper, SEC (2005) 629.

<sup>44</sup> Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions, COM (2005) 569, European Commission, November 2005.

of considering the requirements of funders only when there is, in effect, a single tender environment.<sup>46</sup>

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<sup>45</sup> I.e. using the dialogue phase of the Competitive Dialogue Procedure to merge the best features of the solutions of different candidates, and develop the optimal solution. This is explicitly permitted by the Directives where candidates have waived their right to confidentiality. The author's experience has led him to advance similar arguments elsewhere – in an unpublished submission to the then DG XV – given that in reality there is little evidence that such fears have in reality acted as a barrier to participation by private partners in award procedures. See “The proposed Competitive Dialogue Procedure for EU public procurement – some practical considerations”, June 2000, p. 6.

<sup>46</sup> This is a valid observation given that there have been enough PPP/PFI schemes in most sectors – more than 900 in UK alone – for the treatment of most of the risks most of the time to be capable of being standardised and thus pre-cleared with potential lenders while there is still competition for the contract. PFI – the Private Finance Initiative – is the name often given to PPP in the UK.

## **CHAPTER 2 – Competitive Dialogue – Analysis of Legal Framework and Current Use**

### **OVERVIEW**

Competitive Dialogue has only relatively recently been implemented into European law and transposed into national law. The extent of its use varies widely between EU Member States and the application of the procedure is currently in what may be termed an experimental phase. Different approaches are being used for its implementation, and, in particular, for the conduct of the dialogue phase and the interpretation of what is permissible by law and consistent with good procurement practice in the post-tender phase.

It is a key contention of this book that, having had the opportunity to experiment with different approaches, there are now clear benefits to standardising the approach to the application of Competitive Dialogue and clear pointers to aid the development of an optimal methodology, i.e. one which will promote value for money for the public sector. Put simply, not all methods of applying the Competitive Dialogue procedure are likely to be equally valid.

Chapter 2 is intended to set the context for the use of Competitive Dialogue. It explains how it emerged, how it compares to the Negotiated Procedure, the legal challenges in applying Competitive Dialogue, when it is appropriate to use it and where it is being used in the EU.

### **WHY DID COMPETITIVE DIALOGUE HAPPEN?**

Prior to the introduction of the Competitive Dialogue Procedure, Contracting Authorities faced a dilemma in determining how to conduct a contract award for complex contracts.

Even if Contracting Authorities had a good idea in advance of the

award process of the precise shape of the key features and the strengths and weaknesses of potential solutions to their needs, and often they did not, there were practical difficulties in enabling them to remain open to the development of their ideas to improve those solutions.

The obvious approach was to use the bidding procedure to generate competitive innovation between suppliers. There was, prior to the introduction of the Competitive Dialogue Procedure, no easy means for them to do so. They faced the choice between the Restricted Procedure and the Negotiated Procedure but:

- The Restricted Procedure constrained competitive innovation between suppliers and prohibited negotiations once the award process had started, in essence by requiring the Contracting Authority to have defined the service specification (what was to be done, how and to what standards) in advance of the process. This was restrictive, particularly for PPP contracts, even if the Contracting Authority prepared an outcome-based specification, because the Authority may not have incorporated the most innovative solutions into the specification and, even if it had, the Restricted Procedure does not allow post offer negotiations<sup>47</sup>
- The Negotiated Procedure, while allowing such competitive innovation, and in particular post offer negotiations (albeit within the limits of a non-discriminatory and transparent procedure) was intended to be an exceptional procedure designed to be very difficult to justify under the former EU Public Procurement Directives.<sup>48</sup>

In reality the boundaries of both were stretched – in the Restricted Procedure post-offer clarification became quasi-negotiation and, prior to the issue of the Invitation to Tender it was possible for a Contracting Authority

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<sup>47</sup> See the joint Commission and Council of Ministers' statement issued in 1989 on what constituted "clarification" in the context of the Restricted Procedure (See OJ L210, 21 July 1989). It should be noted, however, that Greece has launched and started to implement an active PPP programme comprising, at the time of writing in late 2009, more than 50 projects, all of which have been awarded using the Restricted Procedure with the very limited flexibility referred to above. This has, in the authors' view set out in detail below, the clear implication that *a fortiori* PPP projects can be delivered using an approach to the Competitive Dialogue Procedure with more, but not unlimited, flexibility after the launch of the award procedure.

<sup>48</sup> This was clear from Art 11, Directive 92/50, which set out the specific circumstances in which the Negotiated Procedure could be used and then said that "in all other cases, Contracting Authorities shall award their public service contracts by the Open Procedure or by the Restricted Procedure". At Art 11(2)(b) it referred to "exceptional cases, when the nature of the services or the risks involved do not permit prior overall pricing" Similar wording existed in Art 7(2)(c), Directive 93/37, which regulated the award of public works contracts.

to consult the short list on the draft contract documentation, whereas Contracting Authorities often hid behind legal opinions justifying the Negotiated Procedure which were far from robust. Neither of these types of action was widely challenged because:

- Losing bidders moved on to the next opportunity and/or were often reluctant to be seen to be aggrieved lest they prejudice their chances for future opportunities either with the Contracting Authority or more widely in the market
- The variability of independent national scrutiny and ease of securing redress meant that the practices did not come to light in a consistent way
- The Commission focused its resources and energies on challenging the use of the Negotiated Procedure without prior publication of a contract notice rather than the use, *per se*, of the Negotiated Procedure where the Contracting Authority had at least published a notice in the OJEU.

This situation was nevertheless unsatisfactory, forcing Contracting Authorities to choose between the need for flexibility and the need for legal certainty, because they could not be certain that the Commission would not change its focus and start to challenge more regularly the use of the Negotiated Procedure with prior publication of a contract notice or the broader interpretation of what was permitted by Restricted Procedure.

The Commission recognised this situation but did not want to widen the scope of the use of the Negotiated Procedure with notice and thus proposed a new procedure, Competitive Dialogue, “in response to the finding that the “old” Directives, Directives 92/50, 93/36 and 93/37, do not offer sufficient flexibility with certain particularly complex projects due to the fact that the use of Negotiated Procedures with publication...is limited solely to the cases exhaustively listed in those Directives”.<sup>49</sup>

#### **HOW DIFFERENT IN PRACTICE IS COMPETITIVE DIALOGUE FROM THE NEGOTIATED PROCEDURE?**

As is the case for the Competitive Dialogue Procedure, so different approaches were used for the implementation of the Negotiated Procedure with prior publication of a contract notice.<sup>50</sup>

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<sup>49</sup> As subsequently expressed in The Explanatory Note on Competitive Dialogue (at p. 1).

<sup>50</sup> In the Negotiated Procedure there is no obligation after short listing for the process to follow any particular structure for the negotiations, though there is, of course, an obligation to comply with the principles of transparency, equality of treatment and non-discrimination in the negotiations.

Good practice in the Negotiated Procedure with prior publication was generally based on a three phase award process<sup>51</sup> i.e.:

- Phase 1 – Competitive selection of a short list based on the criteria related to the suitability of tenderers (**short listing stage**)
- Phase 2 – Competitive selection of a winning bidder with all significant contractual terms agreed and in accordance with the award criteria (**offer stage**)
- Phase 3 – Time limited intensive negotiations of the implementation of the final contractual arrangements in a limited number of strictly defined areas with the winning bidder (**negotiation stage**).<sup>52</sup>

The process typically included the following key features, namely for the Contracting Authority to:

- Review current service standards and strengths and weaknesses prior to planning the procurement process, thus minimising the risk that the benefits of efficiency gains which the Authority is itself capable of achieving were handed to a third party supplier
- Start the process with a clear idea of its objectives and the desired outcome and openness to supplier innovation in respect of the solution which would meet those objectives and outcomes
- Ensure that the flexibility afforded by the Negotiated Procedure is used within the context of a well defined and time tabled process which is consistently applied by the Contracting Authority, and did not lead to an excessively protracted process arising from major changes to the Contracting Authority's approach during the process
- Set a formal commencement date for the process, which could be the date of the Prior Information Notice (PIN). The idea of setting a formal commencement date is in the authors' experience critical to the probity of the process. It marks the boundary between initial consultation with suppliers and supplier selection, though, of course, strict equality had to be maintained between potential suppliers at all times by the Contracting Authority
- Signal to interested parties its desire for full responses at short-listing stage and that it was very open to supplier innovation at that stage. To do this the Contracting Authority would:
  - Prepare an information brief to be provided to all those who wished

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<sup>51</sup> This section is largely based on an analysis of practice in the United Kingdom, which has had extensive experience in the use of the Negotiated Procedure. However, the principles set out here are of generic relevance to the conduct of award procedures for complex contracts irrespective of national jurisdiction.

<sup>52</sup> Subject, of course, to respect for the principle of non-discrimination.

to express an interest. This was to be sufficiently detailed to attract full responses at this stage while being consistent with the need to protect the spread of potentially commercially confidential information

- Provide clear guidance on the format in which they expected to receive expressions of interest
- Develop a documented process for receiving and replying to enquiries from interested parties
- Develop processes for tightly regulating access by interested parties to the staff of the Contracting Authority during the period for expressing interest
- Evaluate expressions of interest against criteria which include a fit with the Contracting Authority's objectives
- Use the ideas generated by suppliers at short-listing stage to develop its own thinking on the preferred solution to the point where it is fairly close to the shape of the preferred solution at the end of the short listing stage. This would be achieved by deploying sufficient resources during the short listing stage, and, in particular, while expressions of interest are being evaluated, to develop its preferred solution
- Address the concerns of bidders re the protection of their intellectual property and/or preferential treatment for one or more of the suppliers by guaranteeing that, in return for the commitment expected of interested parties in sharing innovative ideas, the Contracting Authority would use its best endeavours to ensure that:
  - The specification against which offers will be invited in the offer stage would be presented in such a way as not to favour any one bidder
  - Potentially commercially sensitive information offered by interested parties in the first stage would be used only for the purposes of assessing suitability to be short listed and for developing the most appropriate framework for the contract
- Discuss the shape of its draft preferred solution with short listed suppliers and reflect the outcome of these discussions, in a non-discriminatory way, in the Invitation To Negotiate (ITN)
- Expect short listed suppliers to bid against the preferred solution as modified by the discussions on the draft preferred solution. To do this the Contracting Authority would:
  - Provide a detailed information brief to all bidders
  - Provide clear guidance on the format in which they expect to receive offers

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- Develop a documented process for receiving and replying to bidder enquiries
- Define a process for due diligence, during which further information, full enough to be capable of attracting offers which are close to unconditional, was accessible to bidders in a controlled manner e.g. in a specific place, for a specific period and subject to a confidentiality protocol
- Develop processes for regulated access by bidders to the staff of the Contracting Authority during the bidding process
- The Contracting Authority would make it clear that it was still open to some variation and negotiation at offer stage, but in essence it would be selecting the winning bidder on the basis of the most economically advantageous offer against its preferred solution. The offer would therefore have been made in a competitive environment and would therefore reduce the risks associated with a long period of post offer negotiations commenced without the final shape of the solution being substantially clear at the outset
- Evaluate offers received against criteria which lean towards fit with objectives and outcomes rather than processes
- Award the contract to the winning bidder after a short intensive period of post offer negotiations using at that stage the flexibility provided by the negotiated procedure, within the following framework:
  - The expectation would be that the winning bidder's proposed solution would be very close to the Contracting Authority's preferred outcome
  - Negotiations would be undertaken only with the winning bidder, with the intent to resort to any nominated reserve only in exceptional circumstances
  - The intention would be to minimise post offer negotiations and cap their scope and impact by asking bidders in their submissions to identify any elements of the contract/specification which they wished to vary and the financial impact of those variations
  - The Contracting Authority would not be prepared to negotiate on anything not raised by bidders during the submission of the offers nor anything which could be regarded as a fundamental change to the terms of the contract as they stood at the time that offers were called for
  - At the end of the negotiations the winning bidder's offer and all the terms of the contract would become unconditional.

Thus, it is clear that much of what is regarded as good practice in the Negotiated Procedure is relevant to Competitive Dialogue and could substantially underpin its effective application. In particular, Contracting Authorities should aim to ensure that the selection of winning tender does not happen until all substantial terms and conditions affecting the price and delivery of a project have been settled while there is still competition.

However, the Negotiated Procedure,<sup>53</sup> has often been applied in a manner not calculated to optimise value for money for the public sector i.e. with the fast track selection of a “preferred bidder” on the basis of heavily conditional offers, or, in some cases, indicative offers. This was then followed by lengthy post-tender negotiations with the “preferred bidder” after competition had been eliminated, often on significant elements of the contract.<sup>54</sup>

This alternative approach, which has often been used, particularly in the United Kingdom,<sup>55</sup> has significant disadvantages, namely:

- It leaves the Contracting Authority in a weak negotiating position and that, therefore, there is a risk that the terms of the contract finally agreed will become significantly less favourable to the public sector than those envisaged at the time the preferred bidder was selected. This is because the preferred supplier may subsequently seek to introduce qualifications and conditions associated with the matters included in the initial offer which are stated to be guaranteed and which were relied upon by the Contracting Authority in selecting the preferred bidder. In the case of PPP contracts this frequently occurred because of the demands of lenders not sufficiently engaged with the process until the winning bidder was selected.<sup>56</sup> In practice, it is difficult for a Contracting Authority to resist pressure arising from the momentum of the negotiations and the time invested in the process to date to strike a deal which may no longer

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<sup>53</sup> It should be noted that the Negotiated Procedure has often wrongly been called the Competitive Negotiated Procedure. This is wrong in two senses: firstly, in the formal legal sense that the designation used in the Public Procurement Directives is the term “Negotiated Procedure” and secondly because, as noted in the main text, of the way that the procedure has been applied in practice.

<sup>54</sup> See Arrowsmith, *op. cit.*, paras 8.42 *et seq* and also Sophie Charveron, “Competitive Dialogue threatens PFI”, *Construction Law*, August/September 2007, p. 29 *et seq*.

<sup>55</sup> For an analysis of how this practice developed see Burnett, *op. cit.*, pp. 175-176.

<sup>56</sup> See Ciara Kennedy-Loest, “What can be done at the preferred bidder stage in Competitive Dialogue”, *Public Procurement Law Review*, Sweet and Maxwell, Issue 6, 2006, p. 316 and 319 and The Explanatory Note on Competitive Dialogue, Note 35. There is also the suspicion, not entirely unjustified in the experience of the authors, that this approach has been used as a substitute for the Contracting Authority’s willingness to undertake the key pre-OJEU planning and preparation tasks which form the key to the successful implementation of any complex procurement procedure.

then represent value for money as compared to alternative service delivery methods originally considered in the options appraisal and/or the terms offered by the second placed bidder. This can arise even where a Contracting Authority is in a position where it has the option not to reach an agreement with a provider i.e. because it is not compelled to by its financial position and/or current service delivery standards. This risk is more likely if, at the beginning of the negotiations, the Contracting Authority does not determine what it would regard as the minimum acceptable outcome from the negotiations in respect of service delivery, financial outcome and contractual terms

- The consequent risk that, if the final contract as signed is one which, in the view of the nearest contender to the preferred bidder, could have been negotiated with them on terms as favourable as those ultimately agreed with the preferred bidder, there may be a challenge from nearest contender which could be embarrassing, time consuming and expensive to respond to
- Uncertainty about how to proceed with the procurement process if it proves to be impossible to reach agreement with the preferred bidder, including, and in particular, the circumstances in which the Contracting Authority could either open negotiations with the second placed bidder or withdraw the procedure.

Competitive Dialogue is intended to reinforce many of the good practice messages from the Negotiated Procedure with prior publication, including the need to:

- Undertake a thorough assessment of the need and objectives of the procurement, and ensure that there are limited, if any, changes in scope during the procurement process
- Ensure that the procurement process is conducted in an efficient and effective manner which minimises costs and maintains competition
- Ensure that contractual terms are settled during the competitive stage of the procurement process.

In effect, the approach means that the Competitive Dialogue Procedure should be, as was always possible and desirable in the Negotiated Procedure, applied in a manner akin to what might be called a flexible application of the Restricted Procedure, using the freedom provided by the Competitive Dialogue Procedure to discuss contractual issues in a framework defined by the Contracting Authority rather by the bidders and reduce the risk that there might be an absence of sufficient prior planning on the part of a Contracting Authority.

Thus there are more similarities with existing good practice in the Negotiated Procedure than differences and Competitive Dialogue does not necessarily represent a major or fundamental change to the way in which complex procurements have been undertaken in the past.

## **KEY LEGAL CHALLENGES IN THE USE OF COMPETITIVE DIALOGUE**

The key legal challenges in the use of Competitive Dialogue fall into two categories i.e. justification for the use of the Competitive Dialogue Procedure and challenges in application of the Competitive Dialogue Procedure.

### **Justification for the use of the Competitive Dialogue Procedure**

The objectives of the introduction of the Competitive Dialogue Procedure are, as noted above, to provide for flexibility for Contracting Authorities, promote innovation while maintaining competition between private sector providers.

However, the Commission has also noted that “Competitive Dialogue is a procedure which can only be used in the specific circumstances<sup>57</sup> expressly provided for in Article 29 (of Directive 2004/18)” and must still be objectively justified on a case by case basis.<sup>58</sup>

The burden of proof lies with the Contracting Authority to demonstrate that the use of the procedure has been properly justified. It will, for example, be necessary for public authorities to demonstrate that the use of the procedure has been properly justified i.e. that the transaction is a “particularly complex” contract and that it cannot objectively determine how its needs can be satisfied.

This will, at minimum, involve the Contracting Authority in a process of:

- Identifying the uncertainties which it needs to test in the Competitive Dialogue Procedure. These could include, for example, matters such as possible variations in the delivery of its objectives and how much demand risk the supplier is prepared to accept as well as any of the con-

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<sup>57</sup> See The Explanatory Note on Competitive Dialogue, p. 1 and p. 2. At Section 2.1 it describes the procedure as a “special procedure, whose use is regulated” and not, as is the case with the negotiated procedure, an exceptional procedure.

<sup>58</sup> *Ibid.*

- tents of the service specification and contract conditions
- Ensuring that it has followed a process of attempting to determine how its needs can be satisfied without using the Competitive Dialogue Procedure. In some cases, networks with other Contracting Authorities, market research, including dialogue with suppliers, and/or the assistance of third party consultancy expertise may lead the Contracting Authority to be able to definitively determine its needs prior to the start of the procurement process. Clearly, this is more likely in mature markets and sectors where PPP have previously been used in similar schemes
- Documenting the decision such that it can be explained if challenged by third parties or questioned by auditors
- Obtaining a robust legal opinion to support the decision.

But, though the use of the Competitive Dialogue Procedure must be objectively justified, for the Commission to regularly scrutinise and challenge the decision to use the Competitive Dialogue Procedure would undermine the key purpose of the introduction of the procedure i.e. to provide an alternative to the frequent resort to the Negotiated Procedure, which was, and still is, intended to be an exceptional procedure.

PPP are likely to meet the criteria for justifying the use of Competitive Dialogue (i.e. in being “particularly complex”) and, as the Commission has pointed out,<sup>59</sup> the procedure is “particularly well adapted for use in PPP”.

In particular, the Commission needs to be sensitive to the possible paradox that the more effort a Contracting Authority makes, and the more experience it has, the more difficult it may, on a narrow interpretation of the criteria for the use of Competitive Dialogue, become to justify its use. The optimal approach to the Competitive Dialogue advocated in this book requires a Contracting Authority to develop a significant understanding of its needs and how they might be met in order stay more effectively in control of the award process and thus maximise the likelihood of securing value for money in the award process. But, as is also clear, even if the Contracting Authority is fairly certain about the outcome it wants, dialogue with the short listed candidates will still be beneficial, because market conditions may have changed since the Contracting Authority formed its view and/or the views of the participants actually in the dialogue may differ from those who participated in technical dialogue and/or market consultation. The nature of the amendments proposed by short listed entities and accepted by the Contracting Authority to the provisionally preferred solution cannot in general be objectively foreseen.<sup>60</sup> Thus, it would be perverse

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<sup>59</sup> See The PPP Green Paper, p. 10.

if Contracting Authorities which choose to conduct a Competitive Dialogue Procedure in this way were to be at risk of legal challenge, whether or not the consequences of regular challenge were to be, depending on the preferences common in different Member States, the continuing use of the Restricted Procedure or the Negotiated Procedure with prior publication.

In practice, two consequences are likely to follow from introduction of the Competitive Dialogue Procedure i.e.:

- Having made the procedure available as an alternative to the Negotiated Procedure, the Commission is more likely to scrutinise the justification for the use of the Negotiated Procedure with prior publication more closely<sup>61</sup>
- The greater risk of legal challenge to Competitive Dialogue Procedure, initiated by those dissatisfied with the outcome of the process or by the Commission, is likely to come from the way that the procedure is implemented and not the choice of the procedure.

### **Challenges in application of the Competitive Dialogue Procedure**

In spite of the Commission's Explanatory Note on the application of the Competitive Dialogue procedure there are also significant areas of legal uncertainty about how the procedure can be implemented in practice.

The key legal issues raised by the implementing the Competitive Dialogue Procedure may be summarised as:

- The number of stages in the dialogue phase
- The timetable for dialogue phase/interim stages of the dialogue phase
- The definition of what constitutes a "solution"<sup>62</sup>
- The objectives of different stages of the dialogue phase e.g. whether or not it will be used to move from outline to detailed solutions, to refine the preferred solution(s) of the Contracting Authority, as a means of consecutively assessing technical solutions and then financial proposals,

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<sup>60</sup> As noted below, the Contracting Authority will, however, need to make it clear when it launches the dialogue phase which areas of the contract are open to variation and to what extent they can be varied. This does not, in the authors' view, undermine the ability of the Contracting Authority to justify the use of Competitive Dialogue for that procurement.

<sup>61</sup> As noted above, however, there is nothing in Directive 2004/18 which requires that a Contracting Authority should first consider the use of the Competitive Dialogue Procedure before seeking to justify the use of the Negotiated Procedure i.e. there remains a free choice for them to seek to justify either.

<sup>62</sup> This is addressed in detail below in Chapter 4.

whether or not short listed entities will be eliminated in interim phases and if so how, how issues will be closed off etc.

- The methods to be used in the dialogue phase e.g. written submissions, collaborative website, diagrams/drawings, one to one discussions, presentations etc.
- The form in which responses will be required in interim submissions e.g. the degree of conditionality acceptable in interim submissions, whether or not pricing should be requested, the number of solutions a bidder can offer etc.
- The means by which equality of treatment between short listed entities can be ensured in the dialogue phase, and in particular the timetable and structure for information flows between short listed entities and the Contracting Authority and the frequency, scope, conduct, recording of meetings etc.
- The means by which the confidentiality requirements of the law can be respected in the dialogue phase, including, in particular, how confidential and non-confidential data can clearly be differentiated from each other, how the confidentiality of confidential data will be preserved (transmission, storage, access etc.) and the extent to which the Contracting Authority can encourage those who express interest and/or participants in the dialogue phase to minimise the information which is deemed to be confidential etc.
- When the Contracting Authority will conclude the dialogue phase, bearing in mind it is necessary to specifically declare that the dialogue phase has been concluded
- How the Contracting Authority should call for final tenders i.e. in what form
- How much time the Contracting Authority should allow for final tenders to be submitted
- How many final tenders the Contracting Authority should call for after the conclusion of the dialogue phase
- What, after tenders have been received, do the terms in the Directive “clarify”, “specify” and “fine tune” tenders<sup>63</sup> allow the Contracting Authority to do in practice
- What “clarify aspects of tender” and “confirm commitments in (winning) tender” mean in practice<sup>64</sup>
- The means by which equality of treatment between bidders can be ensured in the post-tender phase i.e. that:

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<sup>63</sup> See Art 29(6) Directive 2004/18.

<sup>64</sup> See Art 29(7) Directive 2004/18.

- Equal opportunities are given to “clarify”, “specify” and “fine tune” tenders
- Once the winning tender has been selected, the process of “clarifying aspects of the (winning) tender” and “confirming commitments in (winning) tender” does not offer opportunities to the winning tenderer of such a significance that, had they been offered to other tenderers, it might have changed the result of the tender process
- The means by which the Contracting Authority will ensure that the contract awarded is sufficiently similar to the opportunity advertised. This is not specific to the Competitive Dialogue Procedure, but is particularly relevant to procurements conducted using it, given the fact that in complex contracts there is greater risk that changes may occur during the procurement process
- How the Contracting Authority will confirm that the final contract continues to represent value for money as compared to other procurement routes
- How these matters will be communicated within the Contracting Authority e.g. by internal guidance notes prepared prior to the relevant stages of the process and a code of conduct
- How, to ensure transparency, participants in the process will be made aware of the above, for example by sharing appropriate parts of the code of conduct with them.

The issues associated with these challenges and how to address them both in terms of what is legally permissible and commercially desirable are considered in later chapters of this book.

#### **WHEN DOES COMPETITIVE DIALOGUE MAKE SENSE?**

The arguments for the use of the Competitive Dialogue Procedure, when it can be justified, rest on the fact that not only does it, as noted above, impose a discipline on Contracting Authorities to clarify their objectives and plan the procurement process effectively but also provides them with greater legal certainty.

As the Commission has noted, the Competitive Dialogue Procedure, by clearly giving public bodies the freedom to discuss the technical, legal and financial aspects of public contracts, will provide greater legal certainty in the procurement of complex contracts. This contrasts with the narrower view taken by the Commission about the permissible uses of the Negotiated Procedure i.e. that it applies principally to technical aspects of the contract

and not, strictly, to legal and financial aspects.<sup>65</sup>

One possible example of legal or financial complexity cited by the Commission<sup>66</sup> might be a situation in which a Contracting Authority cannot foresee whether the economic operators will be prepared to accept such an economic risk that the contract will be a concession contract or whether ultimately it will end up being a “traditional” public contract. In this situation if a Contracting Authority considers it most likely that the contract will be a concession contract and applies a procedure other than as laid down for public contracts,<sup>67</sup> it would find itself faced with difficult choices if it were to turn out at the end of the procedure that the contract would after all be a public contract and not a concession contract.<sup>68</sup> This is because the Contracting Authority could either conclude the contract and commit an infringement of Community law, with all the resultant risks of appeals or infringement proceedings, or cancel the procedure and restart it using one of the procedures laid down for concluding public contracts. In such cases, the Competitive Dialogue allows these problems to be avoided: this is because the procedural requirements would be satisfied whether the contract in the end turns out to be a public contract or a concession contract.<sup>69</sup>

Another example might be when the Contracting Authority wishes to award a complex project relating to the construction of an infrastructure as a public works contract but cannot use the Negotiated Procedure because the conditions for its use, which are to be interpreted restrictively, are not met. In such a case the use of the Competitive Dialogue Procedure makes it possible for the Contracting Authority to discuss all aspects of a given particularly complex works project with the participants.

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<sup>65</sup> See The PPP Green Paper, p. 9.

<sup>66</sup> The Explanatory Note on Competitive Dialogue, p. 3.

<sup>67</sup> E.g. fails to publish the contract in OJEU, applies different selection and evaluation criteria from those permitted by Directive 2004/18 or adheres to a different timetable etc.

<sup>68</sup> In the same way, since, by using the Competitive Dialogue Procedure, the Public Procurement Directives are being applied in the most transparent and open way available, the Contracting Authority also minimises the risk of challenge on the grounds of misclassification of a contract as between works and services or as between priority (Part A) services and non-priority (Part B) services.

<sup>69</sup> The authors are aware of the argument that the flexibility accorded by the Competitive Dialogue Procedure has already rendered the distinction between public contracts and concession contracts less relevant. But the key point is that a PPP which is classified by the Contracting Authority as a public services contract to be awarded by the Competitive Dialogue Procedure has to be advertised in the OJEU – a service concession does not.

## **USING COMPETITIVE DIALOGUE – THE EARLY TRENDS**

Table 1 below<sup>70</sup> shows the incidence of the launch of the Competitive Dialogue procedure, based on an analysis of the contract notices in OJEU since January 2004.

The key conclusions emerging from this analysis are that:

- The extensive use of Competitive Dialogue across the EU appears to have allayed the concerns expressed by some early commentators<sup>71</sup> that Contracting Authorities may be unwilling to use the procedure on the grounds that it does not provide sufficient flexibility as compared to the Negotiated Procedure
- The use of Competitive Dialogue is nevertheless very uneven to date as between EU Member States, with 80.4% of the cases where Competitive Dialogue has been used being in France (40.9%) and the United Kingdom (39.5%)
- Competitive Dialogue has been used much more extensively for supplies contracts than had been expected at the time that the procedure was devised (21.6% of cases)
- There have been, to date, no instances of the launch of the Competitive Dialogue in Greece which has, as noted above, nevertheless implemented a significant programme of PPP schemes.

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<sup>70</sup> Source: Tenders Electronic Daily, up to 19 June 2009. Excludes 17 notices issued by utilities and European Institutions/Agencies or International Organisations.

<sup>71</sup> See, for example, Adrian Brown, “The impact of the new Procurement Directive on large public infrastructure projects: Competitive Dialogue or better the devil you know?”, *Public Procurement Law Review*, Sweet and Maxwell, Issue 4, 2004, p. 160 *et seq.*

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*Table 1 – Use of Competitive Dialogue award procedure: 2004-2009*

<b>Competitive Dialogue contract notices – January 2004-June 2009</b>				
<b>Country</b>	<b>Total</b>	<b>Works</b>	<b>Supplies</b>	<b>Services</b>
France	1239	226	340	673
United Kingdom	1194	228	171	795
Germany	113	35	31	47
Poland	97	12	30	55
The Netherlands	72	44	5	23
Ireland	47	14	16	17
Denmark	38	9	6	23
Finland	37	1	9	27
Czech Republic	31	0	5	26
Slovenia	28	17	4	7
Romania	21	2	8	11
Spain	19	8	9	2
Estonia	16	0	2	14
Austria	15	0	5	10
Hungary	12	1	1	10
Slovakia	10	0	2	8
Belgium	9	1	2	6
Bulgaria	7	2	1	4
Italy	7	3	3	1
Lithuania	6	1	2	3
Portugal	4	0	0	4
Sweden	2	0	1	1
Cyprus	1	0	0	1
Luxembourg	1	0	0	1
Malta	1	0	0	1
Greece	0	0	0	0
Latvia	0	0	0	0
<b>Total</b>	<b>3027</b>	<b>604</b>	<b>653</b>	<b>1770</b>

## **CHAPTER 3 – Competitive Dialogue – An Implementation Overview**

### **OVERVIEW**

Different approaches are currently being used for the implementation of Competitive Dialogue, and, in particular, for the conduct of the dialogue phase and the interpretation of what is permissible in the post-tender phase, where there are different interpretations of the terms “clarifying”, “specifying” and “fine-tuning” tenders,<sup>72</sup> and in the phase following the selection of the winning bidder, where there are different interpretations of the terms and “clarify aspects of (the winning) tender” and “confirm commitments in (the winning) tender”.<sup>73</sup> Different Contracting Authorities also take different views on the extent to which the contractual terms need to be finalised at the end of different phases of the process.

This experimental period in the use of the Competitive Dialogue Procedure has, broadly, been beneficial. Diversity of practice to date has created an opportunity to assess different emerging practice in the application of Competitive Dialogue and to blend it with existing good practice in the Negotiated Procedure.

But it is a key contention of this book that, having had the opportunity to experiment with different approaches, there are now clear benefits to standardising the approach to the application of Competitive Dialogue and clear pointers to aid the development of an optimal methodology, i.e. one which will promote value for money for the public sector. Put simply not all methods of applying the Competitive Dialogue Procedure are likely to be equally valid.

Chapter 3 includes an overview of the key issues arising in the implementation of the Competitive Dialogue Procedure and how they can be best

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<sup>72</sup> See Art 29(6), Directive 2004/18.

<sup>73</sup> See Art 29(7), Directive 2004/18.

addressed, the ideas underpinning the approach proposed in this book and a checklist for creating an audit trail for decisions taken in a Competitive Dialogue Procedure. Users who need a deeper understanding of the different stages of the procedure can then refer to Chapter 4, which deals with the phases up to the end of the dialogue phase, including the submission of the final tender, and Chapter 5, which deals with the post-tender phases.

### **GOOD PRACTICE IN PLANNING AND IMPLEMENTING COMPETITIVE DIALOGUE – KEY ELEMENTS**

The key components of a good practice approach to planning and implementing Competitive Dialogue are to determine:

- What Contracting Authorities need to have achieved in the pre-OJEU, short listing phase, dialogue phase, post-tender phase, at the point where they select the winning bidder and at financial close. These are set out above in Table 2 below
- The key approach to be used in each stage of the process, which Contracting Authorities should adopt in all but occasional circumstances justified by exception.

The optimal model relates to all stages of the Competitive Dialogue Procedure i.e.:

- The conduct of the pre-OJEU phase
- The conduct of the short listing phase
- The conduct of the dialogue phase
- Concluding the dialogue and inviting tenders from short listed entities
- The conduct of the post-tender phase.

### **The conduct of the period prior to OJEU advertisement**

This will include:

- Addressing internal project governance issues which would arise irrespective of the procurement procedure chosen
- Addressing contract strategy issues which would arise irrespective of the procurement procedure chosen
- Taking the necessary action to prepare for implementing the key elements of the optimal approach in securing value for money in the application of Competitive Dialogue shown above
- Making it clear to interested parties the core approach to how the proc-

ess (and in particular the dialogue phase) will be conducted and in particular the approach to variations. This means setting out in the contract notice that variants will be permitted and, in the further information to those who respond to the contract notice, that:

- The short listing phase will be used both to select the short list and to develop its provisionally preferred solution
- The Contracting Authority will launch the dialogue phase with the tabling of its provisionally preferred solution i.e. what may be termed a consultative approach to the dialogue phase (with discussions based on the Contracting Authority’s provisionally preferred solution) rather than an investigative approach based on solutions tabled by the candidates
- Fundamentally different solutions from the provisionally preferred solution will not generally be admitted at that stage since the Contracting Authority will have used market consultation and further assessment during the short listing phase to analyse, discuss and refine the options
- The Contracting Authority will, at the start of the dialogue phase, set out the parameters within which the Contracting Authority will entertain variation
- The Contracting Authority will use the dialogue phase to develop and modify provisionally preferred solution to reach its final preferred solution
- The Contracting Authority will expect substantially unconditional final tenders after the end of the dialogue phase
- The Contracting Authority will interpret restrictively in the post-tender phase the scope of “clarifying, specifying and fine tuning” tenders after the receipt of final tenders and “clarifying aspects of the (winning) tender” and “confirming commitments contained in the (winning) tender” after the selection of the winning tender
- Framing evaluation criteria which are a balance of price and how the preferred solution is to be delivered (incorporating operational and financial aspects) so as to allow the evaluation of offers to be based on how the short listed entities plan to deliver the final preferred solution.

### **The conduct of the short listing phase**

Contracting Authorities should adopt the following approach to the key issues arising in the short listing phase of a Competitive Dialogue procedure which are particular to that procedure:

- Highlighting the key features of the emerging provisionally preferred solution in the call for expressions of interest from interested parties, including any elements of the contract which the Contracting Authority has determined to be non-negotiable such as, for example, the proposed route of the road, the performance standards expected and/or the length of the contract
- Asking interested parties to give as evidence of technical capability the key elements of their technical solution to similar contracts in the past, subject to respecting the intellectual property of other clients and insofar as it is permitted by national law which is consistent with European law
- Requesting and investigating past contracts by contact with current/former clients as part of the assessment of technical capability
- Aiming for a short list of four, balancing the need to ensure that credible, sustainable and competitive offers are received with the manageability of the dialogue phase and that of retaining the interest of short listed entities
- Substantially concluding the stakeholder consultation i.e. with internal and external service end users and other interested parties which the Contracting Authority wishes to consult before the dialogue phase and the development of the provisionally preferred solution.

### **The conduct of the dialogue phase**

The way the dialogue phase is conducted is the key driver of the entire Competitive Dialogue Procedure 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 has implications for the other phases of the process e.g.:

- If the Contracting Authority has not developed a clear understanding of the strengths and weaknesses of potential solutions for meeting the contract objectives prior to launching the process (and enhanced during the short listing phase) it will not be possible to use a consultative approach to the dialogue phase, which is a key element of the optimal approach to Competitive Dialogue
- If a consultative approach to the dialogue phase is not used, it is likely to be too time consuming for the Contracting Authority to enter the dialogue phase with a short list of four candidates
- It will be much more difficult for it to define restrictively the terms “clarify”, “specify” and “fine-tune” tenders and “clarify aspects of (the

winning) tender” and “confirm commitments in (the winning) tender” if the Contracting Authority does not aim to approach the dialogue phase with the idea of definitively resolving contractual issues while there is still competition.

At the end of the dialogue phase the Contracting Authority (see below) will want to be in a position to call for and receive final tenders which are substantially unconditional from bidders and contain all elements necessary to meet the Contracting Authority’s needs for the project.

This means that the Contracting Authority will aim in the dialogue phase to:

- Resolve the issues which must be definitively resolved before final tenders are called for i.e. issues about which after the end of the dialogue phase and the call for tenders there can be no further discussion once tenders have been submitted (see Table 2)
- Reach the maximum possible resolution of the contract terms which generally cannot be fully resolved by the end of the dialogue phase (see Table 2).

It also means that:

- Candidates need to have access to the information and explanations necessary to allow them to submit substantially unconditional tenders
- The Contracting Authority will need to conduct the dialogue phase in such a way that they can gain the information during it which assures them that the final tenders are likely to contain all aspects necessary to meet the Contracting Authority’s needs.

The legal framework for the dialogue phase allows a Contracting Authority to “discuss all aspects of the contract with the chosen candidates during the dialogue”. But the *legal right to discuss* all aspects of the contract is not an *obligation to discuss* every aspect of the contract. It is certainly permissible and almost certainly desirable for the Contracting Authority to determine which aspects of the contract are negotiable in the dialogue phase and which are not.

This is far from being an easy judgment – at one extreme lies a provisionally preferred solution which is absolutely prescriptive and, at the other, a set of objectives, performance standards and operating constraints but no preferences between the means of achieving the desired outcomes.

The extent to which scope should be allowed for variation, and what kind of variations should be permitted, within its provisionally preferred solution is a key judgment for the Contracting Authority.

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The key elements of the optimal approach to the dialogue phase which Contracting Authorities should adopt include:

- Launching the dialogue phase by tabling its own provisionally preferred solution
- Ensuring that, except in exceptional market-driven circumstances justified by factors outside of the control of the Contracting Authority and the bidders, there will be no material changes following the call for tenders which will lead to a fundamental change to the contract
- Allowing the optimal time for the dialogue phase of about four to five months, balancing the objectives of capturing innovation, responding to market developments, minimising costs and allowing time for response by candidates and reflection by the Contracting Authority
- Genuinely listening to candidates during the dialogue phase. This means, if appropriate, being prepared to amend the provisionally preferred solution and/or accept variations if market conditions have changed during the dialogue phase or if they are otherwise persuaded by the candidates that any aspects of the provisionally preferred solution would seriously undermine the likelihood of competition
- Continuing to assess the likelihood during the dialogue phase that candidates will actually bid – which can help to avoid last minute “no bid” shocks, which can happen in spite of the investment that candidates have made. The response to the call for interim submissions – see below – is likely to be a key indicator of whether or not a short listed entity will submit a final tender
- Maintaining equality of treatment and non-discrimination in the provision of information to candidates during the dialogue phase, based on clear guidelines set out at the launch of the dialogue phase. This includes in particular the timetable and structure for information flows between candidates and the Contracting Authority and the frequency, length, scope, conduct, recording of meetings etc.
- Assessing how the confidentiality requirements of the law can be respected in the dialogue phase (again based on clear guidelines set out at the launch of the dialogue phase)
- Closing off contractual issues with candidates i.e. “anchoring” contractual commitments during the dialogue phase
- 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
- Not generally eliminating candidates during the dialogue phase, to maintain competitive pressure in the process even if it is not certain that candidates will actually bid
- Interim submissions should be an integral feature of the optimal ap-

proach to the dialogue phase and are a key element of the management of the process by the Contracting Authority. Their objectives are to enable the Contracting Authority to assess:

- Whether or not there could be affordability issues for the project based on the scope, risk allocation, performance specification and performance standards in the provisionally preferred solution<sup>74</sup>
  - Whether or not there is an indication that better value for money could be obtained by changing the scope, risk allocation, performance specification and performance standards in the provisionally preferred solution<sup>75</sup>
  - Whether or not there is an indication of the likelihood or otherwise of a bidder submitting a credible and sustainable unconditional final tender which meets the Contracting Authority's needs
  - The acceptability to the Contracting Authority of the proposed operational methodologies of the candidates and, in the case of a PPP, the acceptability of the proposed financing structure for the SPV
  - The extent to which lenders and investors are committed to the process, through the certainty of commitment in the interim submissions, the robustness of the financing arrangements (including an assessment of key parameters such as debt service ratios, cash flows and distributable reserves), the extent to which due diligence has started to be carried out by the lenders, their appointment of professional advisers and their engagement in discussions during the dialogue process
- Requesting interim submissions in the same form as the final tenders, so that later the two can be reconciled, and, as noted above, not generally using them as a means to eliminate candidates
  - Ensuring that the process of giving feedback to candidates on their interim submissions does not go beyond that necessary to ensure that final tenders reach the minimum acceptable for the Contracting Authority
  - Ensuring commitment on the part of the Contracting Authority and short listed candidates to the intensive activity likely in the dialogue phase
  - Ensuring access to information by candidates with the overall objective of receiving unconditional offers which are capable of meeting its needs throughout the life of the contract and which comply with the adminis-

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<sup>74</sup> Though there should normally be no surprises at this stage about affordability if the Contracting Authority has, as recommended here, previously developed a sufficient understanding of the preferred solution and current market conditions.

<sup>75</sup> Again, the Contracting Authority should not expect to have to do this if it has previously developed a sufficient understanding of the preferred solution and current market conditions.

- trative requirements of the award process
- In general, not making payments to losing bidders. Art 29(8), Directive 2004/18 permits payments to be made to bidders participating in the dialogue, but there is no obligation to make such payments. Bid costs of losing bidders are, in practice, difficult to verify and measure accurately for a Contracting Authority, given the different means by which bidders might calculate the time taken and cost per hour of time and the fact that the information needed for the calculation is, in essence, within the control of the bidder
- Using the dialogue phase to understand the methodologies that the bidder will use to deliver the contract. This is because the quality element of evaluation of the tenders received from bidders should in general be based more on the means by which the bidder proposes to implement the Contracting Authority's preferred solution than the innovative nature of the solution itself. The method statements should, at minimum, identify the methods to be used and demonstrate how they will deliver the required performance over the life of the contract.

### **Concluding the dialogue phase and inviting final tenders**

The Contracting Authority should continue the dialogue until it is certain that it will receive final tenders which are capable of meeting its needs.

In the optimal approach to the Competitive Dialogue advocated here, this means that:

- Final tenders should be called for on the basis of the Contracting Authority's final preferred solution which would enable bidders to submit substantially unconditional bids
- The Contracting Authority should insist at this stage on unconditional tenders<sup>76</sup> from bidders
- The Contracting Authority should emphasise the fact that, since the quality element of the evaluation criteria will be based on how the bidder proposes to deliver the final preferred solution, operational method statements for the construction, operation, maintenance, asset refresh and decommissioning elements of the contract will form a key element

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<sup>76</sup> In this context "unconditional" means without request for further derogation from the terms of the contract proposed by the Contracting Authority in the final preferred solution, for prices which are fixed except for indexation and agreed volume variation and with committed finance from lenders. It should be made clear to bidders that provisional pricing, which implies post-tender negotiations will be explicitly rejected by the Contracting Authority.

- of that evaluation
- Final tenders should be called for in the same format as that for interim submissions, so that the Contracting Authority can reconcile the final tenders with the interim submissions, and making sure that it is consistent with the evaluation criteria, both to facilitate evaluation and to ensure that the compliance of bidders with the contractual terms can be clearly identified
  - The Contracting Authority should declare that the form of the final tender called for is “based on the solution presented and specified during the dialogue” and that the final preferred solution is “capable of meeting its needs” (to comply with Art 29, Directive 2004/18)
  - Candidates should be allowed between six and eight weeks to submit their final tenders, given that candidates will have had wide access to data and people during the dialogue phase.

### **The conduct of the post-tender phase**

Contracting Authorities should be required to adopt the following approach to the key issues arising in the post-tender phase of a Competitive Dialogue procedure based on a restrictive approach to the terms “clarifying, specifying and fine tuning” tenders after the receipt of final tenders and “clarifying aspects of the (winning) tender” and “confirming commitments contained in the (winning) tender” after the selection of the winning tender.

#### ***Before the winning bidder is selected***

- Resolving the contract terms which must be definitively resolved before the winning bidder is selected i.e. there can be no further discussion about them once the winning tender has been selected (see Table 2)
- Reaching the maximum possible resolution of the contract terms which generally cannot be fully resolved at the point that the winning bidder is selected (see Table 2)
- Setting out a definition of what constitute the “basic features of a tender”, which should be widely drawn
- Defining narrowly the circumstances in which the “basic features of a tender” can be changed
- Defining the *extent* of permitted change in circumstances where changes are permitted
- Ensuring that the process of “clarifying, specifying and fine tuning” tenders only relates to actions initiated by the Contracting Authority i.e. that bidders cannot use the process to improve their tenders

- Documenting and implementing how it will ensure that “clarification”, “specification” and “fine-tuning” conforms to the principles of equality of treatment and non-discrimination
- Updating the Public Sector Comparator (PSC) based on the tenders received and the process of “clarifying”, “specifying” and “fine-tuning” tenders and, in exceptional circumstances, if there have been major changes to market conditions since the conclusion of the dialogue phase.<sup>77</sup>

***After the winning bidder is selected***

- **Finalising** before the conclusion of the contract the terms which may require some clarification and confirmation (further detail) of commitments in the winning tender i.e. all remaining **contract terms**
- Setting out a definition of what constitute “substantial aspects” of the winning tender which, again, should be widely drawn
- Defining narrowly the circumstances in which “substantial aspects” of the winning tender can be changed
- Defining the **extent** of permitted change in circumstances where changes are permitted
- Updating the PSC if there any changes needed arising from the process of “clarifying and confirming commitments” in the winning tender and, in exceptional circumstances, if there have been major changes to market conditions since the selection of the winning bidder<sup>78</sup>
- Documenting and implementing how it will ensure that “clarification and confirmation” of commitments in the winning tender conforms to the principles of equality of treatment and non-discrimination
- Restricting the interpretation of the terms “clarifying aspects of (the winning) tender” and “confirming commitments in (the winning) tender” to the process by which the Contracting Authority obtains further detail about how the winning bidder will discharge its commitments. Again, the initiative rests solely with the Contracting Authority
- Documenting all the winning bidder’s commitments before financial close, so that the enforcement of these obligations can be undertaken when, at a later date, those engaged in the contract negotiations are no longer engaged in it
- Confirming, before the conclusion of the contract, based on expert legal

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<sup>77</sup> As at earlier stages in the process if, after the reworking of the PSC, the use of PPP does not continue to represent value for money, the case for continuing with the project as a PPP should be reviewed.

<sup>78</sup> Again, if, after the reworking of the PSC, the use of PPP does not continue to represent value for money, the case for continuing with the project as a PPP should be reviewed.

opinion, that:

- The contract awarded is sufficiently similar to the contract advertised
- The contract still represents value for money for the Contracting Authority and is affordable
- The contract to be signed with the winning bidder is still, if changed since the selection of the winning bidder, better value for money than the next best bid.

## **GOOD PRACTICE IN PLANNING AND IMPLEMENTING COMPETITIVE DIALOGUE – UNDERLYING CONCEPTS**

The ability to implement the core approach set out above is underpinned by a number of other key ideas described further below.

### **Equality of status between the public and private sectors**

There is a need to bring about equality of status between on the one hand the public sector and on the other both the large and increasingly globalising and consolidating private sector service providers and the predominant influence exercised over PPP by lenders.<sup>79</sup> Put simply, if the public sector does not manage the market for PPP, then service providers and lenders will control it – to do this requires better co-ordinated, appropriately resourced, well-informed, active and skilled market management by the public sector at all levels, using the power which public authorities have as buyers in many markets, bringing schemes to market in such a way and at such a time as to optimise competition.

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<sup>79</sup> The point remains valid even though, of course, writing in late 2009 in the global financial crisis, the balance of power in the PPP market has shifted significantly in favour of lenders with, as one banker put it to the authors, there are now, in the context of the debt finance which generally provides the majority of funding for PPP, “deals chasing money” rather than, as prevailed until 2008, “money chasing deals”. It remains to be seen how long this situation will persist, particularly as, in the authors’ view, one of the key lessons of the crisis is how deeply embedded in the banking sector the culture of aggressively competitive lending has become, driven as it is by incentive structures which have encouraged the pursuit of short term gains in market share.

### **Achieving value for money for the public sector**

Value for money for the public sector is most likely to be achieved if it substantially fixes the terms of the contract while bidders are subject to competitive pressures, i.e. before the winning bidder is selected (see below, Table 2). These include, in particular, the contract period, contract length, expected outputs, price payable, payment schedule, service commencement date/definition of service commencement, default dates, the payment mechanism, service delivery methods to be used (for mobilisation, transition, construction, operation, maintenance, asset refresh, including method statements), performance standards for the construction and operational phases, financing arrangements/SPV financing structure, arrangements for continuation of existing services, financial and performance guarantees, details of assets to be transferred by the Contracting Authority at the start of the contract (physical, financial, IT and human assets) ownership of assets during the contract period, ownership of assets after the contract period and the arrangements for end of contract asset transfers (including valuation), contract monitoring methods, contract change mechanism (including the procedure for unforeseen changes and changes in law), gain sharing on refinancing, assignment of obligations, change of ownership of provider, definition of availability of service, price indexation, price variations, change in law, compensation on complete or partial early termination of the service, insurance, warranties, indemnities, amount and scope of the supplier's liability for direct and indirect losses, definition of *force majeure*, step-in rights for lenders/other aspects of the direct agreement with senior lenders, step-in rights for the Contracting Authority and dispute resolution procedures.

### **The importance of forward planning to minimise the risk of challenge**

There is an increasing trend towards challenges to award procedures though to date, because of the recent introduction of Competitive Dialogue as an award procedure, and thus limited practical experience of its implementation, there has so far been no ECJ case relevant to its (mis)application. But, given the many points of interpretation needed, the current trend of increasing litigation, the wider introduction of freedom of information legislation in EU Member States, the value of the contracts at stake and the recent revisions to the Remedies Directives for a standstill period between contract award and contract conclusion,<sup>80</sup> a public authority would be very unwise to assume that such cases will not arise. Challenges to public procurement

contracts in general, and PPP in particular, have now started to become more frequent even in the United Kingdom where in the past they were relatively infrequent because of the cost of legal proceedings, the availability of other opportunities and the limitation of post award remedies to damages.<sup>81</sup>

In Competitive Dialogue Procedures, in addition to the causes of challenge which may arise in any procurement process, it is reasonable to assume that, given the views of some responses of suppliers to the Commission's consultation on the PPP Green Paper, challenges may also arise from issues associated with the confidentiality of bids now enshrined in the Public Procurement Directive will actually be protected in the dialogue phase of the process and how the dialogue phase of the process will be conducted in a manner consistent with the principles of equal treatment, non-discrimination and transparency.

### **The need to expend significant time at an early stage in the procurement process**

The need to develop a provisionally preferred solution will require significant input at an early stage of the award process through pre-OJEU market consultation/technical dialogue (which may require appropriate external professional advice) and skilful application and effort in the short-listing phase.<sup>82</sup> But the effort needed to do so has to be made by the Contracting Authority during the process in any event in order to effectively manage the process. So it represents bringing forward the necessary engagement of the Contracting Authority rather than additional work or costs. The time expended at an early stage also helps to ensure that the provisionally preferred solution is framed such that it is acceptable to the market (in the

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<sup>80</sup> See "Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665 and 92/13 with regard to improving the effectiveness of review procedures concerning the award of public contracts", Art 2(a) (the revised Remedies Directives). As noted above, this provision derives from what is regarded as settled ECJ case law (*Alcatel Austria and Others v Bundesministerium für Wissenschaft und Verkehr* C-81/98 and *Commission v Austria* C-212/02) and is thus already relevant to contract awards.

<sup>81</sup> One example current at the time of writing is a challenge by a losing bidder to a waste management PPP contract valued at £3.8 million (c€4million) awarded by Greater Manchester Waste Disposal Authority.

<sup>82</sup> Though the volume of work in many areas will be reduced by the fact that the volume of PPP schemes in many areas has led to the development of template solutions capable of being customised.

sense will not act as a barrier to bids), will stimulate the optimum level of competition and will deliver value for money for the public sector.

The need to expend time at an early stage will also place a discipline on the public sector to develop robust schemes, based on due consideration of options, with clearly defined outcomes and assessment of risks, which are affordable, match the Contracting Authority investment priorities and meet its required financial and/or economic criteria for investment projects. It also allows time for appropriate internal approvals and securing professional advice. Other advantages include a potential reduction in bid costs for participants in the process and the fact that the Contracting Authority will engage the respect of the market if they are seen to be well-organised, clear in their objectives and have a brisk but realistic timetable for the procurement process.

Crucially, early effective planning of outcomes improves the likelihood that the Contracting Authority will start the process with the necessary information and skills, enabling it to stay in effective control of the process, rather than allowing the bidders to control it.

It should also help to ensure that the provisionally preferred solution is framed such that it is acceptable to the market (in the sense will not act as a barrier to bids), will stimulate the optimum level of competition and will deliver value for money for the public sector.

### **The importance of listening to candidates during the dialogue**

The proposed approach to Competitive Dialogue will also require the Contracting Authority to genuinely listen to candidates during the dialogue phase and be prepared to amend the provisionally preferred solution if market conditions have changed during the dialogue phase or if they are otherwise persuaded by the candidates that it is desirable. This could arise if any aspects of the provisionally preferred solution would seriously undermine the likelihood of competition (i.e. the likelihood of the short list not bidding as opposed to bidding (which could, for example, arise if the candidates who are actually on the short list have materially different views from those included in the pre-OJEU market consultation) or materially affect the extent to which the Contracting Authority could secure value for money because it might lead to a bid premium.

### **The extent to which business secrets are at risk**

While market operators may in general express serious concerns<sup>83</sup> about misuse of their ideas by Contracting Authorities, the European Commission's experience<sup>84</sup> suggests that the fears of the supplier market of the impact of cherry picking – the use of the ideas and solutions of one of the participants by another one or by the Contracting Authority – may in some cases be exaggerated.

As noted above (see Chapter 1), for Burnett this scepticism is borne out by his practical experience, in the sense of having encountered little evidence in practice that the fear of such abuse has in reality acted as a barrier to actual participation by private partners in award procedures, though this does not mean that Contracting Authorities have not, on occasion, misused business secrets of participants in a procurement process.

Because the Contracting Authority has developed its provisionally preferred solution and a final preferred solution based on market consultation and technical dialogue, there should be relatively limited solution design and innovation which it has not captured. Thus the practical effect of such concerns of market operators about loss of business secrets related to solution design (as opposed to implementation) is likely to be limited. By way of explanation, it has been the authors' experience that attempts to address such concerns have, in practice, been more ones of perception than reality in the sense that people and ideas tend to circulate freely around the construction and service sectors (and sometimes through professional advisers). Thus attempts to frame a process to control design-related business secrets may, in fact, constrain the objective of Contracting Authorities to achieve value for money without, in practice, benefiting market operators, especially, as in some jurisdictions, freedom of information legislation may require that documents be placed in the public domain.

This evaluation of the dynamics of design aspects of confidentiality should, however, be contrasted with that to the financial offers and methodologies for construction and design. Since the financial offers and the methodologies for construction and design represent the essence of how Contracting Authorities will distinguish between offers (rather than the nature of the solution itself) the Contracting Authority should ensure that

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<sup>83</sup> As, for example, expressed in various responses to the Commission's consultation on the PPP Green Paper.

<sup>84</sup> See The Explanatory Note on Competitive Dialogue, p. 7, Note 23, which refers to the absence of challenges on the grounds of cherry picking to procurements conducted in accordance with the Negotiated Procedure where the use of Competitive Dialogue could have been justified.

the confidentiality of these aspects of the offer, and any ideas generated in respect of them in the short listing and dialogue phases is maintained. For example, the fact that concrete will be used to lay a road should not be covered by confidentiality arrangements because it is part of the design of the solution but the methods by which the concrete is laid, the supervisory quality controls used by the bidder and the sourcing and price of the raw materials should be confidential to the bidder.

### **The availability of experience from many PPP schemes**

In many types of infrastructure/public service provision there have now been sufficient prior examples in most sectors – more than 900 PPP/PFI schemes in the United Kingdom alone – for the treatment of most of the risks most of the time to be capable of being standardised and thus understood by the market and pre-cleared with potential lenders while there is still competition for the contract. Thus the desire not to use standardised solutions and to achieve more differentiated and customised needs may be regarded as adding a cost of complexity to the outcome of infrastructure projects.

If it is a novel area of infrastructure/public service provision the Contracting Authority should consider carefully whether or not PPP is a feasible option, invest more time in pre-launch market consultation and technical dialogue and require a higher standard of certainty about its advantages over other means of delivering infrastructure.

### **Identifying the potential deal breakers**

The workability of the concept of a final preferred solution is based on the idea that, though participants may not necessarily regard it as optimal or necessarily the solution they would, ideally, have liked to offer, the solution is one against which they are technically capable of bidding and does not include elements which would act as barriers to bidding. Pressures within potential supplier organisations to bid, as opposed to not bid, will work in the Contracting Authority's favour here, so the skill will be to work out what are the *real* deal breakers. The key judgment here is to distinguish between what short listed entities *say* they will do as opposed to what they *actually* will do when faced with the prospect of winning a significant contract. These are not, in the authors' experience, by any means the same thing.

Since it is based on the outcome of the dialogue, the Contracting Authority ought to be able to frame it to maximise the likelihood that all the short listed candidates will bid, which is one of the key objectives of the dialogue phase for the Contracting Authority.

### **The need to attract and maintain the interest of the private sector**

In the authors' experience, service providers will generally go through an internal process of qualifying a potential project in terms of whether or not it is a potentially attractive for them to bid. The criteria which they will use in the process could include considerations of political and senior officials' commitment to the process, the certainty of the legal and regulatory regime, the ability of customer sustainably to pay for the services if delivered, the value of the contract, the likelihood of winning (including track record in the sector), the acceptability of the risk profile in relation to the returns expected (including likely contract terms and conditions), its ability to deliver the contract's core requirements, its prior and current relationships with the customer, its capacity to bid for and deliver the contract, the customer's competence (e.g. clarity and realism of the objectives and timetable), the likelihood that the procurement timetables set will be adhered, the involvement of end users in the procurement process, the importance of access to information about the contract and the wider importance of the customer to the supplier.

The need to engage with private parties sector includes both service providers and lenders because there will be no transaction unless:

- The private sector partner can make a profit commensurate to the risks it is assuming
- Lenders are willing to lend to the private sector partner.

However, this needs to be done in a way which retains the primacy of the public sector's objective of obtaining value for money in the delivery of public services. The current market model for PPP transactions is unduly unfavourable to the public sector in several ways. These include the involvement of lenders only at a very late stage of the transaction (i.e. when the preferred supplier/winning bidder has been identified), the length of contracts (which makes it difficult to subject the arrangement to periodic competitive pressure), the cost of changing contract terms in a single tender environment and the termination arrangements to compensate lenders where there is failure by the service provider.

Contracting Authorities also need to be aware of the concerns of sup-

pliers (as, for example, expressed in various responses to the Commission’s consultation on the PPP Green Paper) about whether in reality any elements of bids which are subject to confidentiality requirements will actually be protected in the dialogue phase of the process and how the dialogue phase of the process will be conducted in a manner consistent with the principles of equal treatment, non-discrimination and transparency.<sup>85</sup>

This should be based on clear guidelines set out at the launch of the dialogue phase, which will include, in particular, the timetable and structure for information flows between candidates and the Contracting Authority and the frequency, length, scope, conduct, recording of meetings etc.

### **Importance of bidders obtaining committed finance at final tender stage**

Bidders should be required to submit final tenders with committed finance from lenders on terms acceptable to the Contracting Authority.<sup>86</sup> This avoids the situation when, after the selection of the winning tenderer, and the removal of competition, the Contracting Authority may be faced with a series of new negotiating points raised by the lenders. This means in practice that lenders need to play an active part in the dialogue phase of Competitive Dialogue Procedure so that their needs can form part of the overall contract negotiations prior to final tenders being submitted. It also means in practical terms that both bidders and lenders will need to complete their due diligence prior to the submission of final tenders. The argument against involving funders early is that of higher bid costs for bidders but, by ensuring the commitment of funders while there is still competition for the contract, there is likely to be less scope for post-offer variations to the contract terms which might call into question the legality of the award procedure and/or which are unfavourable to the Contracting Authority.

Committed finance through a “strong” or “firm commitment letter” is a

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<sup>85</sup> It should be noted that consideration of these matters are not done solely to address the expectations of suppliers – depending on the jurisdiction where the Contracting Authority is located, they will also need to be conscious of the role of auditors, the media, civil society and legislative scrutiny.

<sup>86</sup> This is current practice in a number of Member States including Germany and Austria. Lately it appears that some Contracting Authorities in the UK have also started to ask that participants in Competitive Dialogue Procedures conclude their due diligence upfront and then to submit offers including full commitment from lenders (see Sophie Charveron, “Competitive Dialogue threatens PFI”, *Construction Law*, August/September 2007, p. 29 *et seq*).

support letter duly signed by the lenders in which the latter must not make their support subject to conditions other than “material adverse changes” (MAC-clause) occurring between the submission of the final tender and financial close. In particular, it means that the lenders should confirm their acceptance of the terms of the contract between the Contracting Authority and the bidder at the point when the final tender is submitted.

The Contracting Authority should include in its tender documents (or descriptive document which is the basis for the final tender) a specimen commitment letter to be used by the participants. In this letter it should be defined what which circumstances or events are to be understood as “material adverse changes” that would allow the lenders to withdraw their support. The MAC-clause should be construed as narrowly as possible, e.g. it should not extend to events or circumstances that could have been foreseen. It is advisable to discuss the content of the commitment letter, including in particular the scope of the MAC clause, with the participants during the dialogue stage in order to avoid non-compliant bids at the final bid stage. “Strong” or “firm” commitment by the lenders, however, does not mean that the participant has to submit complete financial documentation (i.e. all the financing contracts that need to be concluded between the lenders, the members of the bidding consortium and the SPV) with its final tender. It will be necessary to include in the final bid detailed financial term sheets that have been approved by the lenders. It constitutes good practice to demand submission of the complete financial documentation from the successful tenderer only.

The authors are, of course, conscious of the argument advanced by some lenders that, in the current financial conditions of late 2009, they may be reluctant to make such a commitment. But it is contended that it would be inappropriate to formulate the preferred approach to the implementation of Competitive Dialogue on the basis of the current tight credit conditions, irrespective of any judgment about how long they are likely to continue or the view taken about what future credit conditions might be. In any event, if the argument that bidders are not able to submit final tenders with committed finance were to prevail, it would, in the authors’ view, undermine the key idea underpinning Competitive Dialogue that substantially all terms of the contract should be agreed while there is still competitive pressure on bidders. It would, in reality, risk a return to the opportunity for contract terms to be changed to meet the lenders’ needs after the selection of the winning bidder which, as noted above, represented the common, and from the point of view of value for money for the public sector, undesirable practice in the application of the Negotiated Procedure. Thus, potentially, it would have public policy implications which, at the very least, might be

argued to be inappropriate given the significant support given to commercial lenders during the recent financial crisis.<sup>87</sup>

## **GOOD PRACTICE IN PLANNING AND IMPLEMENTING COMPETITIVE DIALOGUE – ISSUES RESOLUTION ROAD MAP**

The optimal approach to the application of the Competitive Dialogue procedure is based on the idea that the Contracting Authority should understand what issues need to be resolved at different stages of the process.

The key idea, carried forward from good practice in the Negotiated Procedure, is that the selection of winning tender should not happen until all substantial terms and conditions affecting the price and delivery of a project have been settled i.e. while there is still competition.

This means that the Contracting Authority will aim:

- **In the dialogue phase to:**
  - **Resolve the issues which must be definitively resolved before final tenders are called for i.e.** issues about which after the end of the dialogue phase and the call for tenders there can be no further discussion once tenders have been submitted
  - Reach the maximum possible resolution of the contract terms which generally cannot be fully resolved by the end of the dialogue phase
- **In the post-tender phase to:**
  - **Resolve the issues which must be definitively resolved before the winning bidder is selected i.e.** there can be no further discussion about them once the winning tender has been selected

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<sup>87</sup> It should be noted that references here to binding commitments by lenders refer, in the current PPP policy context, to commitments by lenders to bidders and not to the Contracting Authority. As far as the authors are aware the question of whether or not in addition (and in the absence of circumstances defined as materially adverse changes) lenders should have enforceable obligations to the Contracting Authority arising from the commitment letter submitted along with final tenders have not been considered. They would not necessarily create a new kind of contractual relationship, because there usually exists in PPP contracts a direct agreement between the Contracting Authority and the lenders, including, for example, the granting of step in rights to lenders to replace a failing SPV. Such enforceable obligations might have a value, if, for whatever reason, bidders fail to effect financial close or otherwise withdraw from the process before construction has been commenced, i.e. before any finance has been actually committed by lenders. Since the committed finance could, in this scenario, remain available to the Contracting Authority for a defined period, it would thus facilitate a swifter replacement of the SPV, subject to the Contracting Authority ensuring, for the protection of lenders, that the terms of contract with the replacement SPV did not change.

- Reach the maximum possible resolution of the contract terms which generally cannot be fully resolved at the point that the winning bidder is selected
- **In the phase following the selection of the winning bidder, to finalise** before the conclusion of the contract terms which may require some clarification and confirmation (further detail) of commitments in the winning offer i.e. **all remaining contract terms**.

The optimal timing for resolution of issues is set out in below in Table 2. It includes matters relating to the certainty and unconditionality of bidders' final tenders and the matters which the Contracting Authority need to resolve to enable them to submit unconditional final tenders.

**The table includes only the matters relevant to the interface with potential bidders and not internal governance issues which also need to be addressed at an early stage i.e. normally pre-OJEU.** It is assumed here that the Contracting Authority will not make material, if any, changes to its requirements following the launch of the dialogue phase and the issue of the provisionally preferred solution. The authors are, of course, aware that this assumption does not always hold true, particularly in circumstances where the Contracting Authority has failed sufficiently to prepare and plan for the award process. Changes should in particular be avoided after the selection of the winning bidder since, if this occurs, it is to be expected that the private partner will want to enter into discussions, which will then be on a single tender basis and thus place the Contracting Authority in a position of weakness, which could lead to a change in the price and/or other key aspects of the contract. Such changes may also lead to the contract awarded being materially different from that advertised. However, the Contracting Authority should not, of course, definitively restrict its option to make changes to its requirements because, exceptionally, there may be market-driven circumstances outside of its control which would justify them.

**Column 2 of the table lists the issues which must be definitively resolved before final tenders are called for.** This column does not distinguish between issues which need to be resolved before the OJEU is launched and in the short-listing phase/before the dialogue phase is launched. These issues are differentiated in more detail below in Chapter 4. As regards the progress which needs to be made in the dialogue phase/before the call for final tenders on the issues in Column 3 (which must be definitively resolved before the winning bidder is selected), any good practice requirements for progress in the dialogue phase are set out in the notes column – see, for example, the notes re sub-contracting. The optimal meth-

odology for conducting the dialogue phase includes a requirement that interim submissions are called for in a form similar to that of the final tender to enable the Contracting Authority, in practice, to be assured that the final tenders are likely to “contain all the elements required and necessary for the performance of the project” as required by Art 29(6), Directive 2004/18.

**Column 3 of the table lists the issues which must be definitively resolved before the winning bidder is selected insofar as they have *not* been definitively resolved before final tenders are called for.** This means that, in practice, final tenders should be submitted in sufficient detail and with sufficient unconditionality such as to:

- Enable the Contracting Authority to evaluate the tenders in accordance with the published evaluation criteria
- Allow, as noted above, for a very restrictive interpretation of what is meant by “clarifying”, “specifying” and “fine-tuning” tenders.

**Column 4 of the table lists the issues which may require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract.**

There are certain issues which will, as noted above, straddle the dialogue, post tender and post winning bidder phase such the detail of designs, securing the commitment of lenders and sub-contracting arrangements. Where issues fall into more than one phase, they appear in more than one column, with the intention that they will be progressively more finalised at each phase. The idea is that the Contracting Authority will reach the maximum possible resolution of the contract terms which cannot, respectively, be fully resolved by the end of the dialogue phase and at the time that the winning bidder is selected. This is also consistent with the aim of minimising, as far as possible, the time spent in concluding the contract after final tenders have been received.

In this context “maximum possible resolution” means sufficient resolution such that:

- Except in exceptional market-driven circumstances justified by factors outside of the control of the Contracting Authority and the bidders, there will be no material changes following the call for tenders which will lead to a fundamental change to the contract. In particular this includes (but is not restricted to) the scope of the contract, the price payable, the payment schedule, risk allocation, the performance standards expected or the methods to be used in delivering the project outcomes. However, matters such as greater detail of designs and specification of named sub-contractors should not impact on any of these fundamental factors and

the only variation in respect of the commitment of finance would be a change to reflect movements in market interest rates beyond limits specified in the contract documentation as being at the service provider's risk or anything covered by the material adverse changes clause referred to above

- The Contracting Authority is provided with sufficient detail (including how bidders will deliver the final preferred solution) to allow it to evaluate the tender made by the bidder, compare it with that of other bidders and reach a conclusion about which tender is the most economically advantageous.

Table 2 – Issues resolution table

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Commitment of lenders	X	X	X (within specific parameters – see notes)	<ul style="list-style-type: none"> <li>• Term sheet commitments may be made in the dialogue phase with the expectation that they will be reflected in final tenders. It means that lenders must be involved in detailed discussions during the dialogue phase</li> <li>• Binding commitments of lenders to lend on agreed terms should be made when the final tenders are submitted, and on the basis that lenders have carried out all necessary due diligence, again subject to the possibility of variation of rates within defined limits for changes in market conditions/ interest rates and subject to the non-occurrence of circumstances defined as material adverse changes</li> <li>• Finally agreed interest rates for loans will only be agreed shortly before final close/hedging of interest rates, with the proviso that this should not impact on bank margins on the loan</li> <li>• Complete financial documentation will be called for from the winning bidder as part of the procedure for contract conclusion.</li> </ul>

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Detail of designs	<b>X</b>	<b>X</b>	<b>X (within specific parameters – see notes)</b>	<p>Should become progressively more detailed at each stage, but ideally resolved at tender stage:</p> <ul style="list-style-type: none"> <li>• The minimum to be specified by the Contracting Authority at the end of the dialogue phase is the area to be occupied, definition of designated use of the infrastructure (for planning purposes) design concepts, availability needs of the infrastructure/access issues, design constraints (e.g. height, noise, visual impact, traffic flows etc.) operating constraints, fitness for purpose, environmental/energy use/waste management/health and safety requirements and materials performance specification for all the infrastructure</li> <li>• The minimum to be included at final tender stage (and thus agreed by the end of tender stage) would be tenders which represent an integrated solution for all aspects of the infrastructure</li> <li>• Final tenders should include designs for the component parts of the infrastructure, showing how the solution for each of the component parts are consistent with each other and demonstrating conformance with the area to be occupied, definition of designated planning use, design constraints, availability needs/access issues, operating constraints, fitness for purpose, environmental/energy use/waste management/health and safety requirements, performance specification for materials to be used and assurances that further detailed specification, such as the precise layout of rooms, will not impact on contract fundamentals e.g. price, scope or performance standards etc. i.e. proposals should consistent with bidders' unconditional final offers</li> </ul>

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Detail of designs (continued)	<b>X</b>	<b>X</b>	<b>X (within specific parameters – see notes)</b>	<ul style="list-style-type: none"> <li>• These tenders would typically include, for a material and representative % of construction:               <ul style="list-style-type: none"> <li>– 1:200 architectural designs</li> <li>– 1:50 layout of infrastructure elements</li> <li>– Engineering/construction drawings</li> <li>– Landscaping/site development proposals.</li> </ul> </li> </ul>
Percentage of work to be sub-contracted <sup>a</sup>	<b>X</b>	<b>X</b>		The Contracting Authority could either specify the percentage of work to be sub-contracted or use it as part of the selection process either at short listing or tender stage. If it is to specify the percentage, this should be indicated in the call for expressions of interest and subsequently confirmed in the provisionally preferred solution/final preferred solution. If the percentage forms part of the final tender evaluation process, the bidders' proposed percentage should be included in the bidders' interim submissions and then carried forward to the final tenders. <sup>b</sup>

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Details of sub-contractors to be used and type of work to be sub-contracted	<b>X</b>	<b>X</b>	<b>X (within specific parameters – see notes)</b>	<p>The Contracting Authority should be satisfied:</p> <ul style="list-style-type: none"> <li>• As part of the short listing process that the sub-contractors are potentially capable of delivering the role assigned to them by the interested parties, using the short listing criteria</li> <li>• As part of the tender evaluation process that the bidders' planned arrangements for managing sub-contractors are robust and sustainable, as part of the evaluation criteria</li> <li>• Ideally, the names of sub-contractors and the work to be sub-contracted should be proposed by the potential supplier at the time of the call for expressions of interest. This is legally required for sub-contractors on whose capability the candidate intends to rely to prove its technical capacity and/or financial/economic standing.<sup>c</sup> It is also important where the sub-contractor is for a key specialist service e.g. tunnelling/electronic tolling systems for a road scheme</li> <li>• In other situations, the names of sub-contractors to be used/the work to be done by them may be updated in interim submissions and discussed during the latter part of the dialogue phase so that the Contracting Authority can confirm that the proposals are acceptable and then can be carried forward to the bidders' final tenders. In exceptional circumstances the names of sub-contractors may not be able to be finally specified until final tenders are submitted and/or after the winning bidder is selected. But later named sub-contractors differing from those proposed in the short listing procedure should be at least as capable as those previously named and bidders should be able to justify changes made.</li> </ul>

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Acquisition of planning consent and other licensing requirements	<b>X</b>	<b>X</b>	<b>X</b>	It may be that, in some jurisdictions, it is currently impossible to obtain detailed planning consent with the detail of design needed for launch of the call for final tenders. This is unsatisfactory and the ideal approach to this situation is for Member States to amend the conflicting legislation so as to allow for a Contracting Authority to have the power to award itself deemed planning consent for its provisionally preferred solution. A less satisfactory but workable alternative is for Contracting Authorities to be able to grant planning consent based on proposals included in the short listed entities' interim submissions. <sup>d</sup>
Confirmation of compliance with other statutory requirements such as health and safety, environmental impact assessment etc.	<b>X</b>			The Contracting Authority should undertake the environmental impact assessment, which candidates should confirm that they have taken into account in their interim submissions and final tenders.
Confirmation of legal title to property	<b>X</b>			The ease of doing so may vary e.g. it may be easier for schools and hospitals than for road projects.

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Contract monitoring mechanisms, including flows of information to Contracting Authority and access to information by Contracting Authority	<b>X</b>			
Stakeholder/public consultation by Contracting Authority	<b>X</b>			
Unforeseen circumstances mechanism	<b>X</b>			To deal with unforeseen circumstances arising after the end of the dialogue phase and before financial close. The mechanism should set out the process to be followed, the responsibilities of both parties and, non-exhaustively, the matters which could potentially be covered by the mechanism e.g. that insurable risks become uninsurable or the service is no longer required or able to be provided economically because of the complete or substantial absence of demand or significantly increased cost. Both parties should also commit to using their best endeavours to resolve such issues using the mechanism, which will, of course, also carry forward to the contract execution phase.

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Details of assets to be transferred by Contracting Authority (physical, financial, IP, human resources)	X			This is key to the ability of bidders to submit unconditional bids. Bidders need to know in particular where they can obtain the information about their potential liabilities under European/national employment/social security legislation.
Assurance of due diligence by service providers including completion of site surveys		X		This requires that the Contracting Authority assures access to the site for short listed entities and other property relevant to the construction and operation of the infrastructure so as to allow bidders to submit unconditional offers based on the completion of its own site surveys rather than conditional offers based on the site surveys of the Contracting Authority.
SPV financing structure	X			The Contracting Authority may allow these to differ from bidder to bidder, even though it may set out its preference in its provisionally preferred solution. The bidders' proposed financing structure should be discussed with the Contracting Authority in the dialogue phase and set out in their interim submissions so that Contracting Authority should know at the end of the dialogue phase what bidders will propose in their final tenders. This should not vary in the final tenders unless there is a major change in market conditions during the tender phase.
Performance specification	X			

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Service delivery methods to be used (for mobilisation, transition, construction, operation, maintenance, asset refresh, including method statements etc.)		X		This does not imply scope for significant changes in service delivery methods during the tender evaluation period.
Performance standards (KPIs/target levels of performance for KPIs)	X			
Price payable		X		This does not imply scope for significant changes in price during the tender evaluation period though, if base interest rates fluctuate between the submission of final tenders and financial close, this may affect the price payable.
Payment schedule		X		The Contracting Authority should be able to assess the continuing affordability and value for money of the project through interim submissions in the dialogue phase which should, subsequently, be reconciled to the final tenders received. As noted above, this does not imply scope for significant changes in price during the tender evaluation period.

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Payment mechanism	X			
Contract period	X			
Contract length	X			
Service commencement date	X			
Definition of service commencement	X			
Contract default/long stop dates	X			
Arrangements for continuation of existing services	X			E.g. where, in the case of a PPP school or hospital, it is necessary to continue to operate services on a site prior to completion of construction/refurbishment.
Ownership of assets during and after the contract period	X			

<b>Key issue</b>	<b>Must be fully resolved before final tenders are called for</b>	<b>Must be fully resolved before the winning bidder is selected</b>	<b>May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract</b>	<b>Notes</b>
Asset valuation and condition at end of contract	X	X		Should be resolved before final tenders are called for if, at the end of the contract, the Contracting Authority will take the asset back at nil value or at a pre-agreed value (subject to condition) or (more rarely) if the asset will be retained by the private partner. If, however, the Contracting Authority decides to invite bids for an end of contract capital payment as part of the tender process, then it must be resolved before the selection of the winning bidder. NB This does not imply scope for significant changes in the amount bid during the tender evaluation period.
Contract change mechanism	X			
Compensation on complete/partial early termination of service	X			
Gain sharing on refinancing and other windfall gains	X			
Conditions re assignment of contract obligations	X			

<b>Key issue</b>	<b>Must be fully resolved before final tenders are called for</b>	<b>Must be fully resolved before the winning bidder is selected</b>	<b>May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract</b>	<b>Notes</b>
Conditions re change of ownership of provider	X			
Definition of service availability	X			
Price indexation	X			
Other price variations (e.g. demand related)	X			
Performance guarantees	X			
Financing guarantees	X			
Insurances	X			
Warranties	X			
Indemnities	X			

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Definition of <i>force majeure</i>	X			
Change in law mechanism	X			There may be need to scope for later variation if there is a change in law after tenders are received/before financial close if the change in law is not within the Contracting Authority's control. As with the unforeseen changes mechanism, it will carry forward to the contract execution phase. Changes in law not within the Contracting Authority's control are, more likely to apply to national law applied to sub-national authorities. But it may also apply to Member States where the change arises from the need to apply EU law, for example arising from an ECJ judgement.
Amount/scope of supplier liability direct/indirect losses including liquidated damages	X			
Dispute resolution procedure	X			

Key issue	Must be fully resolved before final tenders are called for	Must be fully resolved before the winning bidder is selected	May require some clarification and confirmation (further detail) of commitments in the winning offer before the conclusion of the contract	Notes
Direct agreement with senior lenders including lenders step-in rights	X			
Step-in rights for the Contracting Authority	X			

- a In the context of a PPP it should be noted that references to sub-contractors may in fact also need to cover sub-sub-contractors since, legally, the Consortium partners, when delivering the contract works and services, will be sub-contractors to the SPV.
- b Before submitting their proposals short listed entities will know how the Contracting Authority will evaluate different percentages, since this will have been disclosed in the weighting of the evaluation criteria, and will also need to be aware what, if any, restrictions exist on the range of percentages acceptable to the Contracting Authority.
- c See Art 47(2) and (3) and Art 48(2) and (3), Directive 2004/18.
- d Both of these approaches highlight another benefit of the prior development by a Contracting Authority of a provisionally preferred solution.

**GOOD PRACTICE IN PLANNING AND IMPLEMENTING  
COMPETITIVE DIALOGUE – MAINTAINING AN AUDIT TRAIL**

The importance of maintaining an appropriate audit trail for the procedure cannot, in the authors' view, and particularly in the relatively early years of its implementation, be overstated.

The audit trail should allow auditors, or any competent third party procurement expert reviewing the conduct of the process, at least to answer the following questions:

- Was there a well justified assessment of the need for the project? (e.g. to reduce costs, improve quality, deliver new services etc.)
- Was the need for the project appropriately prioritised in the Contracting Authority's investment programme objectives?
- Were the objectives of the Contracting Authority's for the project clearly identified (e.g. scope, performance outcomes, contract length etc.) and documented?
- Was there a proper options appraisal of the alternative means of achieving the Contracting Authority's objectives for the project, including financial and operational considerations?
- Did this options appraisal include a market assessment and/or technical dialogue?
- Were the contract objectives, and in particular the performance outcomes, set by the Contracting Authority realistic?
- Did the Contracting Authority develop an understanding of the strengths and weaknesses of the possible solutions for achieving the contract objectives before launching the procurement procedure?
- Was there an appropriate assessment, valuation and allocation of risks associated with the project and strategies for their management?
- Was the chosen route (e.g. public sector delivery, separate contracts for construction and operation/maintenance, IPPP, CPPP etc.), for the realisation of the project the appropriate route to achieve the Contracting Authority's objectives? (i.e. better value for money than the alternatives and affordable)
- In the case of a PPP, was there any evidence that the contract structure has been unduly influenced by the desire to keep the transaction off-balance sheet, as opposed to by value for money considerations?
- Did the chosen route have appropriate political support within the Contracting Authority?
- Was this chosen route kept under review during the procurement award process e.g. if PPP, by the update of the PSC at different stages of the award process and particularly after the receipt of offers and just before

- financial close?
- What alternative award procedures did the Contracting Authority consider for the procurement process?
- Was the use of the Competitive Dialogue award process properly justified as the most appropriate award procedure on value for money grounds and documented on a firm legal basis?
- Was the justification for the use of the Competitive Dialogue procedure *prima facie* robust? i.e.:
  - Was the contract “particularly complex”?
  - Was the Contracting Authority “not objectively able” to define its requirements?
  - Was this inability due to any fault on the Contracting Authority’s part?
  - Was the Contracting Authority unable to define technical means for the best meeting its needs or was it unable to define the legal or financial make-up of the contract?
  - Could the Open or Restricted Procedures have been used?
- Was there a clear timetable and project plan for the procurement?
- Did this timetable include sufficient time for planning and preparation before the launch of the award procedure?
- Did the Contracting Authority actually complete its planning and preparation before the launch of the award procedure?
- Did the contract proposed reflect the outcome of the market assessment by the Contracting Authority and its own objectives? (e.g. in terms of the service specification and contract conditions)
- Was there evidence that the Contracting Authority gave due consideration to the appropriate time to bring the project to market?
- Was their decision about the timing of the launch of the procedure *prima facie* appropriate?
- Did the Contracting Authority consult with potential stakeholders at an early stage in the process? (e.g. internal service users, external service users, employee representatives, communities affected by the project etc.)
- Were there appropriate internal governance structures in place for the procurement, including clear decision-making processes?
- Was there an appropriate strategy in place for communication with stakeholders during the process?
- Did the Contracting Authority follow the strategy?
- Did the Contracting Authority ensure that, where appropriate, competent professional advisers were appointed at an early stage in the process?

- Did the Contracting Authority have an appropriate strategy for the effective management of professional advisers?
- Did the contract notice accurately describe the opportunity?
- Was the contract widely advertised?
- Was the information provided to interested parties accurate?
- Was the information provided to interested parties compliant with the minimum required by the law?
- Was there any additional information which could have been given to attract appropriate potential suppliers and deter the inappropriate potential suppliers? (to avoid wasting their and the Contracting Authority's time)
- Was the deadline for the submission of applications appropriate to the size and nature of the procurement?
- Were the selection criteria appropriate to the procurement? (i.e. relevant, proportionate and non-discriminatory)
- Were the minimum levels of financial, economic and technical capability for the criteria appropriate to the procurement?
- Did the Contracting Authority actually apply these criteria and minimum levels of capability as planned?
- Did the Contracting Authority receive sufficient credible expressions of interest from potentially capable suppliers?
- Was there an agreed transparent and non-discriminatory methodology for constructing the short list where more than the required number of applicants met the minimum level of capability for short listing?
- Were the reasons for the composition of the short list clear, comprehensible and *prima facie* justifiable?
- Was the short listing phase used to develop the Contracting Authority's ideas about its provisionally preferred solution for its needs as well as to select a short list of candidates
- Was the optimal approach to conduct of the dialogue phase followed, including, in particular:
  - Was it launched with the tabling of the Contracting Authority's provisionally preferred solution?
  - Were the areas in which variations to the provisionally preferred solution clearly stated and was the scope for variation appropriate?
  - Was there *prima facie* evidence that the Contracting Authority genuinely listened to candidates during the dialogue phase and was, if appropriate, prepared to amend the provisionally preferred solution in these areas for variation?
  - Did the Contracting Authority call for interim submissions during the dialogue phase?

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- Did the timetable for the dialogue phase allow sufficient time for the candidates to respond to the provisionally preferred solution and make interim submissions?
- Did the timetable for the dialogue phase allow sufficient time for the Contracting Authority to reflect on the candidates' inputs to the dialogue and assess the interim submissions?
- Did the Contracting Authority ensure that, in the case of PPP, lenders were fully engaged with the dialogue so that bidders could submit unconditional bids at final tender stage
- Did the Contracting Authority maximise the likelihood of competition by not eliminating candidates during the dialogue phase?
- Did the Contracting Authority resolve the contractual issues which must be definitively resolved before final tenders are called for i.e. issues about which after the end of the dialogue phase and the call for tenders there can be no further discussion once tenders have been submitted?
- Did the Contracting Authority reach the maximum possible resolution of the contract terms which generally cannot be fully resolved by the end of the dialogue phase?
- Did the Contracting Authority maintain equality of treatment/non discrimination in the provision of information to candidates, in particular during the dialogue phase?
- Did the Contracting Authority comply with the confidentiality provisions of Directive 2004/18, in particular during the dialogue phase?
- Was the call for final tenders prepared in a way which maximised competition and minimised the risk of the need to resolve issues in the post tender period?
- Was the information provided in the call for final tenders accurate?
- Was the information provided to bidders in the call for final tenders compliant with the minimum required by Directive 2004/18?
- Was there any additional information which could have been given to improve the quality of bids made and encourage bidders to bid?
- Was the deadline for the submission of final tenders appropriate to the size and nature of the procurement?
- Was the Contracting Authority clear about what information it wanted from bidders and in what form?
- Was this information requested in a form which made it easy for bids to be assessed?
- Did the Contracting Authority establish transparent, non-discriminatory and appropriately weighted evaluation criteria and means of assessing tenders? (e.g. guidance to scoring of tenders)

- Did the Contracting Authority actually receive credible, competitive and substantially unconditional tenders from the short listed suppliers which met their service objectives?
- Did the Contracting Authority actually apply the evaluation criteria as planned?
- Did the final award decision take proper account of any financial, commercial and technical risks inherent in the different bids made?
- Was the winning bid sustainable? i.e. based on financial and operational projections which are based on sound assumptions
- Were the reasons for the final award decision clear, comprehensible and prima facie justifiable?
- Did the Contracting Authority define “clarifying, specifying and fine tuning of tenders received” in a restrictive way consistent with the intention of Directive 2004/18?
- Did the Contracting Authority define “clarifying aspects of, and confirming commitments in, the winning tender” in a restrictive way consistent with the intention of Directive 2004/18?
- Did the Contracting Authority have an appropriate commercial strategy in place for the resolution of post tender/post winning bidder issues? (which included ensuring that no fundamental issues are re-opened)
- In the post-tender phase did the Contracting Authority actually:
  - Resolve the issues which must be definitively resolved before the winning bidder was selected i.e. there could be no further discussion about them once the winning bid has been selected?
  - Reach the maximum possible resolution of the contract terms which could not be fully resolved at the point that the winning bidder is selected?
- Did the Contracting Authority, in the phase following the selection of the winning bidder, actually finalise before contract conclusion the contract terms which required some clarification and confirmation (further detail) of commitments in the winning offer i.e. all remaining contract terms?
- In the case of a PPP project, did the winning bidder effect financial close within the agreed time
- Did the conduct of the post tender period result in contract terms which materially varied from the offer at tender stage and thus may have been open to challenge because the Contracting Authority proposed to agree to contract terms which:
  - Were materially less favourable than those included in the tender, and

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- If originally proposed in the offer by the private sector partner could have resulted in the selection of a different bidder?
- Did the Contracting Authority comply with the standstill requirements prior to the conclusion of the contract?
- Was the contract finally awarded consistent with the contract advertised?
- Were there any contract terms which are unduly favourable to suppliers or lenders? (e.g. asset transfers at an undervalue, undemanding performance standards, lax monitoring regime, weak penalty clauses, difficulty of termination, excessively generous compensation on early termination etc.)
- Did the contract require an appropriate degree of improved supplier performance over the contract's life?
- Have the administrative and legal formalities of contract award been properly complied with?
- Was the project as procured still affordable and was it still value for money as compared to alternative ways of realising the project considered at the time that the original options appraisal was developed?
- Were all the winning bidder's commitments documented?
- Was there sufficient knowledge/skills transfer from procurement team to contract management team?
- Has an appropriately skilled, sufficiently resourced and appropriately empowered contract management team been established?
- Has an appropriate contract management regime for the contract been established? (i.e. one which ensures that the Contracting Authority has access to timely, relevant and accurate performance information).

## **CHAPTER 4 – A Practical Guide to Procurement Using Competitive Dialogue (Part 1 – Launching the procedure, short-listing and conducting the dialogue phase)**

### **OVERVIEW**

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.

In the dialogue phase, for example, different decisions are being made about the number of phases in the dialogue, the objectives of the dialogue sub-phases, how the phases are conducted, the time to be allocated to the dialogue phase, the information to be requested from candidates in the dialogue sub-phases, whether or not elimination of solutions should occur during the dialogue phase and, crucially, the position which the Contracting Authority needs to arrive at by the end of the dialogue phase.

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

An experimental period in the use of the Competitive Dialogue procedure has, to date, been beneficial – the diversity of practice to date has enabled an optimal approach to emerge which, it is argued, should be used in the majority of cases. But it is a key contention of this book that not all methods of applying the Competitive Dialogue procedure are equally valid. This applies in particular to the dialogue phase, which, it is argued, is pivotal to the effective conduct of the entire Competitive Dialogue Procedure. The authors argue that there are clear benefits to standardising the approach to the application of Competitive Dialogue and that there are clear pointers to aid the development of an optimal methodology.

After outlining the legal framework relevant to the dialogue phase, this chapter sets out the key stages of the Competitive Dialogue Procedure, explains how the dialogue phase fits into the overall procurement process and its importance to the Competitive Dialogue Procedure, sets out how to plan and prepare for the dialogue phase, including how earlier phases should be conducted so as to optimise the conduct of the dialogue phase,<sup>88</sup> sets out the objectives of the dialogue phase, reviews current methods of conducting the dialogue phase, highlights the key issues in determining a strategy for the dialogue phase and analyses the key operational issues arising in the dialogue phase, including launching the dialogue, different approaches to phasing the dialogue, ending the dialogue and calling for tenders.

The importance of a clear strategy for the dialogue phase is underlined by the evidence reviewed by the authors of the current conduct of the dialogue phase which indicates that, in practice, there has been insufficient clarity about the strategy for the dialogue phase and approach to different parts of it in one of the most common current approaches to the dialogue phase, i.e. to call for outline and then refined/detailed solutions.

In describing and explaining the optimal methodology to the conduct of the dialogue phase i.e. to close down contractual issues while there is still competition, the aim is to maximise the likelihood of the Contracting Authority securing value for money.

The optimal methodology is a combination of practice currently in use and an assessment of the authors about how this might be developed and improved. This is consistent with the idea of the book, which is not merely to describe how currently Competitive Dialogue is being implemented but aim to shape the development of an optimal model of its implementation in PPP projects.<sup>89</sup>

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<sup>88</sup> This chapter is not, however, intended to be a detailed description of all the activities to be undertaken by the Contracting Authority prior to the launch of the dialogue phase or all the decisions to be made by them. It focuses on those activities of particular significance in enabling the Contracting Authority to conduct the dialogue phase in a way consistent with the optimal approach to that phase. In particular, it does not cover in detail the process of undertaking an investment appraisal of projects to determine if they are financially viable or economically beneficial or the process of prioritising investment projects within a Contracting Authority's annual capital investment programme. These processes are not particular to projects awarded using the Competitive Dialogue procedure. This is not to understate their importance, however, because, if they have not been undertaken, then irrespective of financing method and award procedure, a project is at clear risk of failing to achieve its objectives. In the authors' experience, neither financing by means of a PPP nor the use of the Competitive Dialogue Procedure are, *per se* capable of converting projects which are not financially viable or economically beneficial into ones which are.

## LEGAL FRAMEWORK FOR THE DIALOGUE PHASE

The legal provisions relevant to the dialogue phase may be summarised as follows:

- The number of candidates to be selected for the dialogue phase must be indicated in the contract notice. There must be at least three candidates selected for the dialogue phase, assuming that at least three meet the minimum capability requirements. There is an overriding test that the number selected must be sufficient to provide genuine competition<sup>90</sup>
- The purpose of the dialogue phase is to identify and define the means best suited to satisfying Contracting Authority's needs<sup>91</sup>
- Contracting Authorities may discuss all aspects of the contract with the chosen candidates during this dialogue<sup>92</sup>
- The dialogue phase must be launched with an invitation to participate in the dialogue sent simultaneously and in writing to short listed candidates. This will be generally done by means of the issue of a document named the "Invitation to Participate in Competitive Dialogue" ("ITPD") or a similarly named document, which must include:<sup>93</sup>
  - A copy of the specifications or of the descriptive document and any supporting documents, or
  - A reference to accessing the specifications and the other documents indicated in the above bullet point, when they are made directly available by electronic means in accordance with Article 38(6), Directive 2004/18

In addition, the ITPD must also include:<sup>94</sup>

- A reference to the published OJEU notice (including the publication reference number and date)
- The date for the start of the consultation<sup>95</sup>
- The address relevant to the consultation<sup>96</sup>
- The language or languages to be used for the purpose of the dialogue

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<sup>89</sup> This is not merely, however, a question of value for money. It is also a question of legal certainty, because the greater the diversity permitted in the application of the Competitive Dialogue Procedure, the greater the risk that some of the methods used to apply it may be challenged in the courts. In this sense the attempt to define optimal practice is aimed at increasing legal certainty for Contracting Authorities which wish to use the Competitive Dialogue Procedure.

<sup>90</sup> Art 44(3), Directive 2004/18.

<sup>91</sup> Art 29(3), Directive 2004/18.

<sup>92</sup> *Ibid.*

<sup>93</sup> Art 40 (2), Directive 2004/18.

<sup>94</sup> Art 40(5), Directive 2004/18.

- The criteria for the award of the contract
- Information on weighting of the award criteria (unless, in duly justified and exceptional circumstances, weighting is not possible, in which case the criteria must be listed in descending order of importance)
- A reference to any additional documents required from short listed entities as proof of, or in support of the information on financial or technical standing which was submitted at the PQQ stage<sup>97</sup>
- Where an entity other than the Contracting Authority responsible for the award procedure has the specifications, the descriptive document and/or any supporting documents, the invitation shall state the address from which the specifications, the descriptive document and the supporting documents may be requested and, if appropriate, the deadline for requesting such documents, and the sum payable for obtaining them and any payment procedures. This documentation must be sent to the short listed entities without delay upon receipt of a request<sup>98</sup>
- During the dialogue phase the Contracting Authority may not:<sup>99</sup>
  - Provide information in a discriminatory manner which may give some tenderers an advantage over others, or
  - Reveal to the other candidates solutions proposed or other confidential information communicated by candidates participating in the dialogue without their consent
- The dialogue may be conducted in successive stages. Those unable to meet the need or provide value for money (as measured against the published award criteria) may be eliminated at each stage.<sup>100</sup> If a Contracting Authority intends to gradually reduce the number of solutions during dialogue phase, this should be indicated in the contract notice or the descriptive document

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<sup>95</sup> The date of the start of the consultation is the first date when any form of interaction between candidates and the Contracting Authority occurs. In the optimal approach this could be the date when the ITPD is issued or the date for submission by candidates of comments on the provisionally preferred solution.

<sup>96</sup> In the optimal approach this could be the address to which bidder comments on the provisionally preferred solution should be submitted.

<sup>97</sup> These are documents which the tenderer needs to submit to verify information supplied in respect of the suitability and choice of participants in accordance with Article 44, or to supplement the information referred to in that Article. This is not for the purpose of revisiting issues considered at PQQ stage but, where necessary, to update and verify the accuracy of the information previously supplied.

<sup>98</sup> Art 40(3) and 40(4), Directive 2004/18.

<sup>99</sup> Art 29(3), Directive 2004/18.

<sup>100</sup> Art 29(4), Directive 2004/18.

- The dialogue phase continues until the Contracting Authority is satisfied that the solutions which short listed entities will propose will contain all elements necessary for the performance of the project<sup>101</sup>
- The dialogue phase ends when the Contracting Authority declares it to be at an end, tells the candidates in writing that this is the case and calls for final tenders from short listed entities on the basis of the solution or solutions presented and specified during the dialogue<sup>102</sup>
- The call for final tenders must contain:<sup>103</sup>
  - The deadline for receipt of tenders, which must take account of the complexity of the contract and the time required for drawing up of tenders<sup>104</sup> and comply with the principles of equality of treatment and non-discrimination<sup>105</sup>
  - The address to which tenders must be sent
  - The language or languages in which the tenders must be drawn up.

#### **KEY STAGES OF THE COMPETITIVE DIALOGUE PROCEDURE**

The stages of an award process using the Competitive Dialogue procedure are as follows:

- Pre launch planning
- Publication of contract notice
- Submission of Expressions of Interest

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<sup>101</sup> Art 29(5), Directive 2004/18.

<sup>102</sup> Art 29(6), Directive 2004/18.

<sup>103</sup> Art 29(5), Directive 2004/18. It is not clear from Art 29 if the call for final tenders must also again include all the information required to provided at the time that the ITPD was issued i.e.

- A reference to the published OJEU notice (including the publication reference number and date)
- The criteria for the award of the contract and information on weighting of those criteria (unless weighting is not possible, in which case the criteria must be listed in descending order of importance) which should not vary from those previously stated in the OJEU/descriptive document)
- The information to be included in the final bid
- The procedural requirements for the submission of final bids
- The deadline for receipt of final tenders
- The address to which final tenders must be sent
- The language(s) for the tenders.

If the descriptive document or specification has been updated or revised in the course of the dialogue then a final descriptive document or specification should be issued.

<sup>104</sup> Art 38(1), Directive 2004/18.

<sup>105</sup> The Explanatory Note on Competitive Dialogue, p. 8, Note 28.

- Short listing
- Issue of Invitation to Participate in Dialogue
- Dialogue
- Submission of final tenders
- Post tender clarification, specification and fine tuning
- Selection of the most economically advantageous tender
- Clarification and confirmation of commitments in the winning tender
- *Alcatel* standstill period
- Contract conclusion/financial close
- Publication of contract award notice.

This chapter deals with the pre-launch planning and the conduct of the short-listing phase and the dialogue phase itself. The approach to post tender clarification, specification and fine tuning, the selection of the most economically advantageous tender, clarification and confirmation of commitments in the winning tender, the conduct and timing of the *Alcatel* standstill period and the requirements for contract conclusion and financial close are described and analysed in Chapter 5.

The next section highlights the particular importance of the dialogue phase in the Competitive Dialogue Procedure and is followed by analyses of each of the phases covered in this section in the form of:

- A description of the objectives of each of the pre-launch, short listing and dialogue phases and thus what the Contracting Authority needs to have achieved by the end of these phases
- A description of the optimal approach to achieving the desired position at the end of the phase.

#### **WHY THE DIALOGUE PHASE IS KEY TO THE COMPETITIVE DIALOGUE PROCEDURE**

The way the dialogue phase is conducted is the key driver of the entire Competitive Dialogue procedure.

It 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, which will maximise the effect of competi-

tive pressure. Anchoring required outcomes and key contract terms in the dialogue phase before tenders are called for can help to limit any potential changes to the contract after the dialogue phase.

Put simply, it will be much more difficult for the Contracting Authority to define restrictively the terms “clarify”, “specify” and “fine-tune” tenders and “clarify aspects of (the winning) tender” and “confirm commitments in (the winning) tender” if the Contracting Authority does not aim to approach the dialogue phase with the idea of definitively resolving contractual issues while there is still competition.

There is thus a clear inter-relationship between different phases of the Competitive Dialogue Procedure. The way the dialogue phase is conducted has implications for the other phases of the process. This includes the phases which come before the dialogue phase i.e. the pre-OJEU phase and the short listing phase e.g.:

- If the Contracting Authority has not developed a clear understanding of the strengths and weaknesses of potential solutions for meeting the contract objectives, which should be developed before the publication of the contract notice and enhanced during the short listing phase, it will not be possible to use a consultative approach to the dialogue phase
- If a consultative approach to the dialogue phase is not used, it is likely to be too time consuming for the Contracting Authority to enter the dialogue phase with a short list of four candidates.

## **BEFORE THE DIALOGUE PHASE**

The two key tasks for a Contracting Authority in planning and preparing for the dialogue phase of the Competitive Dialogue Procedure are:

- The optimal conduct of the pre-launch phase i.e. the period before the contract notice is published
- The optimal conduct of the short listing phase.

### **Before publishing the contract notice**

#### ***Objectives of the pre-launch phase***

The objectives of the pre-launch phase are to:

- Complete the planning necessary prior to the launch, both in respect of internal governance issues and that related to the conduct of the procurement in a way which maximises the likelihood of securing value for

- money
- Prepare a call for expressions of interest which provides sufficient information for potentially interested parties so as to enable them to decide whether or not to express an interest and which maximises the interest from potentially capable suppliers.<sup>106</sup>

The key tasks to be completed by the Contracting Authority before the end of the pre-launch phase are set out below.<sup>107</sup>

*Setting clear project parameters*

A Contracting Authority needs a clear understanding of its objectives for the project, including its scope and the performance standards for it, based on a realistic assessment of, as appropriate, existing performance standards within the current service, current performance standards in comparable services and considerations of affordability.

The scope of the project needs to include specified works, supplies and services, in a stated location or locations to meet public needs subject to any constraints arising from its statutory objectives or its discretionary powers. This will also include:

- Where a project involves the development of a site for multiple purposes (e.g. combined health, library and community facilities), the respective needs of each service and the interface between them
- Consequential needs such as the need to construct access roads to a newly constructed school site
- An assessment of the interface between different aspects of the project (e.g. construction and different services) which, though they may, in the case of a PPP project, all be the responsibility of the winning bidder to manage, will still need to be understood by the Contracting Authority so that it can assess the suitability of the bidders' proposals for managing them

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<sup>106</sup> As will be clear at several points in this book, the authors' experience is that, in the context of attracting capable suppliers and deterring unsuitable suppliers, a Contracting Authority should err on the side of fuller disclosure rather than restricted disclosure in its interpretation of what constitutes sufficient information for participants in an award process.

<sup>107</sup> The authors make no apology for the fact that this is likely to be a resource intensive process, though this is not a factor particular to Competitive Dialogue Procedures. The need to emphasise this fact is, in their experience of all too frequent failure to plan by Contracting Authorities for procurement procedures and the consequent difficulties which then arise during the procurement itself.

- If relevant, the relationship between the continuing provision of existing services and the new services in the project and/or the transfer of provision of new services to a new site insofar as they need to be integrated into the project.

Setting performance standards often involves difficult judgements, subject to the need to manage public and political expectations and knowing how ambitious it is possible to be. Contracting Authorities sometimes complain that suppliers only achieve the minimum standards required by the contract. Given that the Contracting Authority has normally set the standards originally, this is a misplaced complaint and ignores the fact that often these minimum standards are higher than what was being achieved before the contract award process. It sometimes reflects the fact that Contracting Authority wants to receive a higher standard of service than it can afford to pay for. Setting targets for performance measures is far from easy, balancing the need for improvement, the long-term lock-in to the standards and the desire for targets to be achievable by the private partners so that the project looks to be successful. It is often useful to conduct a service efficiency review before setting targets for a new contract to avoid handing the private partner easy efficiency gains.<sup>108</sup>

*Understanding potential solutions and risks associated with them*

A Contracting Authority needs a clear understanding of the technical solutions which could meet the project objectives, the strengths and weaknesses of those solutions (including performance potential, key technical characteristics, life cycle costs,<sup>109</sup> sustainability, and risks associated with them) based on effective market assessment and prior technical dialogue where necessary and conducted in accordance with Treaty principles and the public procurement principles which derive from them.<sup>110</sup>

A Contracting Authority also needs to develop, in advance of the launch of the procedure, its preferred approach to risk allocation between the public and private partners arising from those solutions, to be reflected in the contract conditions, such as those relating to ownership of assets, ter-

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<sup>108</sup> For a fuller assessment of the process of setting performance standards see Burnett, *op. cit.*, pp. 124-128.

<sup>109</sup> Life cycle costs can include, in addition to the costs of design and construction, the costs of service operation, asset repair and maintenance, user support, user training, supply of materials and cost of decommissioning/disposal.

<sup>110</sup> For a fuller description of market assessment and management by Contracting Authorities see Burnett, *op. cit.*, pp. 41-49 and 112-115. Technical Dialogue prior to the launch of an award procedure is explicitly permitted by Recital 8, Directive 2004/18.

mination liabilities, gain sharing on refinancing, other windfall gains, change of ownership of provider, service commencement date, definition of availability of service, payment mechanisms,<sup>111</sup> price indexation, compensation on complete or partial termination of the service, performance guarantees, insurance, warranties, indemnities, amount and scope of the supplier's liability for direct and indirect losses, definition of *force majeure*, the performance management regime, step in rights for lenders, step in rights for the Contracting Authority and dispute resolution.<sup>112</sup>

*Addressing key internal project governance issues*

The internal project governance issues which will need to be addressed at an early stage in the process include the establishment of an appropriately resourced and skilled project team, the appointment of external advisers,<sup>113</sup> award process governance arrangements (including approval procedures,<sup>114</sup> internal guidance notes for the conduct of the process in general and the dialogue phase in particular and of periodic independent challenges to the continuing appropriateness of the process),<sup>115</sup> the affordability assessment, the preparation and timing of outline and detailed business cases, the preparation of a risk register to identify, value and allocate risks between the public and private sector,<sup>116</sup> the process, (in the case of PPP projects) for the update and refinement of the PSC, data collection procedures, physical/electronic data rooms, ensuring the availability of key personnel within the Contracting Authority to provide information and flow through of personnel from the project team to the contract management team etc.

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<sup>111</sup> Payment mechanisms should consider, for example, the options of fixed sum or volume related unit payment, rewards for early completion, penalties for non-performance, guaranteed minimum volumes/price variation if there is volume variation etc. The payment mechanism should encourage good supplier performance and discourage sub-optimal behaviour such as its being more profitable for a supplier to incur penalties rather than make good service failures. The latter effect is not unknown – some commentators have, for example, attributed the continuing high level of water leakage in the UK water network post-privatisation in 1990, in spite of significant – and long overdue – investment to the fact that the regulatory regime does not sufficiently penalise this type of failure.

<sup>112</sup> In some Member States, such as the United Kingdom for example, there already exist template PPP agreements which address many of these issues and form the basis, subject to customisation, of the Contracting Authority's preferred approach to risk allocation.

<sup>113</sup> For a fuller explanation of the issues associated with the management of external advisers see Burnett, *op. cit.*, pp. 109-110.

<sup>114</sup> The engagement of senior officials and politicians at key stages of the process is the key to maintaining political support for infrastructure projects. This means that they should be provided with the necessary information to take decisions (or, at least, actively endorse them on an informed basis).

Probably the most important of these decisions is the appointment of the project team. This will need to reflect different stakeholders and skills such as finance, legal, operational/technical, human resources (especially if there are staff transfers) and procurement will need to be represented as well as end users and external customers if appropriate. It will typically include a core permanent element with other staff contributing on an *ad hoc* basis. In any event, as is the case with external advisers, it needs to be appointed at the pre-launch stage. The key judgment to be made is to balance sufficient cohesion to enable the team to function effectively, the breadth of skills needed to ensure that all relevant professional perspectives are represented, sufficient numbers to minimise the risk that no one individual can inappropriately dominate the team and effective leadership of an individual skilled both in project management and with sufficient understanding of the professional disciplines relevant to the project.

Similarly, for PPP projects, the preparation of the PSC can often be time consuming, difficult and requires regular update, often under considerable time pressure. The PSC is the term generally used for the process by which the value for money of a PPP project is compared with alternatives, including in particular, with the so called reference project, which could be separate third party contracts for design/construction of an asset and for its operation, a third party contract for the design/construction of an asset and public sector operation of the service or public sector design/construction of an asset and a third party contract for the operation of the service. The preparation of a PSC requires a series of highly subjective judgments about the impact of risks arising and the likelihood of their doing so, which has sometimes, in the authors' experience, lacked sufficient objectivity to be acceptable as a basis for proceeding with a project as a PPP.<sup>117</sup>

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<sup>115</sup> This could be in a form similar to the OGC's Gateway™ review procedure, which involves independent review of the continuing desirability of proceeding with the project at certain key points (including business justification, procurement strategy, the point of investment decision and readiness for service) and has become widely recognised as being good practice. It is done by experienced professionals who are independent of the project team. The review is intended to be confidential, robust and minimise the risk of over-optimism caused by emotional attachment of those too close to the process as well as an objective basis for assessing the impact of changed circumstances on a project in procurement.

<sup>116</sup> Particularly, though not exclusively, required in the case of PPP.

<sup>117</sup> For a detailed guide to the United Kingdom methodology for preparing a PSC, see "Value for Money Quantitative Assessment User Guide", HM Treasury, March 2007.

*Addressing key strategic procurement decisions potentially relevant to any procurement procedure*

The key issues which represent good procurement practice not particular to Competitive Dialogue, and which need to be addressed before the publication of the contract notice in OJEU, include:

- **Determining which information arising during the process it will regard as being *prima facie* exempt from disclosure under freedom of information legislation** (including both information generated by both the Contracting Authority and interested parties/candidates)
- **Data protection requirements for the process**
- **Making it clear in what circumstances the Contracting Authority reserves the right to cancel the award procedure**, which is a decision capable of being challenged and thus must be capable of being justified
- **Dealing with potential conflicts of interest.** This could include ruling out categories of supplier and/or determining what are acceptable ways in which suppliers can deal with such conflicts (considering, for example, other work being done for the Contracting Authority, other activities of the supplier in the sector relevant to the PPP or other sectors and, as far as possible, prospective as well as current work being undertaken by the party concerned etc.). In doing so, the Contracting Authority will need to take account of the principle of proportionality, as illustrated by the *Fabricom* case (Case C-21/03 and Case C-34/03 *Fabricom SA v Belgian State*)
- **How the Contracting Authority will manage canvassing, and soliciting of employees, corrupt practices, collusion between interested parties and candidates and breaches of confidentiality by interested parties/candidates** (which may include the fact that they are participating in the process at all)
- **Dealing with changes in the identity of the bidder during the bidding process**<sup>118</sup>
- **Determining whether or not the transaction is to be a Contractual PPP (CPPP) or an Institutionalised PPP (IPPP).**

These terms were introduced to the language of PPP, helpfully in the authors' view, in the PPP Green Paper:

- CPPP were characterised as a contractual agreement between a Contracting Authority and a supplier to deliver a service e.g. a concession to the provider with charges to the user (with or without ad-

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<sup>118</sup> This often relates in PPP contracts to changes in the composition of a bidding consortium. The issues associated with changes in bidding consortia are addressed below in Chapter 5.

ditional subsidies from Contracting Authority) or a PFI with regular payments to the supplier from the Contracting Authority. In a CPPP, the Contracting Authority's role is as a customer of the private partner

- IPPP were characterised as the establishment of an entity held jointly by Contracting Authority and private partner to deliver services to the Contracting Authority and, in many cases, also to third parties. The Commission refers to the establishment of an IPPP as occurring either by creation of a new entity or transfer of an existing public sector entity to the private sector. In an IPPP, the Contracting Authority's role is as a customer and, by virtue of its shareholding in the mixed capital entity, as a joint service deliverer with the private partner
- **Key elements of the service specification**, where there is a need to balance between specifying outcomes needed rather than methods to be used in achieving outcomes and the need to prescribe any specific level of inputs or operating requirements
- **Setting the performance standards required**, which, as noted above, often involves balancing a range of difficult judgments
- **A decision about the appropriate contract length**. This will need to take account of matters such the nature and size of the investment to be made by the private partner, the period over which lenders will lend (in the case of PPP), the balance between the competitive value of a shorter term contracts and the stability, continuity and potentially lower yearly costs of a longer term contract and the flexibility needed by the Contracting Authority given the likelihood and scope of possible of future change in the pattern of demand for the service and methods of service delivery
- **A decision about the appropriate project timetable**. The procurement timetable should, in addition to complying with public procurement law, be:
  - Launched at a time which will optimise competition
  - Realistic for the Contracting Authority (i.e. allowing sufficient but not excessive time to prepare documents and information, assess expressions of interest, to develop its thinking of the preferred outcome during the short listing phase, conduct the dialogue, assess tenders, and review progress). A realistic timetable for partner selection is very important and ideally should not be compromised by an unduly inflexible pre-announced deadline for the realisation of the project
  - Appropriate for suppliers in the light of the value, complexity and

sometimes location of the contract i.e. allowing interested parties sufficient time to express interest, participate in dialogue and submit detailed and as far as possible unconditional offers, but not be too long, thus not unnecessarily adding to bidder costs (and the costs of the Contracting Authority). More than the minimum time may be needed to maximise competition especially for tenders where international interest is expected

- Mindful of the need for the Alcatel standstill (including any additional time permitted by national law in excess of the minimum set out in EU law) and for the resolution of legal challenges, time for which in some Member States may be required to be provided by national law
- **Consideration of what represents a reasonable profit margin for the private partner.** This implies, in a PPP in particular, indicating a reference profit margin for the project and the scope for variation in it during execution of the contract and consideration of any provisions for profit sharing and/or the creation of a surplus profits pool for allocation at agreed points during the contract. It also relates to procedural matters such as disclosing profit margins, the requirement for open book accounting, giving public sector auditors the right to audit the records of private partners and the use of a probity auditor
- **Arrangements for consultation with stakeholders during the process.** Stakeholders could, depending on the circumstances, include employees, labour unions, internal end users, external end users/customers, members of the public in the location of the project site, local businesses and regional organisations i.e. the scope of those affected by a complex project will be, and should be seen as, wider than just the public officials directly responsible for making and executing the procurement decisions and the private sector partner. As far as possible, their needs should be accommodated. This may be difficult in some cases because a project may sometimes generate opposition motivated or by self interest. For example, some residents of a locality in which an airport or a waste treatment centre is to be built will never be persuaded of the case for the project. In that sense it may be impossible for a public authority to win unqualified *ex ante* public approval for a new development. But in those circumstances it is even more important for it to ensure that it accommodates as many of the valid issues raised by objectors so as to manage the process effectively.

Thus part of the planning for a complex project will be a communication strategy. It is important to communicate openly and candidly with stakeholders to minimise potential resistance to a project. It is possible to be

open in many of the matters in the contract strategy and to consult upon them, such as the formulation of the short listing and award criteria, the design of the service specification and setting performance standards. But it is usually desirable from the point of view of the Contracting Authority, and in any case now protected in principle in the Public Procurement Directives, that information supplied by the participants in the process – e.g. expressions of interest, submissions during the dialogue phase of a Competitive Dialogue and offers should be kept confidential to those directly involved in making decisions about the award process.<sup>119</sup> The ability to do this effectively also builds confidence of participants in the competence of the Contracting Authority's management of the award. This may mean different levels of communication at different stages of the procurement process, but clearly, by opting to communicate transparently at as many stages of the process as possible, the Contracting Authority can maximise the trust that it builds in the fairness of its approach which it can rely on at the times when it is unable to be open, such as the assessment of expressions of interest, during the conduct of the dialogue phase in a Competitive Dialogue and the assessment of offers

- **Deciding where to advertise the opportunity**, beyond the OJEU and other official national sources, which will in part depend on what kind of partners the public authority is expecting to attract and subject to the need to comply with the principle of transparency
- **Deciding when to launch the opportunity**, which will depend on the level of market interest, the relative attractiveness of the opportunity and the scope, value and location of other opportunities concurrently available to potentially interested parties<sup>120</sup>
- **The content of the OJEU notice**, bearing in mind the overriding principle that calls for expressions of interest should act to encourage capable suppliers and discourage those not capable of satisfactorily fulfilling the Contracting Authority's needs. The OJEU notice must also be drafted mindful of the fact that the contract awarded must be consistent with the contract advertised
- **Short listing criteria**. The short listing criteria, which will include the minimum financial, economic and technical capability required of a supplier, bearing in mind the principle of proportionality e.g. not calling

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<sup>119</sup> It should be noted that it remains to be seen whether or not this may, in some jurisdictions, be inconsistent with the interpretation of freedom of information legislation.

<sup>120</sup> For a fuller description of the issues associated with the timing of the launch of procurement procedures, and other market management issues, see Burnett, *op. cit.*, pp. 40-49.

for levels of turnover, assets, experience or number of employees which exceed the capability needed for the contract. There can be an element of self interest in proportionality for the Contracting Authority because it is not in its interest to have as private partner an entity to which it is not an important customer, which might occur if the service provider is too large relative to the contract<sup>121</sup>

- **Format of the pre-qualification questionnaire (PQQ)**, which should be designed specifically to enable the Contracting Authority to obtain the information necessary<sup>122</sup> to assess expressions of interest and to further develop its understanding of its needs and how they might be met
- **Medium for submission of the PQQ and final offers** i.e. hard copy or electronic or both
- **Information to be provided to potential candidates at short listing stage**, including any information disclaimers to attached to them. When answering queries from potential candidates, Contracting Authorities should, in general, err on the side of full answers rather than limited information, to promote interest and demonstrate openness on the part of the Contracting Authority
- **Target number to be short listed**, bearing in mind that it must be sufficient to ensure genuine competition
- **Evaluation criteria and sub-criteria, their weighting<sup>123</sup> and the methodology for applying them in evaluation of tenders.** The evaluation criteria will be a balance of price and how the preferred solution is to be delivered, incorporating operational and financial aspects so as to allow the evaluation of offers to be based on how the bidders plan to deliver the final preferred solution and the extent to which the bids are

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<sup>121</sup> There is some debate amongst legal practitioners about the flexibility accorded to Contracting Authorities by the selection criteria listed in Art 47-50 of Directive 2004/18 and thus how best to incorporate considerations of suitability for partnership into the short listing stage. The debate centres on the interpretation of Art 51, which allows Contracting Authorities to “invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50” in the case of financial and economic criteria and also of what supplementary information can be requested in respect of the “ability of economic operators to provide the service or to execute the installation or the work” which “may be evaluated in particular with regard to their skills, efficiency, experience and reliability” (Art 48(5), Directive 2004/18). The ECJ has ruled by analogy (see Case C213-07, *Michaniki AE v Ethniko Simvoulío Radiotileorasis and others*) that the selection criteria are “exhaustive” but the text above means that the practical effect of the ECJ’s ruling does not appear to significantly constrain the scope of enquiry of a Contracting Authority, provided, of course, that the information is both proportionate and relevant to the contract.

<sup>122</sup> And, in the interests of proportionality, no more than is necessary.

<sup>123</sup> Now normally required. See Art 53, Directive 2004/18.

credible and sustainable. In the case of PPP this will include the entire life cycle of the project, i.e. both construction and service delivery aspects. An example of the specific elements of the methodology to be assessed for a street lighting contract are set out below

It should be noted that recent court judgments, both in the ECJ and national courts, have marked a trend towards a requirement for more detailed disclosure not merely of the main evaluation criteria but also of award sub-criteria and the factors which will be used in the assessment of bids against these criteria. This is in order to fulfil the obligation of Contracting Authorities to ensure that tenderers should be aware of all elements to be taken into account in evaluating tenders, including their relative importance.<sup>124</sup> Oder's experience now leads him to advise Contracting Authorities to assume that bidders will gain access to the judgments made by the Contracting Authority in applying the criteria and sub-criteria and that the application of the criteria and sub-criteria will be challenged.

Consequently, the Contracting Authority needs to be ready to:

- Justify the original judgments about criteria and sub-criteria and their weighting in terms of equality of treatment and non-discrimination, relevance to the contract and proportionality
- Demonstrate that they have not changed them in the light of information gained during the award procedure
- Demonstrate that they have applied them in the award of the contract in a manner consistent with the principles of equality of treatment and non-discrimination<sup>125</sup>

The fact that there is now likely to be closer scrutiny of, and potential challenge to, evaluation criteria and sub-criteria and their weighting is another reason why Contracting Authorities should tend towards the consultative approach to the dialogue phase advocated here. Put simply, the greater the detailed understanding by a Contracting Authority of how their needs might be met, the greater will be its ability to refine the evaluation criteria and their weighting in a way which helps them to justify the decisions made about these matters

- **Means by which candidates meeting the minimum short listing criteria are to be reduced to the required number for short listing**, which is often done by means of a scoring system for the selection criteria applied to the expressions of interest. In this case the selection of the

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<sup>124</sup> See, for example, ECJ Case C-532/06, *Lianakis and Others v the Municipality of Alexandroupolis*.

<sup>125</sup> And that similar considerations are likely to apply to the short listing process.

short list is usually based on those scoring the highest against the selection criteria

- **Approach to sub-contracting** i.e. the desirability of requesting or requiring sub-contracting or not and what control, if any, the Contracting Authority would wish to exercise over the supplier's second tier supply, such as the requirement for them to meet minimum capability requirements, be selected competitively and for their value for money to be benchmarked
- **Approach to variant bids** i.e. whether or not more than one solution will be allowed at all, as alternatives or as additional offers (considering the need to encourage innovation, the need to facilitate the comparability of offers and assessing value for money, the impact on the Contracting Authority's control of procedure and the impact of allowing variant bids on bid costs of participants). The optimal approach advocated here does not favour admitting variant solutions, as opposed to variations within the Contracting Authority's preferred solution
- **Approach to bids from consortia**, which for PPP contracts are to be expected. The key issue is to ensure the lead responsibility of a single entity to establish clear responsibility and ensure the manageability of the contract for the Contracting Authority via contract management procedures
- **Strategy for the conduct of the post dialogue phases**<sup>126</sup>
- **Strategy for how the contract once awarded will be managed**<sup>127</sup>
- **Procedure for asset valuation** i.e. of assets to be transferred to the SPV from the public sector at the start of the contract and the end of contract asset arrangements (in the case of PPP)
- **Arrangements for ensuring that contract awarded is consistent with the contract advertised**
- **Arrangements for acquisition of planning consents and other licensing requirements, the completion of the environmental impact assessment by the Contracting Authority and assurance of legal title to property by the Contracting Authority.**

*Taking specific decisions relevant to the Competitive Dialogue Procedure*

The key decisions which a Contracting Authority needs to determine in the pre-launch stage of a Competitive Dialogue Procedure include confirming and documenting the justification for the use of the Competitive Dialogue

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<sup>126</sup> See below, Chapter 5.

<sup>127</sup> For a detailed description of contract management techniques see Burnett, *op. cit.*, pp. 123-139.

Procedure, obtaining a robust legal opinion supporting its use, determining how Contracting Authorities can comply with principles of confidentiality, equality of treatment and non-discrimination, thus minimising the risk of legal challenge, the number of sub-phases there will be in the dialogue phase, the objectives of dialogue sub-phases, information to be requested in dialogue sub-phases, the methods to be used for gathering information in the dialogue phase (e.g. written submissions, a collaborative web site, diagrams/drawings, formal presentations, minuted face to face meetings etc.), the decision about payments to short listed candidates, the decision about whether or not elimination of solutions will occur during the dialogue phase, the format of any interim submissions to be made during the dialogue phase and the decision about when to conclude the dialogue phase and the format of the final offers.

The optimal approach to these issues is addressed in further detail later in this chapter.

***Optimal approach to achieving the end point of the pre-launch phase***

The key elements of the Contracting Authority's approach to the pre-launch phase are:

- Allowing sufficient time to plan and prepare the project and the procurement process
- Securing sufficient and appropriate resources for planning and preparation, both internal and external as necessary
- Market assessment, including market consultation with potential bidders and/or a technical dialogue and awareness of other similar and contemporaneous opportunities being offered by other Contracting Authorities in which potential bidders might be interested<sup>128</sup>
- Ensuring that the call for expressions of interest attracts potentially capable entities and deters those not capable of meeting the Contracting Authority's needs
- Determining how it will maximise bidder interest in the opportunity through advertisement (possibly in additional media as well as OJEU) and access to information (through response to questions, formal open days or access to competent and informed personnel at the Contracting Authority)
- Managing encirclement of the award procedure i.e. when, before the award process is launched, of potential bidders make formal contact with decision makers and, in some cases, influence decision makers indirectly through third party influencers. Encirclement not only raises questions about the probity of the process but also can have a serious impact on competition. If some market players know that this encircle-

ment has happened, they may conclude that the selection decision has in effect been made outside of the formal process and may thus either not bid or submit what one of the authors once described as an “elegant no-bid” i.e. an expression of interest which was well below the true capability of the organisation making it, and concentrate their efforts elsewhere.

## **Conduct of the short listing process**

### ***Objectives of the short listing phase***

The objectives of the short listing phase are:

- To select a short list which complies with the legal requirements to secure genuine competition and is comprised of candidates who, in the judgement of the Contracting Authority, are capable of submitting credible and sustainable bids which meet the Contracting Authority’s needs by submitting and are likely, if short listed, to submit offers
- To develop its thinking about possible solutions its preferred solution, using further market assessment and the past experience of interested parties
- To maintain market interest in the opportunity.

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<sup>128</sup> The objectives of market assessment may be summarised as seeking to help the public authority answer the following questions i.e.

- Which providers are likely to be interested in this contract? (considering its value, subject matter, timing, novelty, technical complexity etc.)
- Is this enough to provide sufficient competition? (considering the minimum number required by law and need for value for money, possible withdrawals during the process, the contract size and likelihood that there will be, or need to be, consortium bids)
- What do potential suppliers and lenders think of the possible opportunity? (considering the affordability of the opportunity given the budget and its technical feasibility)
- What is the reputation of the Contracting Authority with suppliers? (given the outcome of past procedures completed and considering impact of cancelled and failed procedures)
- What will encourage and/or discourage interest in the contract? (considering the scope, performance specification, contract terms, timing of the offer, procurement timescale, contract execution time scale, award procedure chosen, performance standards expected, planned conduct of procurement procedure, particular contract conditions such as guarantees and warranties required, termination liabilities and allocation of risk etc.)
- What aspects of the contract or the award procedure will act as barriers to bidding or lead bidders to incorporate high risk premiums in bid prices?

For a detailed description of how to undertake market assessment to achieve these objectives, see Burnett, *op. cit.*, pp. 41-49 and pp. 112-115.

By the end of the short listing phase the Contracting Authority should:<sup>129</sup>

- Be able to launch the dialogue phase with a provisionally preferred solution for meeting its needs, developed with sufficient precision to steer the dialogue with the short listed candidates and which substantially forms the basis for the final preferred solution on which bidders will submit their final tenders at the end of the dialogue phase
- Have identified the extent to which this provisionally preferred solution is capable of variation and be in a position to set out to the short list what is and is not capable of variation
- Have updated the procurement strategy, and if necessary the procurement timetable, for developments in the short listing phase.

***Optimal approach to achieving the end point of the short listing phase***

The key elements of the optimal approach to the short listing phase are explained below.

*Launching the short listing phase*

This should include:

- The use of a PQQ to ensure that responses from interested parties are received in a structured form, thus facilitating assessment of the application and reducing the risk of unequal treatment, and that they are focused on information relevant to the bidder's capability to deliver the contract
- Accompanying the issue of the PQQ with document(s) providing sufficient information to those requesting the PQQ to decide whether or not they might be interested in the contract
- Highlighting the key features of the emerging provisionally preferred solution in the call for expressions of interest from interested parties, including any elements of the contract which the Contracting Authority has determined to be non-negotiable such as, for example, the proposed route of the road, the performance standards expected and/or the length of the contract.

*Enhancing genuine competition*

This has two aspects i.e.:

- Determining what constitutes both genuine competition (from a legal perspective) and an appropriate degree of competition to achieve value

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<sup>129</sup> Again, no justification is needed in the authors' view for the fact that a high level of effort will be needed by the Contracting Authority in the short listing phase.

for money (from a commercial perspective).

The Public Procurement Directives<sup>130</sup> say that the number of candidates invited to tender, negotiate or conduct a dialogue in a contract awarded respectively by the Restricted Procedure, Negotiated Procedure with the publication of a contract notice and for Competitive Dialogue must be sufficient to ensure genuine competition. The minimum number is set at three for Competitive Dialogue, though a Contracting Authority may continue with the procedure with lesser numbers if there are not enough candidates who do meet the minimum selection criteria.

This is only part of the picture i.e. what matters from the point of view of the Contracting Authority is that the selected short list will actually submit offers and thus create the necessary competitive tension, though this cannot always be predicted with certainty. Superficially it may seem that the way to ensure sufficient offers is to invite more than the minimum number required by law. But, given the bidding costs involved in a major transaction such as a PPP, to have too many on the short list may create the impression amongst serious candidates that there is an element of lottery in the award process and may thus actually discourage bids. Short listing five could be too time consuming for both sides and carries risks of the “lottery effect”. 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. If, as is advocated here, a consultative approach to the dialogue phase is used, it will generally be possible for the Contracting Authority to enter the dialogue phase with a short list of four candidates, assuming that there are sufficient suitable candidates, balancing the need to ensure that credible, sustainable and competitive offers are received with retaining the interest of candidates. This needs to be underpinned, as noted below, by the inclusion of all candidates who enter into the dialogue phase in the call for tenders, even if it is not certain that they will actually bid. The dialogue will have been conducted separately with each bidder, so competitive pressure on other candidates may to some extent be maintained by this uncertainty

- Determining whether interested parties are likely, if short listed, to submit offers. There is no guaranteed way of ensuring that short listed entities will submit offers, if only because the business strategy of the bidder, the volume of its other contracts and market conditions can change after the time it submits an expression of interest. However, the Contracting Authority can maximise the likelihood of short listed entities submitting offers by:

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<sup>130</sup> Art 44(3), Directive 2004/18.

- Transparency on its part of the Contracting Authority at the time of calling for expressions of interest about its preferred approach to key contract conditions, performance standards, risk allocation and operating constraints, which will signal an appropriate degree of planning of the award procedure
- Setting out an appropriate timetable for the dialogue and subsequent stages of the process
- Ensuring that the capability criteria are both relevant to the contract and proportionate to the ability needed to meet the Contracting Authority's objectives
- Conducting the short listing phase in such a way as to maximise the information available to interested parties both in the call for expressions of interest and in response to questions raised during the short listing phase
- Assessing the completeness of the expressions of interest made and the extent to which the interested parties have invested effort in their submission.<sup>131</sup>

*Assessing the suitability of applicants*

The process of assessing the suitability of applicants includes:

- Determining whether interested parties are capable of meeting the Contracting Authority's needs. In doing this the Contracting Authority will, as in other award procedures, apply the mandatory and discretionary exclusion criteria in Directive 2004/18<sup>132</sup> and also use financial, economic and technical selection criteria in that Directive, with a view to only admitting to the short list entities which are capable of delivering the objectives of the procurement.

One element of this specific to PPP contracts, where, because of the nature of the objectives of the project the winning bidder is likely to be a consortium, is evidence of suitability to work in a consortium and past experience of doing so.

It is the settled case law of the ECJ (See Case C-57/01, *Makedoniko Metro v Elliniko Dimosio*) that it remains a matter for national law whether or not a Contracting Authority should permit changes in the composition of a consortium after the submission of tenders. In the context of a Competitive Dialogue Procedure the Contracting Authority would, in the authors' view, be at risk of breaching the principles of

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<sup>131</sup> It will also, as noted below, be influenced by how the dialogue phase is to be conducted and then actually conducting it in accordance with the planned approach.

<sup>132</sup> Art 45, Directive 2004/18.

equality of treatment and non-discrimination if, before the submission of final tenders, it:

- Accepted the admission to the consortium (particularly by substitution and bearing in mind the role envisaged for the withdrawing entity) a member which, if its capability had been originally assessed, would have resulted in a different short listing decision if did not, because of the change, then meet the basic minimum levels of capability for short listing or because it would, in the case that more than the minimum number of applicants met the basic minimum levels of capability, have led to the consortium not being short listed because another consortium would then have better met the capability criteria
- Accepted the withdrawal of a member of the consortium if, without it, the consortium would no longer meet basic minimum levels of capability or then met them less well than another consortium which met the basic minimum levels of capability but had not been originally short listed
- Accepted the addition of a member of the consortium which, if included originally, would have led to the consortium being excluded on mandatory or discretionary grounds in Directive 2004/18
- Accepted a substitution which had not arisen from clearly justified market driven reasons rather than a mere change of intention by the parties<sup>133</sup>
- Asking interested parties to give as evidence of technical capability the key elements of their technical solution to similar contracts in the past, while respecting intellectual property of those former and existing clients and insofar as it is permitted by national law consistent with European law
- Investigating past contracts by contact with current/former clients as part of the assessment of technical capability
- In the case of PPP contracts, including the following components of the short listing criteria:<sup>134</sup>
  - Capacity to sustain long term, high value, often complex, often high profile contracts such as PPP, including both the construction and service provision phases

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<sup>133</sup> This issue is further considered below in Chapter 5.

<sup>134</sup> As noted above. there is a debate amongst legal practitioners about how exhaustive the selection criteria listed in Art 47-50 of Directive 2004/18 actually are and thus how best to incorporate considerations of suitability for partnership into the short listing stage. The authors' view is that the criteria listed below fall within the scope of what is permissible by Directive 2004/18.

- Evidence, in the case of PPP, on the part of the construction partner(s) of having delivered assets which are capable of being operated in accordance with the whole-life cost expectations. This is consistent with the concept of PPP as a transaction embracing both the creation of an asset and the use of that asset to deliver services. Part of the logic of this transaction structure is that it is likely to optimise the efficiency of design, construction, operation and maintenance of the asset if the private partner responsible for design and construction of the asset is then required to operate and maintain it for a fixed price (bid for competitively), thus avoiding the temptation to minimise construction costs in a way which leads to higher operation and maintenance costs and thus higher overall whole life costs
- In the case of PPP contracts, ability to raise finance (both equity and debt) based on a track record of having done so
- The extent to which other known commitments may act as a barrier to the likelihood of the interested party be able to submit a credible and sustainable offer meeting the Contracting Authority's needs.

*Using the short listing procedure to develop the Contracting Authority's understanding of the possible means of meeting its needs*

This will involve the Contracting Authority in:

- Using the past experience of interested parties to develop its provisionally preferred solution, which could include:
  - Framing appropriate questions for the PQQ to obtain the necessary information about past contracts undertaken by interested parties
  - Making it clear that the completeness of answers to the PQQ will be used by the Contracting Authority as a procedural compliance condition assessed i.e. in effect treating it as an assessment of the good faith of the interested parties in sharing ideas and information with the Contracting Authority and as evidence of willingness to enter into a genuine partnership with the Contracting Authority
- Undertaking further market assessment by updating information from sources used at the pre-launch phase
- Updating the PSC based on additional knowledge gained in the short listing phase and any consequent changes its preferred risk allocation for the project.<sup>135</sup>

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<sup>135</sup> If, after the reworking of the PSC, the use of PPP does not continue to represent value for money, the case for continuing with the project as a PPP should be reviewed.

*Further stakeholder consultation*

The Contracting Authority will also need to substantially conclude the stakeholder consultation i.e. with internal and external service end users and other interested parties which the Contracting Authority wishes to consult before the dialogue phase and the development of the provisionally preferred solution.

Contracting Authorities may, of course, depending on the circumstances of the project, have a legal obligation under the Acquired Rights Directive and other European and national employment legislation to inform and consult with other bodies such as labour unions and works councils etc. This process may not be able to be completed before the plans of the winning bidder are known, but should in any event be launched prior to the dialogue phase.

## **THE DIALOGUE PHASE**

### **Objectives of the dialogue phase**

At the end of the dialogue phase the Contracting Authority will want to be in a position to call for and receive final tenders which are substantially unconditional from bidders and contain all elements required and necessary to meet the Contracting Authority's needs for the project.

This means that the Contracting Authority will aim in the dialogue phase to:

- Resolve the issues which must be definitively resolved before final tenders are called for i.e. issues about which after the end of the dialogue phase and the call for tenders there can be no further discussion once tenders have been submitted
- Reach the maximum possible resolution of the contract terms which generally cannot be fully resolved by the end of the dialogue phase.

It also means that:

- Candidates need to have access to the information and explanations necessary to allow them to submit substantially unconditional tenders
- The Contracting Authority will need to conduct the dialogue phase in such a way that during it they can gain the information which assures them that the final tenders are likely to contain all aspects necessary to meet the Contracting Authority's needs for the project.

The dialogue phase will require careful planning by the Contracting Authority to ensure that it is able to achieve the objectives set out above, to minimise time and costs for both itself and for the private partners and to comply with the legal obligations placed on it by Directive 2004/18.

To accommodate legal, value for money and competition considerations faced by the Contracting Authority the planning of the dialogue phase will need to include:

- A clear and transparent (i.e. known to candidates) timetable and structure for the stages of the dialogue, for information flows between candidates and the Contracting Authority during the dialogue phase, including for the further development of the Contracting Authority's preferred solution and the assessment of the candidates' emerging proposals
- A clear code of practice for conduct of the dialogue phase, for example, clearly identifying what is confidential and non-confidential data, setting out how confidentiality of data will be preserved (transmission, storage, access etc.), how equality of treatment for each bidder in the dialogue will be achieved (frequency, scope, conduct, recording of meetings etc.)
- Training for staff in the Contracting Authority about how to conduct the dialogue phase
- Internal guidance notes within the Contracting Authority (prepared before the final tenders are submitted) about how the evaluation criteria will be applied to different solutions at final tender stage.

The legal framework for the dialogue phase allows a Contracting Authority to "discuss all aspects of the contract with the chosen candidates during the dialogue". But this freedom leaves Contracting Authorities with several key decisions to make about how they conduct the dialogue phase, none of which are incompatible with their obligation to maintain equality of treatment between the candidates and to respect the confidentiality of their intellectual property.

In particular, **the legal right to discuss all aspects of the contract is not an obligation to discuss every aspect of the contract** and it is certainly permissible and almost certainly desirable for the Contracting Authority to indicate the extent to which aspects of the contract are negotiable and which are not negotiable.

### **Key issues in the conduct of the dialogue phase**

The key choices faced by a Contracting Authority in determining how to conduct the dialogue phase are:

- How prescriptive should the Contracting Authority be at the start of the dialogue phase about the service specification and the contract conditions i.e. to what level of detail should it set out its preferences and requirements?
- What is the Contracting Authority willing to discuss (and not willing to discuss) with candidates during the dialogue phase?
- How many sub-phases will there be in the dialogue phase?
- What are the objectives of the different sub-phases?
- What methods can be used in the dialogue phase?
- How many solutions per bidder will be permitted?
- Should the Contracting Authority eliminate solutions initially proposed during the dialogue phase and if so, in what circumstances?
- How does the Contracting Authority ensure that, if any such solutions are eliminated, it is done strictly in accordance with the evaluation criteria it has set?
- Should the Contracting Authority request interim submissions from candidates?
- If so, in what form and when should these submissions be requested during the dialogue phase?
- How does the Contracting Authority ensure that funders are committed during the competitive process?
- Should the Contracting Authority pay bidders in the dialogue phase for their contribution to the dialogue?
- How does the Contracting Authority ensure access to full information for candidates during the dialogue phase to enable them to submit unconditional offers?
- How does the Contracting Authority ensure equality of treatment between candidates?
- How does the Contracting Authority respect the confidentiality requirements of the law?
- How does the Contracting Authority minimise the risk of challenge?
- How does the Contracting Authority define a complete solution to its needs?
- When should the Contracting Authority declare the dialogue to be ended?
- In what form should final tenders be called for?
- How long should the Contracting Authority allow for the submission of final tenders?

The optimal way of addressing these issues is considered in the remainder of this chapter.

### **Current methods of conducting the dialogue phase**

The current methods of conducting the dialogue phase may be summarised as follows:

- Inviting several solutions, then narrowing the differences between them towards a single merged solution i.e. to use the early part of the dialogue phase to develop a hybrid solution i.e. one based on the best features of the solutions proposed by the different participants<sup>136</sup>
- Inviting outline solutions and then one or more progressively more detailed solutions
- A consecutive approach i.e. dialogue first on technical and then on financial aspects of the offer
- Starting from a provisionally preferred solution or solutions of the Contracting Authority and inviting candidates to comment on (mark up) the solution(s) as the basis of dialogue.

The term “solution” is, in fact, not defined in such a way as to exclude either solutions initially proposed by the Contracting Authority or solutions initially proposed by short listed candidates. The term has sometimes been interpreted as referring to solutions initially proposed by short listed candidates but the authors do not regard this interpretation as being justified by the wording of either Art 29 or Art 40, Directive 2004/18.<sup>137</sup> Those who are nervous about this interpretation may choose to describe what the Contracting Authority sets out at the beginning of the dialogue in some other way i.e. as a “statement of detailed needs and requirements” so it would make little sense, legally, if there were to be such a restriction on the definition of the word “solution”. The wording of Directive 2004/18 also does not in any event imply what the scope of a solution by a short listed entity should be. It could be a detailed set of proposals, or, if the Contracting Authority

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<sup>136</sup> This, of course, would require their agreement in the light of the confidentiality provisions in Directive 2004/18. For a discussion of the appropriateness of these confidentiality provisions in Competitive Dialogue Procedures, see Peter Trepte, “Public Procurement in the EU – A practitioner’s guide”, Oxford University Press, 2007, pp. 407-409 and pp. 449-450.

<sup>137</sup> This sets out what information must be sent out at the start of the dialogue and refers non-restrictively to a “copy of the specifications, descriptive document and any supporting documents”.

launches the dialogue with detailed proposals of its own, marked up comments by the candidate.

Nor is it desirable, since it potentially prevents the Contracting Authority from launching the dialogue phase by tabling its own solution should it choose to do so. The essence of the dialogue phase is the way in which the candidates show how they meet the requirements of the Contracting Authority. This is not affected by the level of detail in which the Contracting Authority sets out its requirements at the start of the dialogue. Thus the decision becomes one which is a matter of what is, or what is not, desirable from a value for money perspective, a matter discussed further below. The key issues are how prescriptive the Contracting Authority wishes to be, how much variation it plans to permit from that prescription and how it listens intelligently to candidates to form a judgment about changes to its initial ideas before calling for final tenders.

Thus, all of the approaches described here are compatible with the legal requirements for the Competitive Dialogue Procedure in general and the dialogue phase in particular. But the fact that they are legally permissible does not provide sufficient guidance for Contracting Authority and does not mean that, in terms of the likelihood of securing value for money for the public sector, they are equally effective.

The main conclusions arising from these diverse approaches are that:

- In general, most of the approaches have, in practice, led to at least two sub-phases within the dialogue phase
- There has not always been sufficient clarity about the objectives of each sub-phase i.e. what the Contracting Authority needs to achieve at the end of each phase
- The methods used in the dialogue phase have converged towards written submissions by candidates, regular one to one discussions between the parties, presentations by candidates, availability of information through extranets, access by candidates to relevant personnel of the Contracting Authority and submission of interim solutions by candidates
- The time allocated in practice by Contracting Authorities for the dialogue phase has varied widely, with the observed range being between one and eight months
- There are practical difficulties associated with the approach of inviting outline, then detailed solutions (discussed further below). This is because of the pressure that it creates on the Contracting Authority in responding to bidder solutions if it has failed to devote sufficient resources to understand the issues associated with the project in detail and to work out its approach to them in advance of discussions with candidates. It is then at a disadvantage in the dialogue in trying to understand and re-

- spond to bidder solutions
- It is difficult in practice to separate out the operational and financial aspect of a bid because of the links between the cost of project and its scope, duration and performance standards.

The concept of a provisionally preferred solution of the Contracting Authority is based on the idea that, though participants may not necessarily regard it as optimal or necessarily the solution against which they would, ideally, have liked to offer, the solution is one against which they are technically capable of bidding, does not breach the principles of equality of treatment and non-discrimination and does not include elements which would act as barriers to bidding. Pressures within potential supplier organisations to bid, as opposed to not bid, will work in the Contracting Authority's favour here, so the skill will be to work out what are the *real* deal breakers. Since it is based on the outcome of the dialogue, the Contracting Authority ought to be able to frame it to maximise the likelihood that all the short listed candidates will bid, which is one of the key objectives of the dialogue phase for the Contracting Authority.<sup>138</sup>

### **Strategy for conducting the dialogue phase**

The key decision to be made by the Contracting Authority in the conduct of the dialogue phase is how far it is to be consultative and how far it is to be investigative. The authors find it helpful to use the terms Consultative Dialogue and Investigative Dialogue to distinguish between the two as follows:<sup>139</sup>

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<sup>138</sup> The development of a provisionally preferred solution also facilitates in the case of a PPP, should the Contracting Authority wish to use it, the availability of a type of staple finance for the project. This could mean in practice that, having developed a solution to its needs in sufficient detail for a lender to assess the risks of the project, it undertakes a funding competition before launching the procurement process amongst lenders willing to lend to the winner of the procurement process based on the contractual terms set out by the Contracting Authority as part of the funding competition. This allows the Contracting Authority to launch the procurement with greater certainty that the transaction can be financed. There are variations on this approach in which the winning lender assists the Contracting Authority in the selection of the winning bidder in the procurement process and in which the winning bidder is allowed to offer to the Contracting Authority finance terms more favourable than the staple offer.

<sup>139</sup> See Michael Burnett, "Conducting Competitive Dialogue for PPP projects – Towards an optimal approach?", *European PPP Law Review*, Issue 4, 2009, Lexxion Verlagsgesellschaft mbh, pp. 192-200.

- **Consultative Dialogue** i.e. 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 candidates of the Contracting Authority's preferred solution(s).  
The idea that the dialogue is launched using the Contracting Authority's provisionally preferred solution is important to the conduct of the dialogue phase, since the call for interim submissions and final tenders is then based on variations to the Contracting Authority's provisionally preferred solution and not solutions proposed at that stage by the candidates. It means that what the Contracting Authority is doing is managing the variations between permitted responses to its solution in the dialogue phase.  
Put simply, the consultative approach defines the dialogue phase as, in principle, a dialogue about a single solution – that of the Contracting Authority – and variations about implementing that solution rather than competition between different solutions of different candidates
- **Investigative Dialogue** i.e. an investigative approach, based on candidate-driven solutions. This starts from a definition by the Contracting Authority of its objectives and desired outcomes but less definition of the elements of the preferred solution(s). In this method, the dialogue phase will typically start with the submission of outline solutions by the candidates which subsequently become more refined during the course of the dialogue.

The key criterion against which this is to be judged is that it is the approach most likely to assist the public sector to secure value for money from the award procedure. In addition, it should aim to:

- Minimise time needed for the Contracting Authority in the dialogue phase
- Minimise time and cost for the candidates in the dialogue phase
- Retain the opportunity for the Contracting Authority to capture innovation in the dialogue phase insofar as it is beneficial to allow for alternative means of delivering a solution which meets its needs and/or take account of latest market developments.

The optimal approach advocated here is a consultative one i.e. that the dialogue phase should be launched by the Contracting Authority tabling its provisionally preferred solution as the basis for the dialogue.

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. This approach is thus likely to represent a shift in the timing of work by the Contracting Authority, bringing it forward (and thus influencing 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.

Developing a prior understanding of the potential solutions is not only desirable but should be a logical next step for a Contracting Authority if it has conducted a rigorous market assessment before launching the opportunity, supplemented, if necessary by pre-dialogue discussions with the short list. Such discussions are not forbidden by Directive 2004/18. Contracting Authorities will also have to develop such an understanding in order to develop outline and final business cases, where this forms part of the process of investment appraisal of projects, for subsequently seeking approval for their inclusion in capital expenditure programmes and launching the procurement.

The level of cost detail required for capital costs and lifecycle maintenance and operating costs in practice often requires a degree of prior detailed planning of the design/construction and operating specification in PPP contracts. For example, in the model output specification for United Kingdom schools built under the Building Schools for the Future (BSF) programme includes 76 pages of generic detailed design requirements (for adaptation in individual cases) based on 18 design objectives, (see Table 3)<sup>140</sup> in addition to compliance with relevant legislation, and recommended standards and policies. The need for such detailed planning and understanding by the Contracting Authority in advance of the procurement process might in some cases even mean that, having done this work and based on a understanding of market capability, current best practice and assessment of its own needs, the Contracting Authority then takes the next step of producing its own preferred design as a key element of the provisionally preferred solution rather than leaving this to short listed entities.

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<sup>140</sup> The suite of documentation produced by Partnerships for Schools for BSF contracts is comprehensive and may be found on the Partnerships for Schools web site ([www.partnershipsforschools.org.uk](http://www.partnershipsforschools.org.uk)), to which the authors gratefully acknowledge access.

Table 3 – Design objectives for BSF Schools<sup>141</sup>

### Section 1: Design Principles

1. **Site plan and location:** Good use of the site, balancing the needs of pedestrians, cyclists and cars and enhancing the school's presence in the community. Maximise the potential use of each site and thoughtful location of new buildings, in a manner that will permit possible future extensions.
2. **Access and inclusion:** It should be easy to find your way around the school and there should be clarity in the arrangement and location of entrances, main circulation routes and key spaces. The buildings and grounds should provide good access for everyone in line with national and local inclusion policies.
3. **Organisation and layout:** Good organisation of spaces in plan and section, easily legible and fully accessible, with circulation that is well organised and imaginatively designed, with good arrival space to suit the community as well as the school.
4. **Internal space:** Learning spaces should be the right size for their functions, well proportioned, fit for purpose and meet the needs of the curriculum. There should be sufficient spaces to provide the number of pupils places planned (as measured by the net capacity).
5. **External space:** Well-designed external spaces offering a variety of different settings for leisure, learning and sport should provide for formal and informal teaching and learning, and social and recreational, needs of the school community.

### Section 2: Design Outcomes

6. **Flexibility and adaptability:** To suit changes in policy, technology and changing demands of the curriculum and organisation, the building and grounds should be able to respond to changing school needs: with the flexibility to allow for short-term changes of layout and use, and adaptability for long-term expansion or contraction.
7. **Enhancing learning:** The building should enhance the activities of teaching and learning through being a high-quality and aesthetically pleasing environment that will stimulate and inspire young people.
8. **Enhancing ethos:** The building and its grounds should embody the school's vision and ethos, lift the spirits and raise aspirations.
9. **Identity and community context:** The building should enhance and uplift its neighbourhood, with a layout that encourages broad commu-

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<sup>141</sup> Source: Partnerships for Schools, November 2008.

nity access and use out of hours, where appropriate. The design and use of the site should promote a public perception of a civic building, engender local ownership and consider the requirements of the wider community, including any conservation areas.

10. **Welcoming and secure:** The buildings and grounds should be welcoming to both the school and the community while providing adequate security for pupils and staff and a feeling of a secure and environment that is a pleasure to use.

### **Section 3: Environmental Conditions**

11. **Internal environment:** The internal environment should provide comfortable environmental conditions throughout including creative and maximum use of natural light, suitable ventilation for different activities and an appropriate level of personal control.
12. **Building services:** The building should include suitable artificial lighting that enhances all learning environments but is complementary or supplementary to natural lighting, as well as appropriate mechanical and electrical installations.
13. **Form and structure:** The building should be well composed, with an efficient structure that allows future adaptability.
14. **Building fabric and materials:** A simple palette of robust, attractive, environmentally friendly materials and finishes that are durable and attractive and will weather and wear well.
15. **Details and integration:** The construction should be well thought through and detailed carefully to ensure an intelligent integration of building fabric, services, ICT infrastructure and furniture and equipment.
16. **Sustainable design:** A sustainable approach to design, construction and environmental servicing to provide a resource-efficient school with low environmental impact, efficient use of energy and water and opportunities for recycling, both in the construction and operation of the building.

### **Section 4: FM and Maintenance**

17. **Operability:** The engineering systems and components of the building should be easy to operate.
18. **Design life and maintenance:** The building should be easily cleaned and maintained using materials and components that will have a suitable design life [and whole life cost] and ensure minimum inconvenience and disruption from breakdowns, repairs and maintenance activities.

In summary, a Contracting Authority should expect that the provisionally preferred solution will represent a substantial proportion of the final preferred solution, which means that it should be substantially aware of the best means of meeting its needs before launching the dialogue phase. **The dialogue then becomes a controlled process of improving the Contracting Authority's preferred means of meeting its needs rather than an open ended exploration of what these needs are, or, based on an absence of sufficient prior planning, about how these needs might be met.**

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 and staying in control of the process. 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 then becomes 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.<sup>142</sup>

The implications of a consultative approach to the dialogue phase for its launch, conduct and termination are set out below.

### **Developing the provisionally preferred solution**

As noted above, the dialogue phase should be based on consulting the short listed parties on the Contracting Authority's provisionally preferred solution to its needs, developed in advance of the dialogue phase, rather than on an investigative approach which leaves the development of the solution primarily to the candidates. To achieve this, the Contracting Authority should launch the dialogue phase by tabling its provisionally preferred solution as the basis for the dialogue. This would include contract documentation set-

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<sup>142</sup> This does not, in the authors' view, undermine the justification for the use of the Competitive Dialogue Procedure because, given that a complex procurement using the Competitive Dialogue can last up to 30 months, with a planning and preparation phase of often 12 months, market conditions may have changed since the Contracting Authority formed its view about the how its needs might best be met and in any event it is possible that the key issues for the actual participants in the award procedure may be different from those consulted in the market consultation/technical dialogue.

ting out the scope of the contract, key contract conditions, a detailed output-based performance specification for the operational phase of the contract, detailed functional/performance-related design specifications for all elements of the infrastructure for the construction phase of the contract, contract performance standards, contract monitoring mechanisms,<sup>143</sup> delivery methodologies and delivery constraints. This documentation will, in effect, represent the Contracting Authority's proposed risk allocation for the contract.

The relevance of the development of a provisionally preferred solution by the Contracting Authority is driven by the need to bring about equality of power between on the one hand the public sector and on the other both the large and increasingly globalising and consolidating private sector service providers and, the case of PPP, the predominant influence exercised by lenders. Put simply, if the public sector does not manage the market for PPP, then service providers and lenders will control it – to do this requires better co-ordinated, appropriately resourced, well-informed, active and skilled market management by the public sector at all levels, using the power which public authorities have as buyers in many markets, bringing schemes to market in such a way and at such a time as to maximise competition.

The development of a provisionally preferred solution will require significant input at an early stage of the award process through pre-OJEU market consultation/technical dialogue (which may require appropriate external professional advice) and skilful application and effort in the short-listing phase. But, as noted above, it is worthy of emphasis that the effort needed has to be made by the Contracting Authority in any event in order to effectively manage the process. So it represents bringing forward the necessary engagement of the Contracting Authority rather than additional work or costs. The time expended at an early stage also maximises the likelihood that the provisionally preferred solution is framed such that it is acceptable to the market (in the sense that it will not act as a barrier to bids), will stimulate competition, is affordable by the Contracting Authority and will deliver value for money for the public sector. The rigour involved in such a process, and the definition (see below) of the scope for variations within the dialogue phase, will also minimise the likelihood that the Contracting Authority will avoid the highly undesirable, even if legally permissible, need to change the contractual requirements after the submission of tenders.

As also noted above, the applicability of the concept of a final preferred

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<sup>143</sup> Key features of the approach to contract management are described in more detail in Burnett, *op. cit.*, pp. 129-143.

solution is based on the idea that, though participants may not necessarily regard it as optimal or necessarily the solution which they would, ideally, have liked to offer, the solution is one against which they are technically capable of bidding, does not include elements which would act as barriers to bidding and does not breach the principles of equality of treatment and non-discrimination in the sense of being unduly favourable to one bidder or class of bidder.

The key judgment for the Contracting Authority will be how prescriptive to be in framing the provisionally preferred solution. The authors have had experience of Contracting Authorities who, on the one hand, have used the flexibility provided by the Competitive Dialogue procedure, and the dialogue phase in particular, as a reason for insufficiently rigorous planning in advance of the procurement procedure and, on the other hand, have stifled innovation by being too prescriptive. Put simply, the decision about how much variation to allow in the provisionally preferred solution of the Contracting Authority should not be driven by a lack of adequate planning or by a lack of market knowledge about what innovative solutions might be available.

Best practice suggests that the provisionally preferred solution should be based on the desired outcomes which could, without any change, act as the basis for the submission of substantially unconditional final tenders by bidders. But this statement in itself does not provide sufficient guidance for a Contracting Authority in how to develop a provisionally preferred solution.

A Contracting Authority will have to decide how much scope there is for variation within its provisionally preferred solution, which will in turn determine how it will assess the ideas of candidates and their interim submissions and, ultimately, how they will evaluate the final tenders received from bidders.

This amounts to a judgment about how far the winning bidder will be selected on the basis of the uniqueness of its solution and how far on the basis of methodology proposed for the implementation of the solution and about what constitutes a variant solution.

The distinction between the uniqueness of its solution and the methodology proposed for the implementation of the solution can be illustrated using the example of a road and is that between the use of concrete as opposed to other materials to construct a road (part of the solution) and the methods by which the concrete is laid (the way the bidder proposes to lay the concrete i.e. sourcing of materials, laying techniques, quality control methods etc.).

As regards what constitutes a variant solution, there is a lack of clarity

in Directive 2004/18 about what degree of variation there needs to be for a solution to be considered a variant solution. One interpretation is that a variant solution implies a fundamentally different way of delivering the objectives of the project i.e. a bridge or a tunnel to cross a stretch of water or the route of a road through a mountain by means of a tunnel or cutting or round a mountain by re-routing. However, the authors' view is that such fundamental differences are not the only, or the most helpful, interpretation of a variant solution i.e. less significant variations may be considered in this field, such as, for example, whether or not a road should be laid with concrete or with asphalt. Thus, they find the use of the term “variations” rather than “variant solutions” to be more helpful terminology in the context of a Competitive Dialogue Procedure.<sup>144</sup>

At one extreme lies a provisionally preferred solution which is absolutely prescriptive and, at the other, a set of objectives, performance standards and operating constraints but no preferences between the means of achieving the desired outcomes.

The extent to which scope should be allowed for variation, and what kind of variations should be permitted, within its provisionally preferred solution will vary from sector to sector and project to project, and will depend on factors such as:

- The extent to which the degree of prescription allows the Contracting Authority to remain in control of the process in the sense of being able to discuss intelligently with candidates their preferences for achieving the desired outcomes and the consequences of them
- The technical complexity and novelty of the project. In many kinds of infrastructure project there have now been sufficient prior examples for template solutions capable of being customised to form the basis of the Contracting Authority's planning and for the risks to be well understood by service providers and, in the case of privately financed PPP, also by lenders. But if it is a novel area of infrastructure/public service provision the Contracting Authority should consider carefully what the most appropriate delivery vehicle might be, invest more time in pre-launch market consultation and technical dialogue and, if PPP is emerging as a possible form of solution, require a higher standard of certainty about its advantages over other means of delivering infrastructure
- The robustness of established technologies in the area of economic ac-

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<sup>144</sup> Nevertheless a Contracting Authority should, to accommodate the flexibility it may need, indicate, as required by Art 24, Directive, 2004/18, that variations may be authorised and, as noted below, indicate the parameters for variation at the launch of the dialogue phase.

- tivity relevant to the project
- The extent of recent, current or reasonably foreseeable future scale of technical innovation in the area of economic activity relevant to the project
- The Contracting Authority's view of the extent to which there are genuine business secrets which confer competitive advantage in the sector on one or more entities
- The extent to which there exists a clear choice between technical and financial solutions i.e. how clearly preferable one approach is to another
- The willingness of the Contracting Authority to invest in contract management if differences in solutions imply different levels of contract management e.g. where there is an option of a lower capital cost with higher costs of/more regular maintenance, this may have implications for the level of contract management inputs<sup>145</sup>
- Whether or not the accommodation of any particular variations might render the manageability of the award process more difficult e.g. in the sense it may make the evaluation of offers more difficult<sup>146</sup>
- The extent to which competition can only be stimulated by admitting different approaches to part of the solution i.e. for some parts of the solution to be delivered where there are only as limited number of suppliers for possible approaches
- Whether or not the restriction of variations may lead candidates to not submit offers or to submit offers which carry an excessive risk premium or to act a barrier to the willingness of lenders to finance the project in the case of PPP<sup>147</sup>
- Considerations of equality of treatment and non-discrimination i.e. the extent to which permitting variations might represent an advantage to one of the candidates.

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<sup>145</sup> E.g. as between a concrete and asphalt surface for a road.

<sup>146</sup> It is a requirement of Directive 2004/18 that the evaluation criteria and their weighting must be formulated at an early stage in the award process, and, ideally, before the launch of the procurement. It underlines the importance of the Contracting Authority gaining sufficient understanding of the technical, financial and legal aspects of a project so that they can set the evaluation criteria with an understanding of how any variations that they might allow can be evaluated using those criteria.

<sup>147</sup> Or, conversely, whether the accommodation of a variation might place the affordability and/or value for money of the project at risk. There could very well be a trade-off, which could be apparent even at the stage when the dialogue is being launched, between the likely cost of different approaches and the extent to which they meet or exceed the needs of the Contracting Authority. For the avoidance of doubt, the authors see no need to apologise for repeating that a well prepared Contracting Authority ought to be able to recognise such trade-offs if they are present.

A number of examples based on the transport sector can, in the authors' experience, help to illustrate the decisions which Contracting Authorities need to make in determining the amount of variation permitted within its provisionally preferred solution and subsequently in call for interim submissions and final tenders, namely:

*If a road or a rail route is more appropriate*

The choice as between a road or a rail route to meet transport needs is a matter of policy choice and priority based on an economic and financial appraisal which should be determined prior to the launch of the award procedure and is not generally subject to variations proposed by the candidates.

*If a bridge or a tunnel is more appropriate for a river crossing*

The Contracting Authority should determine before launching the dialogue phase<sup>148</sup> that a tunnel or a bridge is its preferred solution, the type of bridge or tunnel to be constructed and the safety and environmental standards to which it should be constructed i.e. they are not subject to any fundamentally different approach proposed by the candidates. For less technically complex structures, such as schools, hospitals and prisons, it would be assumed that there would be even more limited, if any, scope for variation proposed by candidates.

*If PPP is the most appropriate delivery mechanism for the project*

The decision about whether or not PPP is the most appropriate delivery mechanism for a project is normally determined by a value for money driven options appraisal prior to the launch of the award procedure and updated by the Contracting Authority in the light of information gained during the procedure. It is not generally subject to variations proposed by the candidates.

*If a Contractual PPP or an Institutional PPP is a more appropriate type of PPP to use*

The decision about whether to use a Contractual PPP or an Institutional PPP, assuming that PPP is the delivery mechanism assessed as being most appropriate, is a decision determined by the Contracting Authority in the light of market management and value for money considerations prior to the launch of the award procedure. It may be updated in the light of infor-

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<sup>148</sup> This is the latest point at which a Contracting Authority should make this decision – ideally, they will have resolved this issue before launching the award procedure through an economic, financial and technical options appraisal.

mation gained during the procedure, but is not generally subject to fundamental variations proposed by the candidates.<sup>149</sup>

*If a demand based or availability based PPP<sup>150</sup> is a more appropriate type of PPP to use*

The decision about whether to use a demand based or availability based PPP, again assuming that PPP is the delivery mechanism assessed as being most appropriate, is a decision determined by the Contracting Authority in the light of value for money considerations prior to the launch of the award procedure. It may be updated in the light of information gained during the procedure, but is not generally subject to fundamental variations proposed by the candidates.<sup>151</sup>

*Performance measures and targets for them*

The decision about the performance measures and targets for them is normally determined by the Contracting Authority prior to the launch of the award procedure and is not generally subject to fundamental variations proposed by the candidates.

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<sup>149</sup> Though they may, within certain limits pre-determined by the Contracting Authority, be permitted to propose a different level of public sector equity investment in the project, and the cost implications of it, which may include the freedom to propose a small amount of public sector equity investment even where the base case foresees a purely contractual PPP. Any such variation would have to be discussed with the Contracting Authority during the dialogue phase and proposed in the interim submissions. To ensure comparability of final tenders, no variation between bidders should be permitted at that stage. Similar considerations could also apply at interim stage to variations in the payment stream i.e. a Contracting Authority may allow for limited variations, if proposed by candidates, for payments made to the Contracting Authority, in the case of a PPP, which include an element of a capital sum during or on completion of the construction phase. This may offer the Contracting Authority better value for money but, if the amount of the capital sum is too high, it may undermine the principle of PPP, i.e. that the bidder is incentivised to bid in a way which, both in terms of price and quality, leads to *whole life* value for money for the Contracting Authority.

<sup>150</sup> E.g. decisions such as the use of a real toll or a “shadow toll” and whether the return to the investor will be partly demand based and partly availability based.

<sup>151</sup> They may, again within certain limits pre-determined by the Contracting Authority, be permitted to show the cost implications of a different balance between demand based and availability based payment and/or the extent of minimum income or other guarantees for candidates. Again, any such variation would have to be discussed with the Contracting Authority during the dialogue phase and proposed in the interim submissions and no variation between bidders should be permitted at final tender stage.

*Differences in technically complex solutions e.g. electronic tolling technologies*

The decision about the preferred method of electronic tolling should be proposed by the Contracting Authority in its provisionally preferred solution,<sup>152</sup> discussed between the Contracting Authority and candidates during the dialogue phase and proposed by candidates in their interim submissions, so that the Contracting Authority should know at the end of the dialogue phase what bidders will propose in their final tenders. Different methods of electronic tolling are an example of where there may be scope for admitting proposals for different parts of the solution to be delivered differently by different candidates where there are situations where competition, including at final tender stage, can only be stimulated by admitting different approaches to part of the solution.<sup>153</sup>

*Construction materials (e.g. concrete v asphalt)*

The decision about the preferred type of materials should be proposed by the Contracting Authority in its provisionally preferred solution, discussed between the Contracting Authority and candidates during the dialogue phase and proposed by candidates in their interim submissions, which may show different life cycle cost implications of different materials. The Contracting Authority should then generally specify what construction materials can be used in their call for final tenders.

*Financial engineering*

As noted above, in the case of a PPP project, the decision about the financial structure of the SPV and the risks associated with it (such as the debt-equity ratio, different types of lending etc.) should generally be a matter for the candidates and may differ from bidder to bidder, though the Contracting Authority may include limits to the scope for financial engineering in the provisionally preferred solution. The financial structure of the SPV should be discussed between the Contracting Authority and candidates during the

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<sup>152</sup> Based on market consultation, technical dialogue and other studies carried out in the pre-launch phase and updated during the short listing phase.

<sup>153</sup> Similar considerations may apply to innovative approaches to promote environmentally sustainable solutions to public sector delivery objectives in the sense that there may be a range of original solutions which each represent the intellectual property of one service provider. In these cases also the Contracting Authority may be deprived of the opportunity to compare alternative means of delivering the most appropriate solution. This highlights both the importance of planning for competition before launching the award process in areas of technological dynamism and, incidentally, a need for caution in incorporating environmental sustainability requirements into contracts before sufficient competition exists to deliver them.

dialogue phase and proposed by candidates in their interim submissions, so that the Contracting Authority should know at the end of the dialogue phase what bidders will propose in their final tenders. Subsequent variation in the bidders' proposed financing structure (e.g. as between debt and equity and different forms of debt) should not then be permitted at final tender stage unless there is a major change in market conditions between the dialogue phase and the final tender phase.

*Key operating constraints*

Key operating constraints, for example relating to materials used,<sup>154</sup> working practices, e.g. environmental and health and safety obligations, construction and operational working hours etc. should form part of the contract conditions included in the Contracting Authority's provisionally preferred solution and discussed with candidates. It is a matter of judgment on a project by project basis which of these may be subject to amendment after dialogue with the short list. The call for interim submissions and final tenders should reflect the Contracting Authority's considered judgment on such contract conditions and generally not permit variation by candidates.

*Proposals for use of surplus land*

In some infrastructure projects the site which needs to be made available for the core objective of the project may include land which is surplus to requirements. If such surplus land has an economic value, the possibility exists for the Contracting Authority to invite proposals for its use (assuming that it does not want to develop it separately as part of a different contract).

If it chooses to make the surplus land available as an adjunct to the core contract, it should:

- Identify and make clear to potential bidders the location and area of the land deemed to be surplus (to avoid the possibility that it might receive "hybrid" and difficult to compare proposals involving different areas for the core project)
- Identify and make clear to potential bidders acceptable uses of the surplus land and conditions for its use
- Obtain an indicative valuation of it for the permitted purposes and assuming that the core contract is implemented
- Make it clear to potential bidders that proposals for the use of the sur-

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<sup>154</sup> A Contracting Authority is not prohibited from specifying, for example, that a certain proportion of energy used should come from renewable sources and/or that certain materials are prohibited from being used.

plus land do not form part of the short listing process or the evaluation of the quality elements of tenders and will only be assessed in financial terms

- Make it clear to potential bidders that:
  - Any financial offers made for the surplus land should be made distinctively from, and in no way conditional upon, any aspect of the implementation of the core project
  - The Contracting Authority reserves the right not to dispose of the surplus land to the winning bidder or, indeed, any bidder
  - The financial offer made for the surplus land, assuming that the planned use is acceptable, will be netted off against the financial offer for the core project for the purpose of determining the price element of the evaluation of the core project
  - The financial offer made for the surplus land should state very clearly what assumptions the bidder is making about any associated infrastructure and services which it will expect the Contracting Authority to provide
- Ensure that any reference in the contract notice to the possibility of disposal of surplus land does not constrain the Contracting Authority in acceptance of tenders for the core project and acceptance/non-acceptance of offers for the surplus land.<sup>155</sup>

Having reached its judgment on the extent to which, and when, it will accept variations in the scope of the contract, key contract conditions, the performance specification for the operational phase of the contract, the design specifications for all elements of the infrastructure for the construction phase of the contract, contract performance standards, contract monitoring mechanisms, delivery methodologies and delivery constraints, the Contracting Authority should inform the candidates when launching the dialogue phase. This will be based on an informed judgement about the project requirements and the market for supplying those needs as well as the other factors identified above. As noted above, the extent to which variation is permitted may differ as between that indicated in the provisionally preferred solution at the launch of the dialogue phase, that permitted when

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<sup>155</sup> Discussions about the alternative acceptable uses of the surplus land could form part of the dialogue phase and the Contracting Authority could, after the receipt of interim submissions, indicate, entirely separately from the feedback on the interim submissions for the core project, whether or not the detailed proposals for the use of surplus land by bidders are likely to be acceptable and if not, why not. This will then form the basis for a decision at final tender stage as to whether or not to proceed with the disposal of the surplus land.

interim submissions are being called for and that permitted when final tenders are being called for.<sup>156</sup>

Thus the contract documentation included in the ITPD will comprise a combination of elements of which:

- Some are prescriptive and are not open to variation in the sense that the Contracting Authority has clearly identified in the specification how it needs can be met, methods it wishes to be used and subject to contract conditions which reflect its willingness to accept risk
- Some may be open to alternative proposals by candidates for part or all of the award process.<sup>157</sup>

### **Conducting the dialogue**

The key issues for the conduct of the dialogue phase are set out below:

#### ***Maximising resolution of issues in the dialogue phase***

In the dialogue phase the Contracting Authority needs to:

- Resolve the issues which must be definitively resolved before final tenders are called for i.e. issues about which after the end of the dialogue phase and the call for tenders there can be no further discussion once tenders have been submitted
- Reach the maximum possible resolution of the contract terms which generally cannot be fully resolved by the end of the dialogue phase.<sup>158</sup>

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<sup>156</sup> Any variation permitted must, of course, be consistent with the original contract notice issued by the Contracting Authority and further information given to interested parties who apply for it in response to the contract notice. Directive 2004/18 refers to this further information as the “descriptive document”, though there is no legal requirement to use this term. The authors prefer to continue to use the term “Information for interested parties”.

<sup>157</sup> It bears repeating that, as noted above, the provisionally preferred solution must be framed such that it is acceptable to the market (in the sense will not act as a barrier to bids), will stimulate competition, is affordable by the Contracting Authority and will deliver value for money for the public sector. However this does not mean that it has to be an approach which short listed entities necessarily regard as optimal or necessarily the solution which they would, ideally, have liked to offer, so long as the solution is one against which they are technically capable of bidding, does not include elements which would act as barriers to bidding and does not breach the principles of equality of treatment and non-discrimination in the sense of being unduly favourable to one bidder or class of bidder.

<sup>158</sup> See Table 2 above, for a summary of what issues need to be resolved by which stage of the process.

In this context “maximum possible resolution” means sufficient resolution such that:

- Except in exceptional market-driven circumstances justified by factors outside of the control of the Contracting Authority and the bidders, there will be no material changes following the call for tenders which will lead to a fundamental change to the contract.<sup>159</sup> In particular this includes (but is not restricted to) the scope of the contract, the price payable, the payment schedule, risk allocation, the performance standards expected or the methods to be used in delivering the project outcomes. However, matters such as greater detail of designs and specification of named sub-contractors should not impact on any of these fundamental factors and the only variation in respect of the commitment of finance would be a change to reflect movements in market interest rates beyond limits specified in the contract documentation as being at the service provider’s risk or anything covered by the material adverse changes clause referred to above
- The Contracting Authority is provided with sufficient detail (including how bidders will deliver the final preferred solution) to allow it to evaluate the offer made by the bidder, compare it with that of other bidders and reach a conclusion about which offer is the most economically advantageous.

#### ***Phasing and timing of the dialogue phase***

The dialogue phase should comprise the following sub-phases:

- **Initial discussions with candidates**,<sup>160</sup> including time for candidates to consider the Contracting Authority’s provisionally preferred solution and discuss it individually with the Contracting Authority
- **Interim submission sub-phase**, including the preparation of the call for interim submissions by Contracting Authority, the preparation of interim submissions by candidates and the assessment of the interim submissions by the Contracting Authority
- **Further individual discussions with candidates** following the interim submission sub-phase

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<sup>159</sup> Though there may be changes between interim submissions and final tenders in areas, and to the extent, clearly identified by the Contracting Authority in the light of the interim submissions.

<sup>160</sup> In this context “candidates” means:

- The parties nominated by consortium partners to conduct the dialogue on their behalf and authorised to make decisions on behalf of the consortium
- As noted above, in the case of PPP, lenders who will be committing finance to the project.

- **Completion of the final preferred solution** by the Contracting Authority and the call for final tenders i.e. the provisionally preferred solution modified by the dialogue phase).

The optimal time for the dialogue phase is about four to five months, balancing the objectives of capturing innovation, responding to market developments, minimising costs and allowing time for response by candidates and reflection by the Contracting Authority. This would allow for a sub-timetable of:

- Up to four weeks for candidates to respond to the ITPD
- Up to four weeks of discussions on the ITPD
- Two weeks for the Contracting Authority to complete the call for interim submissions
- Four weeks for candidates to submit interim submissions
- Two weeks for the Contracting Authority to assess the interim submissions
- Two weeks for further discussions with candidates
- Two weeks for the Contracting Authority to complete its final preferred solution and the call for final tenders.

***The importance of listening to candidates during the dialogue phase***

Genuinely listening to candidates by the Contracting Authority is essential during the dialogue phase. This means, if appropriate, being prepared to amend the provisionally preferred solution and/or accept variations if market conditions have changed during the dialogue phase or if they are otherwise persuaded by the candidates that it is desirable. This could arise if any aspects of the provisionally preferred solution would seriously undermine the likelihood of competition (i.e. the likelihood of the short list not bidding as opposed to bidding (which could, for example, arise if the organisations who are actually on the short list have materially different views from those included in the pre-OJEU market consultation) or could materially affect the extent to which the Contracting Authority could secure value for money because it might lead to a bid premium. Candidates should generally be encouraged to minimise the amendments they propose to the provisionally preferred solution and to require them to justify any requests for changes. The key skill is to be able to distinguish between what stakeholders say is important to them/what they will do as compared to what their actual behaviour is when faced with what is often a high value and high profile opportunity.

The evidence suggests that there is no general pattern to the methods by which a Contracting Authority achieves its objectives during the dialogue

phase. Clearly, in any dialogue, the exchanges between the parties will involve processes such as:

- Explanation of positions by the parties
- Questioning to establish understanding of the position of the other party
- Mutual exploration based on development of ideas by both parties
- Challenge to the validity and logic of the positions of the parties
- Negotiations based on trading of risk allocations.

The Contracting Authority will also need to continue to assess the likelihood during the dialogue phase that candidates will actually bid – which can help to avoid last minute “no bid” shocks, which can happen in spite of the investment that candidates have made. The response to the call for interim submissions – see below – is likely to be a key indicator of whether or not a short listed entity will submit a final tender.

***Maintaining equality of treatment, non-discrimination and confidentiality in the dialogue phase***

The issue of how the dialogue phase of the process will be conducted in a manner consistent with the principles of equal treatment and non-discrimination, especially if there is more than one stage to the dialogue, was one of the main concerns expressed by suppliers about the Competitive Dialogue Procedure (see, for example, various responses to the Commission’s consultation on the PPP Green Paper), though, in reality, they are concerns which could also reasonably have been expressed about the Negotiated Procedure. Similar concerns were also expressed about whether in reality the confidentiality of information enshrined in the Public Procurement Directive will actually be protected in the dialogue phase of the process.

One dimension of equality of treatment and non-discrimination in the dialogue phase is in the provision of information to candidates, which should be based on clear guidelines set out at the launch of the dialogue phase. This includes, in particular, the timetable and structure for information flows between candidates and the Contracting Authority and the frequency, length, scope, conduct, recording of meetings etc.

There are several considerations to be taken into account in respecting the principles equality of treatment and non-discrimination in practice i.e.:

- There is a need for a pre-determined and pre-agreed timetable of meetings with candidates, all with prepared agendas and minutes showing, in particular, the positions of the parties and questions asked by both parties during the dialogue and the answers to them. But is not clear, for example, whether a Contracting Authority is obliged to *actually spend* the same time in meeting with candidates but equality of treatment certainly

implies the *allocation of the same amount of available time* for such discussions

- There is no strict requirement that the same issues should be discussed with all candidates in a mechanistic fashion, though, insofar as a Contracting Authority is pro-actively consulting with candidates on the acceptability of proposals to them,<sup>161</sup> they need to consult all candidates. The actual content of the discussions will depend on the comments made by the candidates (in the initial phase of the dialogue) and the content of the individual interim submissions of candidates (in the latter part of the dialogue)
- As noted above, all candidates will have been made aware of areas in which the Contracting Authority is prepared to entertain variations from its provisionally preferred solution and the potential scale of the variations
- The timetable for the dialogue phase allows candidates equal time for preparation for meetings, reflection between individual meetings, to prepare the interim submission and to prepare the final tender. This means that the final meetings before the call for interim submissions and final tenders should be scheduled simultaneously. Any later requests for information by any candidate after the final designated dialogue meeting before the call for interim submissions and final tenders should be responded to by emails circulated to all candidates (which should encourage candidates to ensure that all matters are raised by them before the final designated dialogue meeting)
- There is a need for a complete, auditable record of all contacts, written or oral, between the Contracting Authority and each candidate during the dialogue phase outside of formal meetings
- There is a need for a complete log of all changes to the provisionally preferred solution requested by the candidates during the dialogue phase, showing whether or not they are accepted by the Contracting Authority and of the reasons for its decision
- There is a need for a complete log of all changes to the provisionally preferred solution during the dialogue phase made by Contracting Authority independently of any request by candidates<sup>162</sup>
- Particular care is needed in the process of giving feedback to candidates on their interim submissions (see below).

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<sup>161</sup> Which should not be necessary if appropriate steps have been taken to ascertain this in the pre-dialogue phase and is not here recommended in the optimal approach.

<sup>162</sup> Which should generally be limited to ones arising from exceptional market-driven circumstances.

As regards how the confidentiality requirements of the law can be respected in the dialogue phase, this can be done by clear guidelines set out at the launch of the dialogue phase determining, in particular, how what is confidential and non-confidential data can clearly identified, how the confidentiality of confidential data will be preserved (transmission, storage, access etc.), holding individual discussions with candidates and the extent to which the Contracting Authority can encourage those who express interest and/or participants in the dialogue phase to minimise the information which is deemed to be confidential etc.

***Closing off issues in the dialogue phase***

Contractual issues need to be closed off with candidates i.e. “anchoring” contractual commitments. This could be done by regular summaries, requiring the agreement of the candidates to issues which the Contracting Authority regards as finalised. The authors are familiar with the argument – often advanced in the United Kingdom in particular – that the optimal outcome in practice of the implementation of Competitive Dialogue would be to re-introduce the same kind of wide scope for post-tender negotiation which occurred under the Negotiated Procedure so that, for example, matters such as the price, scope of the performance regime, detailed building design, detailed planning permission, the precise terms of the financing of the transaction and other key contract conditions would be determined only after the selection of the winning tenderer (often referred to as the ‘preferred bidder’ in the Negotiated Procedure). But the advocates of such a view are under an obligation, as well as addressing the legality of such an approach, to explain the commercial logic of an approach to a transaction which leaves these key areas to be determined when there is no competition. The Commission’s Explanatory Note on Competitive Dialogue (at Section 3.3) makes it clear that the intention is not to allow negotiations with the winning tenderer.<sup>163</sup>

***Avoiding the elimination of candidates in the dialogue phase***

As noted above, it is not generally recommended that be eliminated during the dialogue phase, to maintain competitive pressure in the process. i.e. that all candidates who enter into the dialogue phase should normally in the call for tenders, even if it is not certain that they will actually bid. The dialogue

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<sup>163</sup> The process of closing off contractual issues is part of the overall process of managing bidder requests for amendments to the provisionally preferred solution. This is sometimes managed through the use of template forms on which requests for amendments are made by candidates and have to be responded to by the Contracting Authority.

will have been conducted separately with each bidder, so competitive pressure on other candidates may to some extent be maintained by this uncertainty. A Contracting Authority should, however, give itself the flexibility, exceptionally, to eliminate candidates during the dialogue phase if, for example, it becomes apparent that a bidder, through serious failure to comply with the procedural requirements of the award process, expressed intention of non-compliance with non-negotiable contract conditions or submission of an interim submission which, to the candidate's knowledge, does not comply with the scope or performance standards determined by the Contracting Authority, is very unlikely to submit a credible and sustainable final tender which meets the Contracting Authority's needs and is not procedurally compliant.

Even if it were desirable from a value for money perspective, there are also potential legal issues associated with the elimination of candidates during the dialogue phase. If candidates are to be eliminated during the course of the dialogue phase, this can only be done by application of the award criteria to their proposals.<sup>164</sup> But proposals which are submitted and evaluated in the course of the dialogue need not, by definition, cover "all elements required and necessary for the performance of the contract" as this is only a requirement at the final tender stage. The evaluation of such proposals must nevertheless be made based on the award criteria specified in the OJEU notice or descriptive document(s). Thus it is possible to argue that a proposal, even an interim submission in a form similar to that of the final tender (see below), is not the final submission of the candidate, for example in the sense that it may contain conditions and/or alternative proposals, and thus it may be argued to be premature to eliminate a candidate on the basis of award criteria intended to be applied to final tenders.

#### *The use of interim submissions in the dialogue phase*

Interim submissions should be an integral feature of the optimal approach to the dialogue phase and are a key element of the management of the process by the Contracting Authority. Their objectives are to enable the Contracting Authority to assess:

- **Whether or not there could be affordability issues** for the project based on the scope, risk allocation, performance specification and performance standards in the provisionally preferred solution<sup>165</sup>

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<sup>164</sup> Art 44(4), Directive 2004/18.

<sup>165</sup> The PSC should be updated after the receipt of interim submissions. Of course, the Contracting Authority should, at this stage, have developed a sufficient understanding of the project such that there should be no surprises at this stage.

- **Whether or not there is an indication that better value for money could be obtained by changing the scope,<sup>166</sup> risk allocation, performance specification and performance standards in the provisionally preferred solution<sup>167</sup>**
- **Whether or not there is an indication of the likelihood or otherwise of a candidate submitting a credible and sustainable unconditional final tender which meets the Contracting Authority's needs.** This can be judged by matters such as the extent of compliance with the procedural requirements of the Contracting Authority, the length and content of the interim submission i.e. the completeness, internal consistency and quality of the information provided, the extent to which candidates have started to undertake due diligence and gather information about the opportunity, their responsiveness during the discussions with the Contracting Authority, the nature and extent of comments made by them on the Contracting Authority's provisionally preferred solution, including proposed changes in the contract conditions and performance standards and the credibility and sustainability of the operating and financial assumptions made, including the realism of the assumptions underlying the bidder's projected income and any deductions for non-availability of assets and/or failure to perform the service, sensitivity analysis undertaken etc.
- The acceptability to the Contracting Authority of the proposed operational methodologies of the candidates and, in the case of a PPP, the acceptability of the proposed financing structure for the SPV e.g. the debt/equity split
- **The extent to which lenders and investors are committed to the process,** through the certainty of commitment in the interim submissions, the robustness of the financing arrangements (including an assessment of key parameters such as debt service ratios, cash flows and distributable reserves), the extent to which due diligence has started to be carried out by the lenders, their appointment of professional advisers and their engagement in discussions during the dialogue process.

Interim submissions should be requested in the same form as the final offers, so that later the two can be reconciled, and, as noted above, should not generally be used as a means to eliminate candidates.

The call for interim submissions should, in addition to the statement of

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<sup>166</sup> Subject, of course, to the constraint that this should not lead to a contract which is materially different from that originally advertised.

<sup>167</sup> Again, there should be no surprises at this stage.

requirements to be met, include details of the process compliance requirements and set out the format and structure in which the response should be made and the documents required by the Contracting Authority. There should also be a compliance table requiring bidders to set out where in the submission the Contracting Authority can find details of how the candidate meets the key substantive requirements. It should also specifically include a request for:<sup>168</sup>

- **A positive affirmative statement that the candidate accepts the contractual terms** which form part of the offer documentation except where specifically indicated by the bidder
- Confirmation that there are no changes to information from candidates which the Contracting Authority relied on at the short listing stage
- **The price for the contract based on the acceptance by the candidate of the Contracting Authority’s provisionally preferred solution** (as modified by any changes agreed by the Contracting Authority since the launch of the dialogue phase). In the experience of the authors the “price” in the context of a PPP project (i.e. the unitary payment profiled across the life of the contract in the case of an availability based project) is likely to be a combination of the base charge with adjustments. These could be for unavailability deductions and service performance deductions, any costs, such as a utility costs, which the Contracting Authority may agree are to be passed directly to them, indexation arrangements and, possibly, amendments arising from contract changes and/or potential adjustments (increases or decreases) in service performance deductions relevant to performance in subsequent periods according to whether deductions are ratcheted up over time and/or abated for improved performance in a later period. This in itself includes several complexities – beyond the scope of this book – but which serve to highlight a constant theme of this book i.e. the importance of the Contracting Authority understanding these complexities before the launch of the award procedure.

It remains a point of debate amongst practitioners as to whether it is desirable to indicate to short listed entities the Contracting Authority’s expectations in respect of the unitary charge and the assumptions underlying it such as, for example, the total expected capital and lifecycle costs. In doing so it needs to balance the management of bidder expectations

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<sup>168</sup> This list is intended to highlight the particular features of the call for interim submissions to enable the Contracting Authority to achieve its objectives for the dialogue phase using the proposed optimal approach. It is not intended to be a list of all the elements of a call for offers.

against the possible risk that it may lead the financial offer to cluster around the Contracting Authority's forecast of the expected unitary charge. It is in any event generally considered desirable to advise short listed entities of certain assumptions which should be made in the financial element of its offer, such as the reference interest rates to be used and the discount rate to be used for calculating the NPV

- **The price for the contract based on alternative proposals by the candidate**, highlighting the nature of each individual variation and its impact on the offer price. This will include any variations to the contract conditions which, following the discussions in the first part of the dialogue phase, the bidder still wishes to see i.e. the extent to which the offer is conditional. Conditionality in interim submissions should be acceptable only to the limited extent that they reflect issues not resolved between the parties, which means that the Contracting Authority should define in the call for interim submissions which areas it regards as not yet resolved, as far as possible how any conditionality should be expressed (e.g. differences in price) and the extent to which, after part of the dialogue is complete, it is at that stage willing to accept variations from its provisionally preferred solution in candidates' solutions. This may differ from its position at the start of the dialogue
- **The methodology for implementing different elements the contract** (for both the construction and service delivery phases in the case of a PPP),<sup>169</sup> including sub-contracting arrangements, the form to be used in the method statements and an indication of the level of detail required in the method statements. The method statements should, at minimum, identify the methods to be used and demonstrate how they will deliver the required performance over the life of the contract. This will have been discussed with short listed entities during the earlier part of the dialogue phase and the detail provided should enable the Contracting Authority to determine whether or not the proposed methodology is likely to meet their needs
- **Request for confirmation that the candidate has taken into account all the information made available by the Contracting Authority** including such matters as taxation treatment, accounting treatment, environmental impact assessment, workforce data, site surveys and relevant employment, health and safety, environmental and social security legislation
- **In the case of a service contract or a PPP contract, the candidate's**

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<sup>169</sup> See below for examples of the methodologies which could be requested by the Contracting Authority in the context of a street lighting contract.

**detailed business plan for the opportunity including assumptions underlying it**<sup>170</sup> and in the form of a spreadsheet, with confirmation by a duly competent independent entity, such as a professional audit or accountancy practice, that the results shown in the spreadsheet are consistent with the formulae from which they are derived. The spreadsheet should enable the Contracting Authority to apply sensitivity analysis in assessing the robustness of the bidders' business plans. Some Contracting Authorities require bidders to include a range of pre-determined sensitivity assumptions in summary form with their bid.

This level of detail should also enable the Contracting Authority to determine the rate of return to be earned by the candidate.

Though the financial element of the evaluation will be based on the financial offer, rather than the target rate of return, the contract signed will include reference to the rate of return planned to be earned by the candidates. The target rate of return for the winning bidder implicit in its bid, combined with open book accounting, could act as a platform for the effective management of change during the life of the contract. For example, the contract could include not only the target rate of return but also a rate of return cap, which, to comply with Treaty principles and the principles included in the Public Procurement Directives such as freedom to provide services, freedom of establishment, equality of treatment and non-discrimination will be expressed in the call for offers as an upward percentage increase in the rate of return. The contract could say that a variation, whether proposed by the service provider or the Contracting Authority, which leads to the service provider's rate of return being increased over the target rate implicit in the original offer by more than, say 20% (e.g. from a rate of return of 15% implicit in the service provider's offer to one of 18%), will, provided it is justified as arising from circumstances outside the control of the service provider or the Contracting Authority and meets the value for money conditions set out below, not be treated as a fundamental change requiring a new procurement procedure.

Monitoring the target rate of return will thus form part of the contract monitoring arrangements where changes are proposed by the service provider and in any event should be done on an annual basis through a requirement for an update of the information provided at the time the contract was awarded. In principle, a contract change proposed by the bidder which does not reduce the scope of the contract and impact nega-

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<sup>170</sup> Such as for income, capital costs and life cycle operating expenditure and the financing of them.

tively on the performance standards in the contract and does not increase the target rate of return above the capped rate will also, provided that it has as an individual change been subject to benchmarking or competitive tendering, be deemed to represent value for money for the Contracting Authority. This is to simplify the process of dealing with the inevitable variations which will arise across the life of the contract. But it requires that participants submit a business plan enabling the Contracting Authority to obtain the base information and that a revised business plan, taking account of all developments since the commencement of the contract/last annual rate of return review or since the last agreed variation, be submitted when a new variation are being considered.

This approach is, of course, subject, from a legal (though not a value for money) perspective, to any clarification provided by the Commission on what constitutes a fundamental contract change and/or any judgements on the matter in the ECJ or national courts

- **In the case of a PPP, the financial profile of the service provider, proposed financing structure for the SPV, the sources of finance, the terms and conditions for the finance, the strength of commitment of the finance,<sup>171</sup> possible refinancing plans, details of insurances, liability caps, warranties, guarantees and indemnities etc.**

Short listed entities should be given an absolute assurance that the amount of their interim submissions and, for that matter, their final tenders, will not be disclosed in whole or in part to its competitors.

Particular sensitivity is needed in the process of giving feedback to candidates on their interim submissions. It is essential that the process of giving feedback does not go beyond that necessary to ensure that final tenders reach the minimum acceptable for the Contracting Authority. Even then, the feedback should be given obliquely in the form of questions posed rather than concrete suggestions.<sup>172</sup> The feedback should not enable candidates to improve offers which are already acceptable since this would create a serious risk of inequality of assistance to different candidates.

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<sup>171</sup> I.e. that funders have read and support the interim submission, have reviewed the spreadsheet and details of the debt and equity to be provided. A fuller description of what a Contracting Authority might ask for may be found on the 4Ps website <http://procurementpacks.4ps.gov.uk/index.aspx>.

<sup>172</sup> Thus the authors can see risks in the “traffic light” system which has been used by some Contracting Authorities i.e. to indicate whether or not a bidder’s current proposals are currently acceptable overall to the Contracting Authority, close to being acceptable or some distance from being acceptable (which does not, as noted above, imply elimination).

Irrespective of the methods used to give feedback on interim submissions, the Contracting Authority should give candidates an indication of the acceptability of variations proposed by them to the provisionally preferred solution and any greater level of detail required in the final tenders as compared to interim submissions<sup>173</sup> and could also refer to questions of affordability, design and construction approach, operational methodologies and the financing solution.

Following the receipt of interim submissions the Contracting Authority should, in the case of a PPP, rework the PSC to ensure that the chosen delivery route for the project continues to represent value for money for the Contracting Authority.

***Commitment to intensive activity in the dialogue phase***

There needs to be a commitment on the part of the Contracting Authority and short listed candidates to the intensive activity likely in the dialogue phase. The experience of Contracting Authorities who have used Competitive Dialogue has been that the dialogue phase was highly intensive and demanding for all the participants, with a pre-determined and pre-agreed timetable of meetings with candidates, all with prepared agendas and which need to be minuted. Each meeting requires careful preparation and could require pre-briefing at the beginning and feedback meetings at the end of each of several very long days. In order to achieve the required timescale the discussions are often needed in parallel with different candidates and in different strands of the process, i.e. technical, legal and commercial. In addition to the dialogue team there also typically needs to be a parallel team to update the contract data,<sup>174</sup> in some cases overnight. In addition, regular, often weekly, key meetings are needed with stakeholders to update them on progress. In all of this very busy process, the Contracting Authority needs time to reflect on developments and determine when and how it will amend its provisionally preferred solution during the dialogue phase.<sup>175</sup>

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<sup>173</sup> This directly benefits the Contracting Authority because it enables them to adopt the restrictive approach to “clarifying, specifying and fine tuning tenders” advocated here.

<sup>174</sup> The use of parallel teams is not merely a question of different functions – it also provides a mechanism for internal challenge within the Contracting Authority for judgments made within the dialogue phase.

<sup>175</sup> All of this underlines the importance of the Contracting Authority having, as advocated, substantially worked out its position on most issues and the private parties’ likely response in advance. But however much the Contracting Authority has done this in advance, there is still a risk of surprises in the dialogue phase due to changing market conditions or the negotiating tactics of the private partners. It also argues for core teams to be in place throughout the dialogue process.

***Responsiveness to candidates in the dialogue phase***

Responsiveness to short listed entities is, in the authors' experience, always important in a procurement process, subject, of course, to respect for the principles of equality of treatment and non-discrimination.

One key aspect in the dialogue phase is access to information by candidates. The Contracting Authority should always bear in mind throughout the dialogue phase that the overall objective is to receive unconditional offers which are capable of meeting its needs throughout the life of the contract (particularly in the case of a services contract) and which comply with the administrative requirements of the award process. This is not merely a question of preparing an appropriately informative ITPD. In the authors' experience the best way to do this is to provide short listed organisations with the fullest possible access to the information necessary to be able to submit such offers (and, subject to a controlled process, to key people able to elaborate on that information if needed). It is good practice, for example, to create an electronic data room in a secure environment which candidates can access. It also means a timely response to candidates' requests and providing as full a reply as possible to such requests for further information and clarification, subject to the need to maintain strict equality between candidates.<sup>176</sup>

***Not making payments to losing bidders***

Art 29(8), Directive 2004/18 permits payments to be made to bidders participating in the dialogue, but there is no obligation to make such payments.

The argument sometimes advanced for doing so is that bidders might incur significant costs during the dialogue and final tender stages in complex procurements, which they will not recover if they do not win the contract and thus may be discouraged from participating in a contract award procedure using Competitive Dialogue. It is true that a badly conducted Competitive Dialogue Procedure does have the potential to be very time consuming for Contracting Authorities and potentially expensive for bidders, so Contracting Authorities certainly need to consider the design of their Competitive Dialogue to address the issue of cost control.

But it is not clear if the costs they incur in a Competitive Dialogue Procedure are, in reality, any higher than they would be if a Contracting Authority uses best practice in the Negotiated Procedure, i.e. to ensure that the selection of the winning bidder should not happen until all substantial terms and conditions affecting the price and delivery of the scheme have

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<sup>176</sup> This approach is also consistent with the intentions of Directive 2004/18 – see Art 40(3) and 40(4).

been settled while there is still competition. The input needed by bidders should be significantly reduced by the proposed optimal approach to application of the Competitive Dialogue Procedure. This is because of the tasks in the process to be carried out by the Contracting Authority and its need to make a significant input at an early stage of the award process i.e.:

- The Contracting Authority will develop a provisionally preferred solution and will then commence the dialogue phase by tabling its provisionally preferred solution in sufficient detail such that it could be used as the tender document for the call for final offers
- The input of short listed entities will then be to comment by marking up the provisionally preferred solution
- The Contracting Authority, will, after discussions with short listed entities and the interim submissions, be responsible for formulating the final preferred solution.

Bid costs of losing bidders are also, in practice, difficult to verify and measure accurately for a Contracting Authority, given the different means by which bidders might calculate the time taken and cost per hour of time and the fact that the information needed for the calculation is, in essence, within the control of the bidder.

There may, exceptionally, be circumstances in which a Contracting Authority may wish to make a retainer payment to the second placed bidder for a strictly limited period of time if they judge it necessary to retain a reserve option while the contract with the winning bidder is being finalised, thereby maintaining some competitive pressure on the winning tenderer. This, of course, is not necessary if substantially all of the key contractual issues have been resolved prior to the submission of tenders. Subject to this very limited exception, payments to losing bidders are likely to be very difficult to justify (to auditors, amongst others) on value for money grounds.<sup>177</sup>

### ***Understanding bidder methodologies***

It is a key part of the dialogue phase for the Contracting Authority to understand the methodologies that the bidder will use to deliver the contract. This

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<sup>177</sup> One example of when a Contracting Authority did decide to pay bid costs for the PPP project “A5 Nordautobahn – PPP Eastern Region” in Austria (relating to the planning, building, financing and operating of a 51km motorway stretch with estimated building costs of € 800m, awarded at the end of 2006), which even in an international context was a very large project. In that case the Contracting Authority took the decision to pay a certain fixed amount to each tenderer who submitted a final offer that was not rejected by the Contracting Authority as non-compliant.

is because the quality element of evaluation of the tenders received from bidders should in general be based more on the means by which the bidder proposes to implement the Contracting Authority's preferred solution than the innovative nature of the solution itself. The method statements should, at minimum, identify the methods to be used and demonstrate how they will deliver the required performance over the life of the contract.

Using the example of a street lighting PPP contract, the service delivery methodologies which could be requested by the Contracting Authority might include:<sup>178</sup>

- Investment programme over the life of the contract and milestones against which the Contracting Authority can measure progress
- Annual programme for the delivery of services in the first year of the contract
- Details of the lighting equipment which will be used and the processes for sourcing of the equipment
- Procedures for compliance with the Contracting Authority's design requirements
- Consultation procedures relating to pre-planned works under the contract
- Procedures for monitoring performance of lighting units
- Procedures for planned maintenance of lighting units, including quality control procedures and management information systems
- Operational responsiveness and reactive maintenance procedures, including quality control procedures management information systems
- Contract management, including management information systems
- Customer interface procedures, including management information systems and consultation procedures re service provision
- Contract performance reporting procedures
- Procedures for assisting the Contracting Authority with its statutory and other reporting requirements from higher level authorities
- Working practices e.g. in respect of compliance with labour legislation, compliance with traffic management measures, environmental obligations, health and safety of employees and the public, staff training and staff identification etc.

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<sup>178</sup> For this summary of the service delivery methodologies which might be requested the authors gratefully acknowledge the guidance in 4Ps Street Lighting Procurement Pack, prepared to help UK local authorities and accessible via <http://procurementpacks.4ps.gov.uk/index.aspx>. This also includes other useful documentation for PPP procurement using the Competitive Dialogue Procedure, including that related to procedural, financial and commercial and legal and contractual aspects of the PPP process.

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- Monitoring of employee compliance with working practices
- Procedures for the certification and commissioning of new lighting equipment
- Procedures for the incorporation into the delivery of contract performance standards of additional street lighting infrastructure adopted by the Contracting Authority during the life of the contract
- Procedures for connection of lighting equipment to, and disconnection from, the electricity supply distribution network
- Procurement procedures to secure energy supplies for street lighting infrastructure
- Mobilisation procedures to ensure the effective takeover of the existing street lighting service, including management information systems, at the start of the contract
- Procedures for maximising innovation and cost savings during the life of the contract, including, for example, use of new procedures, equipment and materials and reduction of energy consumption
- Procedures for compliance with the Acquired Rights Directive for any staff transferring at the start of the contract
- Decommissioning procedures to ensure the effective return to the Contracting Authority of the street lighting infrastructure and service provision at the end of the contract (including inspection of equipment on handback and handback of management information systems).

This is not an exhaustive list and, of course, will need to adjust it according to the needs of the contract. In other types of contract it may, for example, also include the bidder's procedures for:

- Phased handover of construction
- Phased implementation of services
- Managing the interface between construction/facilities management services and professional services such as clinical and educational services not part of the same contract (which they generally are not in PPP contracts).

***Bringing in the lenders to the dialogue***

As noted above, lenders should be brought into the dialogue, so that they too are signed up to the key terms of the contract before tenders are called for. This minimises the risk of last minute surprises and 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.

### **Concluding the dialogue and inviting final tenders**

The Contracting Authority should continue the dialogue until it is certain that it will receive final tenders which are capable of meeting its needs.

In the optimal approach to the Competitive Dialogue advocated here, this means that:

- The last part of the dialogue phase will be for the Contracting Authority to complete its final preferred solution
- The Contracting Authority will then declare the dialogue to be concluded by informing the short list in writing
- At the same time, final tenders would then be called for on the basis of the Contracting Authority's final preferred solution which would enable bidders to submit substantially unconditional bids
- The Contracting Authority should insist at this stage on unconditional tenders<sup>179</sup> from bidders, including confirmation of compliance with other statutory requirements such as health and safety, environmental impact assessment, the Acquired Rights Directive and other employment and social security legislation and assurance of due diligence by service providers, including completion of site surveys
- The Contracting Authority should emphasise the fact that, since the quality element of the evaluation criteria will be based on how the bidder proposes to deliver the final preferred solution, operational method statements for the construction, operation, maintenance, asset refresh and decommissioning elements of the contract will form a key element of that evaluation
- Final tenders should be called for in the same format as that for interim submissions, so that the Contracting Authority can reconcile the final tenders with the interim submissions, and making sure that it is consistent with the evaluation criteria, both to facilitate evaluation and to ensure that the compliance of bidders with the contractual terms can be clearly identified<sup>180</sup>
- Final tenders should be called for from all the candidates who have not withdrawn from the process<sup>181</sup>
- The Contracting Authority should declare that the form of the final tender called for is “based on the solution presented and specified during

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<sup>179</sup> In this context “unconditional” means without request for further derogation from the terms of the contract proposed by the Contracting Authority in the final preferred solution, with committed finance and for prices which are fixed except for indexation and agreed volume variation. It should be made clear to bidders that provisional pricing, which implies post-tender negotiations will be explicitly rejected by the Contracting Authority.

the dialogue” and that the final preferred solution is “capable of meeting its needs” (to comply with Art 29, Directive 2004/18)

- Emerging best practice is to allow bidders about six to eight weeks to submit their final tenders, given that bidders will have had wide access to data and people during the dialogue phase. During this period lenders will need to obtain formal credit approval enabling them to issue the committed finance letters of support.

Before completing the final preferred solution, the Contracting Authority will again need to revisit the considerations set out above about the extent to which variation may be permitted between tenders.

But in completing the final preferred solution the Contracting Authority would expect to substantially reduce any scope for variation which may have been foreseen when the provisionally preferred solution was launched and/or at the time interim submissions were called for. At this stage even if (which the authors do not recommend) the Contracting Authority had allowed fundamentally different solutions at an earlier stage in the dialogue (such as the choice between a bridge or a tunnel for a river crossing scheme), this should not be permitted at final tender stage.

This means that the dialogue phase should not be concluded until the Contracting Authority has had the opportunity to assess the interim submissions,<sup>182</sup> hold further discussions with candidates and reflect on how they might influence the final preferred solution.

Limited variation would be expected between the interim submissions and final tenders, which the Contracting Authority would expect to be able to reconcile.

In the call for final tenders, the Contracting Authority should ask candidates to:

- Re-confirm that there are no changes to information from bidders which

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<sup>180</sup> It goes without saying that:

- All tenderers should be required to bid against the same tender documents
- The “terms and conditions for the performance of the contract must be formulated clearly and the candidates can interpret them in the same way and take them into account in preparing their tender must not discriminate in favour of every tenderer” (PPP Green Paper).

<sup>181</sup> As noted above, even if the Contracting Authority does not think that a bidder’s final tender will be affordable or offer better value for money than that of other candidates, it should still call for a final tender because this may to some extent still exert competitive pressures on other candidates and may in any event result in a more competitive offer by the bidder.

<sup>182</sup> The nature of the assessment follows from the objectives of calling for interim submissions.

- the Contracting Authority relied on at the short listing stage
- Make a further affirmative statement that the bidder accepts the contractual terms which form part of the call for final tenders
  - Supply re-confirmation from funders of their commitment to funds and the terms on which they will be made available, through detailed term sheets, subject to changes in interest rates between the date of submission of final tenders and those prevailing at financial close<sup>183</sup> and the non-occurrence of circumstances referred to in the material adverse changes clause<sup>184</sup>
  - Explain the reasons for any differences in price (including the payment schedule) from that submitted in the interim submission. This should take the form of a table dividing the total price change into different categories, using explanations such as:
    - Changes in the required specification by the Contracting Authority since the interim submission was submitted
    - Changes in performance standards required by the Contracting Authority since the interim submission was submitted
    - Changes in the desired delivery methods by the Contracting Authority since the interim submission was submitted
    - Changes in risk allocation since the interim submission was submitted (analysed by type of risk)
    - Changes in market conditions since the interim submission was submitted (analysed by category e.g. change in interest rates)
  - Submit final tenders which show clearly any differences in resources, methodologies, policies etc. between the interim submission and final tenders. This could be done by inviting bidders to submit a track changes version of the interim submission or a marked up version of interim submission as part of the final tender submission
  - Confirm the period, typically eight to twelve weeks, to complete full financial documentation, complete detailed rooms designs and finalise the identity of sub-contractors, should the candidate be successful.

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<sup>183</sup> Some of the risk (or gain) associated with changes in interest rates between submission of final tenders and financial close may be left with bidders in the sense that the contract may not allow for full adjustment of the unitary payment arising from changes in interest rates between submission of final tenders and financial close.

<sup>184</sup> See above, Chapter 3.



## **CHAPTER 5 – A Practical Guide to Procurement Using Competitive Dialogue (Part 2 – Conducting the post-tender and post-winning bidder phases)**

### **OVERVIEW**

The post tender and the post-winning bidder phases are of particular importance as the winning tender in the Competitive Dialogue Procedure must be chosen during those phases.

This chapter analyses in detail the key issues arising in the phases after the receipt of final tenders and, subsequently, selection of the winning bidder.

The chapter will aim to develop a best practice approach to the conduct, respectively, of the phases after receipt of final tenders and the selection of the winning bidder i.e. how to finalise the contract in a way which both complies with Directive 2004/18 and maximises the likelihood of the Contracting Authority securing value for money, bearing in mind that, when the winning bidder is selected, competition for the contract is, in effect, eliminated.<sup>185</sup>

The best practice approach will be a combination of practice currently in use and an assessment of the authors about how this might be developed and improved. This is consistent with the idea of the book, which is not merely to describe how currently Competitive Dialogue is being implemented but aim to shape the development of an optimal model of its implementation in PPP projects.

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<sup>185</sup> For the avoidance of doubt, the authors do not intend here to include a detailed description of how to evaluate tenders. This need is more than adequately met elsewhere, See, for example, Arrowsmith, *op. cit.*, Chapters 7 to 10.

## **LEGAL FRAMEWORK FOR THE POST DIALOGUE PHASE**

At the end of the dialogue phase participants must submit tenders that are final, i.e. that are binding on them and are not subject to negotiations. According to Art 29(6), Directive 2004/18 “[these] tenders shall contain all the elements required and necessary for the performance of the project”.

Read alone, this might lead to the exclusion of the possibility of, or need for, changing the final tender at all. However, the Directive seems to provide that certain changes to the final tenders are permissible, as the second paragraph of Art 29(6) of the Directive 2004/18 allows for these tenders to be “clarified, specified or fine-tuned at the request of the Contracting Authority”. At the same time it is stated that “such clarification, specification, fine-tuning or additional information” may not involve changes to “the basic features of the tender or the call for tender” when those variations are “likely to distort competition or have a discriminatory effect”.

Likewise, after having identified the most economically advantageous tender on the basis of the award criteria<sup>186</sup> the Contracting Authority may ask the winning bidder to “clarify aspects of the tender or confirm commitments contained in the tender”. Any such clarifications or confirmations must, however, not have the effect of “modifying substantial aspects of the tender or the call for tender” and risk distorting competition or cause discrimination.<sup>187</sup>

This gives rise to the questions to which extent changes to the final tenders and the winning tender are permissible i.e. when are final tenders “final”?

The possibility to change “final tenders” after expiry of the tender deadline and/or after the selection of the winning tender nevertheless leads to two different imperatives, which are not always easy to reconcile:

- On the one hand, the Contracting Authority may wish to have certain elements of the tender changed for legitimate reasons, such as to correct errors, omissions, inconsistencies reflecting some degree of misunderstanding of the tender documents or to have tenders adapted due to changes in circumstances which occurred subsequent to the tender deadline (e.g. objectively unforeseen and unforeseeable events, such as the global financial crisis of 2008/2009)
- On the other hand, changes to tenders carried out at post tender stage

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<sup>186</sup> The winning tender must be chosen in accordance with the “most economically advantageous tender” award basis only.

<sup>187</sup> See Art 29(6), Directive 2004/18.

might contravene the fundamental principles of equal treatment of bidders and transparency, especially where some tenderers would not be given the opportunity to amend their offers or where the Contracting Authority would use this as a tool to favour one tenderer over the others.

The issue of finality of tenders is not, of course, an issue which only arises in the Competitive Dialogue Procedure but also in other procedures such as the Open and Restricted Procedure and, in particular, in the Negotiated Procedure.

It becomes of particular importance in projects that are based on “non-recourse” or “limited-recourse” financing which is often the case for PPP projects.<sup>188</sup> Providing the proof of financial standing of the bidder or the members of a bidding consortium alone is not enough. Such projects demand explicit support from financing institutions that will be providing the project company (“Special Purpose Vehicle” or “SPV”) with the financial means necessary to implement the project. For such projects based on the principle of project financing it is of great importance for the Contracting Authority to only accept bids where the bidder can show that its financing solution has been approved by the lenders. A bid falling short of such approval (“firm” commitment) cannot be regarded as a “final tender”.<sup>189</sup> Therefore, a final tender made subject to the positive outcome of further (legal, financial and/or technical) due diligence still to be carried out by a financing institution cannot be regarded as final and must thus be rejected by the Contracting Authority.

The same should logically be true for any other condition attached to the final tender that makes the validity of the offer dependent on circumstances that the bidder cannot be sure of at the time of submission of the

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<sup>188</sup> “Non-recourse” or “limited-recourse” financing meaning, in principle, that the successful bidder or bidder consortium, which is under the contractual obligation to found the project company (SPV) and to ensure that the SPV has sufficient (financial) resources to fulfil its obligations under the PPP contract, bears no or only limited liability vis-à-vis the Contracting Authority in case the project fails (after the SPV has been duly founded and provided with sufficient resources). This means that the Contracting Authority thus has no right to demand fulfilment of the contract from the bidder or bidder consortium that won the tender procedure in case the project fails. This project finance approach enables private sector participants to keep the involvement in a PPP project off their balance sheets (with no contingent liability).

<sup>189</sup> The position is the same in Open and Restricted Procedures where the Contracting Authority is prohibited from negotiating on the tenders submitted. This suggests that in an Open or Restricted Procedure a tender must be submitted in a manner and form that the Contracting Authority is in the position to accept it without the need to conduct negotiations about the tender (see Art 30(2) and (3) of Directive 2004/18).

final bid, in particular if the offer or parts of it are subject to the approval of a third party which has not yet been obtained.

### **OPTIMAL APPROACH TO THE POST DIALOGUE PHASES**

This book advocates that a restrictive approach should be adopted to what is done while “clarifying”, “specifying” and “fine-tuning” final tenders and “clarifying aspects of (the winning) tender” and “confirming commitments in (the winning) tender”. This means minimising the extent to which changes are made to the contract after tenders have been submitted and even more so after the selection of the winning tender and thus minimising the time taken to complete the post dialogue phases. In this way the provisions of Art 29, Directive 2004/18, can be used to underpin the structured approach to the procurement of major infrastructure and other large scale projects which have represented good practice in the Negotiated Procedure.

The key specific elements of this optimal approach to the post dialogue phase are that:

- As regards “clarifying”, “specifying” and “fine-tuning” the final tenders, a wide definition of what constitutes the “basic features” of a tender and strict limitations on how much and what type of variation to them can be permitted
- As regards “clarifying aspects of (the winning) tender” and “confirming commitments in (the winning) tender” a wide definition of what constitutes the modification of “substantial aspects” of the tender and similarly strict limitations on how much and what type of variation to it can be permitted
- The reference to “confirming commitments in (the winning) tender” does *not* imply any scope for the winning tenderer not to adhere to the offer it has made within the period for which final tenders are valid<sup>190</sup>
- The process of “clarifying”, “specifying” and “fine-tuning” tenders and “clarifying aspects of (the winning) tender” and “confirming commitments in (the winning) tender” refers solely to actions taken by the Contracting Authority and does not include the right of bidders to re-open issues resolved at an earlier stage in the process or to amend their tender.

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<sup>190</sup> Unless, of course, that the Contracting Authority seeks at this late stage to change its requirements in a way which would materially alter the economic balance of the contract.

The arguments for a restrictive approach rest on both value for money grounds i.e. of the benefits of substantially fixing the terms of the contract while bidders are subject to competitive pressures, and on legal grounds i.e. to minimise the risk of breaching the principles of equality of treatment and non-discrimination.<sup>191</sup>

In the case of Competitive Dialogue, the argument for a restrictive approach is enhanced by the provisions of Directive 2004/18, since there is also the explicit freedom to resolve uncertainties during the dialogue phase because all aspects of the contract may be discussed and by the requirement in Art 29(6) of Directive 2004/18 that the final tenders “shall contain all the elements required and necessary for the performance of the project”.

A restrictive approach to the potential for changes in contract terms in the post-tender phase also acts to reduce the risk of challenge on grounds of breach of state aid rules. The conclusion to be drawn from the ECJ judgment in the *Altmark* case (Case C-280/00) is that a contract arising from a public procurement conducted in accordance with Directive 2004/18 will not invoke questions of state aid as long as the contract satisfies all four conditions laid down by the ECJ and that it is awarded to the bidder submitting the most economically advantageous tender. But, as has been made clear by the European Commission (see Commission of the European Communities, N264/2002, *London Underground Public-Private Partnership decision*, 2 October 2002) it is necessary, even when the Negotiated Procedure is being used, to be able to justify the scope and nature of negotiations after the selection of the winning bidder to ensure that state aid rules have not been breached.<sup>192</sup>

The use of a restrictive approach is not, however, solely for the benefit of the Contracting Authority – it can also act as protection to bidders from attempts by the Contracting Authority to re-negotiate the contract in its own favour as part of the tender evaluation process.<sup>193</sup>

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<sup>191</sup> As noted above, the authors draw a clear distinction between what is, or might be, legally permissible and what is commercially desirable.

<sup>192</sup> A more detailed analysis of this issue can be found in Phedon Nicolaides, “State aid advantage and competitive selection – What is a normal market transaction?” *European State Aid Law Quarterly*, Forthcoming article, 2010. For a summary of the commercial considerations in this case, and an example of why what is legally permissible is not necessarily commercially desirable, see Burnett, *op. cit.*, pp. 163-164. This, by definition, applies *a fortiori* to the Competitive Dialogue Procedure since the scope of any permissible amendments after the selection of the winning bidder is more explicitly restricted than in the Negotiated Procedure.

## **ANALYSIS OF THE LEGAL FRAMEWORK FOR THE POST DIALOGUE PHASES**

### **Permissibility of changes to bids – Open, Restricted and Negotiated Procedures**

To what extent are changes to final tenders permissible?

References to “clarifications”, “modifications” and/or “changes” to tenders submitted in Open, Restricted or Negotiated Procedures, whatever wording is used to describe submissions, raise questions as to what they do and do not include.

It is thus worth looking first at how this issue is dealt with in those procedures as a point of reference for how this matter may be addressed in the Competitive Dialogue Procedure.

#### ***Changes to tenders in the Open and Restricted Procedures***

For Open and Restricted Procedures the Procurement Directives do not expressly deal with this issue. Directive 2004/18 requires offers to be submitted which have then to be assessed in accordance with the award criteria but it is silent on whether changes to offers after their submission are admissible.

It is well established that in Open and Restricted Procedures negotiations with bidders subsequent to the opening of tenders are prohibited. This can be concluded from the ECJ case law as well as from the lawmakers.

In the *Bus Wallons* case the ECJ held that in an Open Procedure it is inadmissible for the Contracting Authority to take into account amendments to the initial tenders made by one tenderer after the opening of the tenders.<sup>194</sup> The Court found that it is clear that this tenderer enjoyed an advantage over its competitors, which breaches the principle of equal treatment of tenderers and impairs the transparency of the procedure. Moreover, taking into account amendments submitted after the opening of the tenders would have led to a better evaluation of the now amended tender under the award criteria, thus affecting the ranking of the tenders. Even though, tech-

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<sup>193</sup> For the avoidance of doubt, the authors are aware of the risk that a restrictive approach could be used by Contracting Authorities more readily to cancel award procedures which look unlikely to result in the award of the contract to their pre-favoured tenderer and then relaunch it in a way which achieves the desired result. However, it is the settled case law of the ECJ that a decision to cancel an award procedure is a decision capable of being challenged through review procedures (Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs GmbH v Stadt Wien* and C-15/04, *Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH*), so that this risk is capable of being managed.

nically speaking, it appears from the judgement that no formal negotiations took place between the Contracting Authority and the tenderer concerned, the admission of this tenderer's "supplementary notes" commenting on certain points of its initial tender, thereby changing terms of the initial tender, is in effect equal to receiving an improved bid after negotiations.

This does not mean that a Contracting Authority will act in breach of the principle of equal treatment when it contacts the bidder after the opening of the tenders. In Case T-19/95, *Adia Interim v Commission*, the Court of First Instance (CFI) dismissed the applicant's plea that the Commission acted in breach of the principle of equal treatment when it contacted a competitor after the opening of the tenders and allowed it to correct a systematic calculation error made in the latter's tender. It is worth noting that Art 99(h), Commission Regulation (EURATOM, ESC, EC) No. 3418/93, which was applicable to the procurement procedure at hand in conjunction with Directive 92/50, explicitly prohibited any contact between the institution and the tenderer after the tenders have been opened save, exceptionally, "if some clarification is required in connection with a tender, or if obvious clerical errors contained in the tender must be corrected." In those cases the institution was permitted to contact the tenderer. The CFI found that the Commission acted in conformity with these provisions and principles when it contacted the tenderer in order to clarify the exact nature and cause of the systematic calculation error.<sup>195</sup>

What is the position with regard to non-compliant tenders? Are changes permitted in order to render non-compliant tenders compliant, and if yes, under what circumstances?

Again, the ECJ's case law provides for some guidance.

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<sup>194</sup> ECJ Case C-87/94, *Commission v Belgium (Bus Wallons)*. In this procurement procedure, which concerned the purchase of buses, one tenderer provided the Contracting Authority with "supplementary notes" by which it changed certain points of its initial tender, in particular the level of fuel consumption (reduction to 45 litres per 100 km from 54 litres per 100 km indicated in its initial tender), a change in the frequency of engine and gearbox replacements, and certain aspects of the technical quality of the material offered, all of which had a positive impact on the assessment of its tender.

<sup>195</sup> This was confirmed by the CFI in the *Esedra* Case which related to the procurement of the management of a day nursery and kindergarten for children of the staff of the European institutions. In its judgment the ECJ confirmed that it does not constitute a violation of the principle to clarify concepts and tests mentioned in the tender, without modifying the substance of its tender in relation to the requirements laid down by the contract documents (Case T-169/00, *Esedra SPRL v Commission*). In a Competitive Dialogue Procedure this judgment may be difficult to reconcile with the idea that a complete or partial absence of relevant information from a bidder should, in the evaluation of final tenders be scored negatively given that candidates will have had an opportunity, during the dialogue phase, to determine what level of detail is required in those tenders.

As a general principle it can be held that the principle of equal treatment requires strict compliance with the tender documents (i.e. specifications, conditions etc. set out therein) for a tender to be considered.<sup>196</sup> This holds true for substantive requirements as well as for formalities set out in the tender documents.

This does not, however, mean that every discrepancy makes a tender non-compliant such that it cannot be accepted. Whereas it seems that non-compliance with a mandatory substantive requirement must result in the Contracting Authority rejecting the bid, this is not clear in cases of non-compliance with procedural formalities. It seems that a Contracting Authority enjoys some discretion to accept offers which are not fully in compliance with procedural formalities. It can be argued that for breaches of formalities which will not create any significant inequity between tenders the Contracting Authority should have the right to allow the tenderer to make its bid compliant or to waive compliance with specific formalities. However, certain substantive or mandatory formalities<sup>197</sup> will probably have to be treated the same as substantive requirements of tender specifications and conditions.<sup>198</sup>

Where the particular nature and importance of certain formalities is such that to waive compliance might lead to inequity between tenderers then the principle of equal treatment prohibits the Contracting Authority from allowing corrections or from waiving compliance with these formalities.<sup>199</sup>

Likewise it would not be permissible to waive a requirement for one bidder but to uphold it for all the other bidders. Any discretion on the Contracting Authority's side thus ends where the principle of equal treatment would be violated.<sup>200</sup> Contracting Authorities should thus be very careful when setting out formalities in its tender documents.

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<sup>196</sup> This can be inferred from case law of the CFI. In the *Scan Office Design* case the CFI held that it was unlawful to accept a late tender (Case T-40/01, *Scan Office Design SA v Commission*).

<sup>197</sup> Examples of mandatory procedural requirements include the obligation on the bidder to submit a bid guarantee together with its tender (where the tender documents so require) or to have the tender signed with the necessary legal authority.

<sup>198</sup> See Austrian Administrative Court (VwGH) judgments of 25 February 2004 (2003/04/0186) and 24. February 2006 (2004/04/0078).

<sup>199</sup> In case T-211/02, *Tideland Signal Ltd v Commission*, however, the CFI held that the Commission must allow the correction of an apparent ambiguity in the documents over the length of validity of the tender. Even though this procurement procedure did not relate to the Procurement Directives but to a contract awarded by the Commission under the rules relating to external aid, the general principle would probably also apply under the Procurement Directives.

This is consistent with the Joint Commission and Council of Ministers Statement issued in 1989 which makes clear that in Open and Restricted Procedures all negotiations with candidates or tenders on fundamental aspects of contract, variations which are likely to distort competition and in particular in prices must be ruled out. However, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of the tenders or the requirements of contracting authorities and provided that this does not involve discrimination.<sup>201</sup>

In short, the Open and Restricted Procedures are, in principle, adverse to changes made to tenders after the opening of the tenders in view of the principle of equal treatment and transparency of procedure.<sup>202</sup> In accordance with ECJ case law any change to a tender submitted in an Open or Restricted Procedure that might lead to give one tenderer a competitive edge over the others would be contrary to the principle of equal treatment of tenderers.

#### ***Changes to offers in the Negotiated Procedure***

The matter of what changes are permitted to offers is less clear when it comes to the Negotiated Procedure.

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<sup>200</sup> The Austrian Administrative Court (Verwaltungsgerichtshof), for example, has held consistently that any amendment to a bid which will result in an improvement of the tenderer's competitive position in a substantive way would be contrary to the principle of equal treatment and thus should be prohibited (Verwaltungsgerichtshof, judgment of 3.9.2008, 2004/04/0017: "Zur Behebbarkeit von Mängeln in Angeboten hat der Verwaltungsgerichtshof im Erkenntnis vom 25. Februar 2004, Zl. 2003/04/0186, mit ausführlicher Begründung unter Bezugnahme auf Literatur und weitere Judikatur ausgeführt, dass solche Mängel als unbehebbar zu qualifizieren sind, deren Behebung nach Angebotseröffnung zu einer Änderung der Wettbewerbsstellung des Bieters führen kann. Bei der Abgrenzung zwischen behebbaren und unbehebbaeren Mängeln ist darauf abzustellen, ob durch eine Mängelbehebung die Wettbewerbsstellung des Bieters gegenüber seinen Mitbieteren materiell verbessert würde").

<sup>201</sup> OJ L 210, 21.7.1989.

<sup>202</sup> See ECJ in Case C-87/94, *Commission v Belgium (Bus Wallons)*, where it is stated at Recital 55 and 56: "(55) When, as in the present case, a Contracting Entity opts for an Open Procedure, such equality of opportunity is ensured by the requirements under Art 16(1)(a) of the [Utilities Directive 90/531] [...] It must therefore both set a final date for receipt of tenders, so that all tenderers have the same period after publication of the tender notice within which to prepare their tenders, and set the date, hour and place of opening of tenders, which also reinforces the transparency of the procedure, since the terms of all the tenders submitted are revealed at the same time.

(56) When a Contracting Entity takes into account an amendment to the initial tenders of only one tenderer, it is clear that the tenderer enjoys an advantage over his competitors, which breaches the principle of equal treatment of tenderers and impairs the transparency of procedure".

Does the Negotiated Procedure leave a much wider scope for changes after the submission of the tenders since the law allows the Contracting Authority to negotiate the terms of the contract? In Negotiated Procedures is the Contracting Authority prevented from setting conditions that must be complied with at submission stage by all bidders? Are bidders free to change their offers at will after having submitted them or even disregard the terms set out in the tender documents?

It is obvious that this position would be difficult to reconcile with the fundamental principle of equal treatment of tenderers which also applies to Negotiated Procedures.<sup>203</sup> It is well established that the principle of equal treatment does not allow a Contracting Authority to accept tenders which do not comply with fundamental requirements set out in the tender documents. This applies not only to Open and Restricted Procedures but also to Negotiated Procedures, as was held in the *Scan Office Design* case where the CFI established that a Contracting Authority must reject a bid that does not comply with the fundamental mandatory requirements of a specification in a Negotiated Procedure.<sup>204</sup>

How to treat non-compliant tenders in the Negotiated Procedure in view of these principles?

There are diverging opinions on this issue.

Some argue that, in a Negotiated Procedure, a Contracting Authority could allow a bidder who submitted a bid which is non-compliant with a substantive requirement to adjust that bid to bring it into compliance with the tender documents, this being justified on the grounds that in a Negotiated Procedure the Contracting Authority can negotiate with the bidders all aspects of the contract.<sup>205</sup> But to allow tenderers to bring their bids into compliance would be tantamount to allowing deviations from the tender documents and the requirements set out by the Contracting Authority in it without this having negative consequences. Such position, however, is difficult to reconcile with the principle of equal treatment and the judgment in the *Scan Office Design* case.

There is another argument relevant to the contention that it must always

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<sup>203</sup> See Art 30(3), Directive 2004/18.

<sup>204</sup> Case T-40/01, *Scan Office Design SA v Commission*. This judgment relates to the purchase of furniture by the European Commission in a Negotiated Procedure. Even though it is not entirely clear whether the Court's finding relates to the rules of the then applicable Supplies Directive 93/36 or to the internal regulations applicable to the European Commission's procurement, this should in view of the authors not be of decisive importance as the underlying principle should apply regardless of which procurement rules are to be adhered to.

<sup>205</sup> See Arrowsmith, *op. cit.*, para 8.57.

be permissible to bring non-compliant tenders into compliance and to change tenders submitted in Negotiated Procedures. When a Contracting Authority concludes negotiations with the (minimum of) three participants<sup>206</sup> and invites them to submit their best and final offer in order to first evaluate those offers under the award criteria and second to award the contract to the tenderer ranked first, it normally does not want to reopen negotiations with this successful tenderer. In such a situation the best and final offer, a Negotiated Procedure, after the conclusion of the negotiations, could be compared to a tender submitted in an Open or Restricted Procedure. Changes to the best and final offer carry the danger of discrimination against one or more tenderers and will have to be tested against the principle of equal treatment of tenderers.

Consequently, even though the Negotiated Procedure might allow for greater leeway to change terms of the tenders submitted, in particular when the Contracting Authority declared in its tender documents that it intends to negotiate certain terms and conditions with the tenderers, this does not mean that any change will always be admissible.

### **Clarifying, specifying and fine tuning tenders**

#### ***Key concepts***

What is the position on changes to final tenders with regard to the Competitive Dialogue Procedure?

As noted above, in contrast to the position for the Open, Restricted and Negotiated Procedures, Directive 2004/18 contains explicit rules in respect of the completeness of final tenders and the scope for changes to them (see Art 29(6) and Art 29(7)).

There are a number of conclusions to be drawn from the law and the principles that have been established for the other procedures.

It is clear that the qualification of the extent to which such changes are permissible flows from the principle of equal treatment. The wording is similar, albeit not identical, to the Joint Declaration of the Commission and the Council of Ministers of 1989 relating to changes in Open and Restricted Procedures. It would probably be too restrictive to conclude that the discretion given to a Contracting Authority through this provision must be measured against the test set out in the Joint Commission and Council Statement

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<sup>206</sup> Presuming that the Contracting Authority decided to keep competitive pressure upon the participants until the end of the procedure and thus having the best and final offers based on the final contract terms.

with regard to Open and Restricted Procedures. This would be inconsistent with the fact that the Competitive Dialogue Procedure was designed to procure particularly complex projects which – as a consequence of their (legal, financial and/or technical) complexity – cannot be procured through an Open or Restricted Procedure.<sup>207</sup>

It follows that, on the one hand, the scope for clarifying, specifying and completing final tenders after their submission must be at least as wide, but is probably wider, than in Open and Restricted Procedures. It will thus be possible – as with Open and Restricted Procedures – to amend the final tenders to correct obvious errors where it is clear what the correction should be or minor inconsistencies without this having any influence on the substance of the tender.<sup>208</sup>

The discretion given to the Contracting Authority to ask for clarification, specification, fine-tuning and additional information must, however, not be understood in the sense that the dialogue phase will be followed by a phase of negotiations where substantive parts of the specifications or the contract can be renegotiated.<sup>209</sup>

It seems to be more appropriate to regard the final tender phase of the Competitive Dialogue Procedure as being analogous to submission of tenders the Open or Restricted Procedure even though the wording of Art 29(6), Directive 2004/18, suggests that the Contracting Authority enjoys a somewhat wider discretion to have the final tenders adapted than in the Open or Restricted Procedure.

This is underpinned by the concept of “fine-tuning” which must be understood as somewhat different from “clarifying”; also, the possibility to provide “additional information” might be understood as going further than providing information to clarify ambiguities in the tender, maybe even allowing certain minor improvements to the tenders. The underlying justification for allowing the Contracting Authority somewhat more flexibility in having the final tenders amended is that certain details of projects procured through the Competitive Dialogue Procedure might, even at this stage, still have to be finalised to some degree, for example certain design parameters or some details with regard to financing, which will have to be submitted by

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<sup>207</sup> See Art 29(1) and Recital 31, Directive 2004/18.

<sup>208</sup> See Arrowsmith, *op. cit.*, paras 10.37 and 10.44 *et seq.*

<sup>209</sup> See OGC/HMT, “Competitive Dialogue in 2008, Joint Guidance from OGC and HM Treasury, Section 5.4.2, M.Holoubek/K.Holzinger in Schramm/Aicher/Fruhmann/Thienel (ed.), Bundesvergabegesetz 2006 (Austrian Federal Procurement Act 2006), § 162 recital 1 *et seq.*, Heiermann, “Der wettbewerbliche Dialog”, ZfBR 8/2005, Pkt XII and Knauff, “Im wettbewerblichen Dialog zur Public Private Partnership?”, NZBau 2005, heft 5, S. 249 *et seq.*

the successful tenderer only.<sup>210</sup>

As is the case with the other procedures, the principle of equal treatment does not allow a Contracting Authority to accept final tenders in a Competitive Dialogue Procedure which do not comply with fundamental requirements set out in the tender documents and which are thus non-compliant. The Contracting Authority will certainly be able to do the same they are allowed to do in the other procedures. This means that it is, for example, allowed to waive non-compliance with minor formalities, which do not have an influence on the substance of the tender. However, non-compliance with fundamental requirements, regardless of whether they are procedural requirements or substantive conditions, will also have to lead to the rejection of the final tender. The possibility to clarify, specify or fine-tune a final tender cannot be understood as reaching as far as bringing final tenders which are not compliant with fundamental requirements into compliance. The decisive question thus is whether the Contracting Authority's right to waive compliance or the request to adapt the final bid to make it compliant would lead to a violation of the principle of equal treatment.

Another important aspect is that the tenderers have no right to have their final tenders adapted. It is exclusively for the Contracting Authority to request that clarification, specification or fine-tuning is made which can lead to certain changes to the final tender. This also supports the argument that this phase of the Competitive Dialogue Procedure was not designed in order to hold negotiations on certain aspects of the tender but merely to ensure that the final tender satisfies all requirements agreed upon during the dialogue phase.

Already at this stage, i.e. before looking at the specific provisions dealing with changes at the final tender stage in the Competitive Dialogue Procedure, it can be concluded that it is advisable for a Contracting Authority to reduce the scope of changes to the final tender to the minimum necessary both in scope and quantity in order not to endanger the legality of the procedure in view of the principles of equal treatment of tenderers and transparency of procedure.

### ***The “basic features” of a tender***

What are the limits to changes permitted after submission of the final tenders but before evaluating them under the award criteria?

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<sup>210</sup> See above, Table 2. It is clear that the extent of details still to be finalised needs to be limited both in scope and quantitative effect since not to do so might give rise to serious concerns under the principles of equal treatment of tenderers and transparency of procedure.

According to the wording of Art 29(6), Directive 2004/18, the principle of equal treatment would not be respected if the clarification, specification and fine-tuning involved changes to the “basic features”,<sup>211</sup> which are likely to distort competition or have a discriminatory effect. It is important to note that both conditions need to be fulfilled, i.e. the change must at the same time relate to a basic feature of the tender **and** potentially distort competition.

Two matters immediately arise for a Contracting Authority seeking to apply this section of the Directive.

Firstly, the change of a basic feature is likely to distort competition if there is the possibility that it has an influence on the competition for this particular contract. Whether or not the competition in the market concerned under the rules of European or national competition law is also affected, e.g. by way of increasing market power in a geographical or product market, is irrelevant. For the purpose of Art 29(6) the relevant aspect is whether the change of a particular basic feature potentially affects competition for the individual contract offered for tender.

Secondly, Directive 2004/18 does not contain any definition on what are the “basic features” of a tender.

Some guidance on this issue can be drawn from ECJ case law. It can be inferred from the case law that basic features will include all elements of a contract where such a variation which could have led to other providers being interested in participating in this tender procedure.<sup>212</sup> Thus, any change that potentially leads to a different range of companies interested in submitting offers would have to be regarded as a basic feature of a tender.

In the *Rennes Urban Railway* case the ECJ had to decide whether the conclusion (or continuation) of a contract relating to works and equipment linked to the urban district light railway system in Rennes without a prior call to competition infringed procurement law.<sup>213</sup> The ECJ held that, in a Negotiated Procedure which may extend over a long period of time, the parties might take into account of technological developments that take

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<sup>211</sup> The concept of “substantial aspects” of the winning tender (referred to in Art. 29(7)) and whether it is any different from the concept of “basic features” is discussed below.

<sup>212</sup> See Opinion of AG Kokott in Case C-454/06, *Presstext Nachrichtenagentur GmbH v Republik Österreich Bund and others*.

<sup>213</sup> See ECJ judgment in Case C-337/98, *Commission v France (Rennes Urban Railway)*. One of the issues was that the contract negotiations had started prior to the enactment of the Utilities Directive 90/531 but were finalised after its entry into force and, according to the Commission, with substantially different terms than initially envisaged. The Commission claimed that as essential terms of the contract had been renegotiated after the Utilities Directive entered into force the contract should have been put out for tender.

place while the negotiations are under way, without that as such being regarded as a renegotiation of the essential terms of the contract requiring the contract to be put out for tender as a new contract. Even an increase in price that was greater than the rate of inflation during the relevant period did not automatically prove that essential terms of the contract were renegotiated if, as was the case here, the increase was a result of the exact application of the formula for the revision of prices contained in the initial contract.

Another important ECJ judgment shedding light on the issue of what might constitute a basic feature of a tender is the *Presstext* case.<sup>214</sup> In this case the ECJ had to decide on a similar issue as in the *Rennes* case – in essence, it concerned the issue of the circumstances in which amendments to an existing agreement between a Contracting Authority and a service provider may be regarded as being material or essential and thus may constitute a new award of a public contract within the meaning of the Procurement Directives.

The main amendments which the ECJ had to deal in this case were the following:

- Conversion of prices to Euros without changing their intrinsic amount. This was found not to be a material contractual amendment provided that the amounts in Euros are rounded off in accordance with the relevant provisions in force
- A price adjustment which exceeded the amount authorised by the provisions governing the conversion. This was considered as not constituting an amendment to an essential condition if the adjustment was minimal (0.3%) and objectively justified (because it facilitated billing procedures)
- Use of a new price index that replaced the index agreed upon in the initial agreement. This was found not to be an amendment to an essential condition of contract
- Renewal of the waiver to terminate the contract during the period of validity of the contract. This was found not to be a change of an essential contract clause since it covered a short period of time – 3 years – and was thus considered as unlikely to distort competition
- The granting of greater rebates granted by the contractor to the Contracting Authority. This was found not to be a material contractual amendment as it did not shift the economic balance of the contract in favour of the contractor

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<sup>214</sup> See ECJ C-454/06, *Presstext Nachrichtenagentur GmbH v Republik Österreich Bund and others*.

- The assignment of a contract to a wholly owned subsidiary of the original contractual partner was not deemed a material change where the original partner continued to take responsibility for the contract
- A change in the share capital of a listed company was not found to affect the validity of the award of a public contract to that company i.e. is not a material contractual amendment.

In reaching its judgment in this case the ECJ established some general principles with regard to the materiality of changes (Recitals 34-37):

“(34) In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 *Commission v France* [2000] ECR I-8377, paras 44 and 46)<sup>215</sup>

(35) An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted

(36) Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Art 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part, services listed in Annex IA thereto, restrictions on the extent to which Contracting Authorities may use the Negotiated Procedure for awarding services in addition to those covered by an initial contract

(37) An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.”

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<sup>215</sup> It should be noted that, in its judgment in the *Pressetext* case (see above) at Para 34, the ECJ also referred to the *intent* of the parties to renegotiate the essential terms of the original contract, but in practice it then defined intent with reference to the *materiality* of the changes.

The main difference between the *Rennes* case and the *Presstext* case is that the *Rennes* case concerned changes to the contract prior to the conclusion of the contract whereas the *Presstext* case pertains to amendments to a contract that had already been concluded. However, this – in view of the authors – does not constitute a barrier to the use of the findings in the *Presstext* case as a guide to what is to be understood as an essential condition of a contract in the sense used in the Competitive Dialogue Procedure.<sup>216</sup>

A third ECJ judgment relevant to the determination of an essential condition of a contract (also relating to the contract execution period) is *CAS Succhi di Frutta* case<sup>217</sup> in which the Court ruled that any change to a tender process which, had it been known about at the time that final tenders were submitted, would have enabled bidders to submit a different tender is a change to an “essential term” of a contract (in this case a change, after the contract had been awarded and during its execution, to the means of payment for the supplies concerned).

Similarly there remains the question of whether or not changes to the identity of a bidder during the procedure can amount to a substantial change of the tender submitted by that bidder. This is a situation that is in practice of great relevance for bidding consortia. The difficult question behind this issue is how to deal with changes to the composition of a consortium during the dialogue and/or post-tender phase. Directive 2004/18 does not contain explicit rules on this issue. This issue was considered by the ECJ in the *Makedoniko Metro* case.<sup>218</sup> The ECJ made clear in its judgment in this case that this matter can, as a consequence of it not being regulated by Community law, be dealt with by national law and the Contracting Authority. If a Contracting Authority does not include specific rules about if and when it will accept changes then it can be argued that any change in the composi-

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<sup>216</sup> This view is supported by Adrian Brown who has pointed out that, “The Commission’s analysis (in the *London Underground* case) of changes agreed with the preferred bidder prior to entry into the contract may be considered equally applicable, by analogy, to changes made during the course of the contract itself “(see “When do changes to an existing public contract amount to the award of a new contract for the purpose of the EU procurement rules? Guidance at last (in the *Presstext* case)”, Public Procurement Law Review, Sweet and Maxwell, Issue 6, 2008, NA259). Thus in the authors’ view – as has been argued above – it is not difficult to envisage that similar principles should apply to post tender changes during the selection period as to those in the contract execution phase, though, arguably, such principles should be applied more strictly in the during the selection period given that they are at that stage less likely to have been unforeseeable or to have arisen from events outside the control of the parties.

<sup>217</sup> *CAS Succhi di Frutta v the Commission*, Case C-496/99.

<sup>218</sup> ECJ Case C-57/01, *Makedoniko Metro and Mikhaniki AE v Elliniko Dimosio*.

tion of a consortium during the procedure (or, to be precise, after the invitation to participate in the dialogue) will be tantamount to a change of the identity of the bidder (even if the change is confined to companies within the same group).<sup>219</sup>

### **Clarifying aspects of, and confirming commitments in, the winning tender**

After having determined compliance of the final tenders with the conditions set by the Contracting Authority – if need be after having taken recourse to necessary clarification, specification, fine-tuning or additional information – the Contracting Authority must evaluate the remaining tenders on the basis of the award criteria and thus select the winning tender. According to Art 29(7), Directive 2004/18 the tenderer identified as having submitted the most economically advantageous tender may, at the request of the Contracting Authority, 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.

Again, as is the case with Art 29(6), both conditions set out in this provision need to be fulfilled at the same time. Thus, any clarification or confirmation must not modify “substantial aspects” of the tender **and** must not risk the distortion of competition or discrimination.

What is the scope of “clarifying aspects” of the tender and “confirming commitments” contained in the tender?

The wording of Art 29(7) suggests that the scope of changes to the (winning) tender must be construed as narrowly as the one applicable to the preceding phase after receipt of the final tenders, or arguably even more narrowly as the words “clarify” and “confirm” do not allow room for change.<sup>220</sup> It seems evident that every clarification/confirmation that would

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<sup>219</sup> Consequently, the bidder would have to be excluded from the procedure because, strictly speaking, it was not the same entity as had been invited to participate in the procedure but a bidder with a different legal identity. In order to avoid situations like this the Contracting Authority should foresee the possibility of changes and declare at the outset of the procedure if such changes are permissible and, if so, in what circumstances.

<sup>220</sup> See also Arrowsmith, *op. cit.*, paras 10.53 *et seq.*, who argues in favour of scope for change since Art 29(7) says that changes should not be permitted where they modify *substantial* aspects of the winning tender. Thus, for example, changes relating to non-substantial aspects should be permissible. This underlines the importance of a clear and restrictive definition of what constitutes permissible change to “basic features” of tenders and/or “substantial aspects” of the winning tender.

have led to a different result at the evaluation of the tenders in accordance with the award criteria will be impermissible, as this would unarguably have the effect of distorting competition for this particular contract.

Is there a difference between the concepts of “basic features of a tender” in Art 29(6) and “substantial aspects of a tender” in Art 29(7)?<sup>221</sup>

The authors contend that those two concepts do not differ from each other in any material sense, though it might at first sight appear that the use of different words (“basic features” as opposed to “substantial aspects”) seems to indicate that the legislator might have meant to lay down two different tests. This is because, had it not wished to do so, it would have used the same wording for both situations.

Nevertheless, as regards the intention of those two concepts, it is clear that, in the first place, any change that might lead to the distortion of competition between tenderers or having a discriminatory effect is prohibited. Both concepts thus pursue the same goal, regardless of whether the change in question occurs before or after the evaluation of the tenders.

It follows that both concepts are very closely related to each other, the main difference being that in one situation the changes are made prior to the evaluation of the tenders and in the other case after the evaluation of the tenders has been carried out. It would seem very strange if those concepts were to have meanings that vary in essence from each other. If there are differences then – in view of the authors – they are intended, if they exist at all, to be insignificant.

In principle, the position as regards the admissibility of changes in this very last phase of the Competitive Dialogue Procedure ought to be similar to the one with respect to changes made to final tenders prior to their evaluation under the award criteria. This means that the right enjoyed by the Contracting Authority to ask for clarifications of certain aspects and confirm commitments must not be perceived as possibility to revisit the contractual terms.

What is then permissible? It would probably be permissible, for example, to ask the winning bidder to submit documents which, in accordance with the procedural rules set by the Contracting Authority, only the winning bidder is obliged to produce after its appointment as winning bidder.

This could be, for example, the case for the financial arrangements necessary to provide the SPV with sufficient financial means (i.e. equity and debt) to fulfil the tasks assigned to it. Whereas the final tender needs to

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<sup>221</sup> In the German version of Directive 2004/18 the wording is different as well: “grundlegende Elemente des Angebots” (Art 29(6)) and “wesentliche Aspekte des Angebots” (Art 29(7)).

include all commercial details (including price) on the basis of detailed financial term sheets approved by the lenders it does not seem necessary to ask the tenderers to submit the complete financial documentation prior to the appointment as winning bidder. It constitutes good practice (and would most likely be approved by the private sector participants) that this task is left for the winning tenderer only since the resources needed to complete the financial documentation can be – depending on the financing structure chosen by the tenderer – quite significant.

The Contracting Authority will nevertheless have to make sure that the contractual arrangements relating to financing correspond to the commitment given by the tenderer in its final tender. It would thus not be permissible to change the terms of those arrangements in a way that this would lead to a change of a substantial aspect in the tender, thereby distorting competition.

As with changes to final tenders prior to their assessment a restrictive view has to be taken. Any change that results in the possibility of influencing the ranking (in case the other tenderers would have had the opportunity to take this change into consideration with this potentially leading to a different tender being submitted) will have to be regarded as potentially violating the principle of equal treatment. It cannot be in the interest of the Contracting Authority to endanger the legality of the procedure at this stage.

## **PRACTICAL APPLICATION OF LEGAL PRINCIPLES**

### **Defining the “basic features” of a final tender and “substantial aspects” of the winning tender**

In typical PPP contracts the following elements are, on the basis of the general principles discussed above, likely to be regarded as “basic features” of a final tender and/or “substantial aspects” of the winning tender (though this is not necessarily an exhaustive list):

- The payment mechanism
- The price to be paid (including reduction/increase)<sup>222</sup>
- The payment schedule
- The scope of the contract (including reduction/increase)
- Change of ownership of the service provider

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<sup>222</sup> And the means by which the payment is effected. See Case C-496/99, *CAS Succhi di Frutta SpA v Commission*.

- The timetable for the execution of the contract (which may mean acceleration or delay of the start or completion date)
- Contract length (duration)
- Changes in performance indicators or targets for them
- Changes in the way the performance management regime is conducted
- Changes in contract delivery methods
- Changes in the materials to be used
- Changes in the place in which the contract is to be delivered.

They will probably also include changes in the risk allocation (as reflected in the changes in a number of contractual clauses, even though it is not necessary that these changes lead to an increase (in terms of quality and quantity) of the risks transferred to the private partner (it is sufficient if the project's risk profile is altered by the change), such as those relating to:

- Ownership of assets
- Termination liabilities
- Gain sharing on refinancing/other windfall gains
- Definition of availability of service
- Price indexation
- Compensation on complete or partial early termination of the service
- Performance guarantees
- Delay events and their consequences
- Insurances (in particular the definition of, and consequences of, risks that are or become uninsurable)
- Warranties and indemnities
- Amount and scope of the supplier's liability for direct and indirect losses
- Definition of *force majeure* and its consequences
- Step in rights for lenders
- Step in rights for the Contracting Authority
- Dispute resolution procedures.

A change to “basic features” of a tender or the “substantial aspects” of the winning tender will probably also include:

- Changes to the technical specifications
- Alterations to the scope of the project (e.g. due to new budgetary constraints or to the wish of the Contracting Authority to include additional works/services)
- Changes of the procedural rules (including changes of the award criteria and other conditions).

As discussed above the key question to answer is whether or not the variation has or risks having the effect of placing the other tenderers at an unfair advantage.

### **Making changes to final tenders and the winning tender**<sup>223</sup>

The definition of the circumstances in which variation might be permitted can most usefully be considered from the negative perspective i.e. the type of changes of “basic features” of a tender or the “substantial aspects” of the winning tender which are, by definition, likely to be regarded as – or could possibly lead to – a distortion of competition (which is the overriding test for whether or not a variation is likely to be permitted after the submission of final tenders).

Even though the ECJ judgments cited above deal with the question whether a particular change constitutes an essential condition of a contract or a material contractual amendment, they are most useful and relevant as it can be inferred from them that any change to an essential condition of the contract will most probably also have to be seen as a change of a basic feature or a substantial aspect of a tender. From these judgments it can further be concluded that the appraisal of whether a change to a particular contract concerns a basic feature or a substantial aspect of the tender must be made on a case by case basis by the Contracting Authority.

**Variations not permitted** may be summarised as potentially including:

- Changes that have or could have an impact on the evaluation of the tenders in accordance with the award criteria, in particular on the ranking of the tenders, will always have to be seen as relating to basic features or substantial aspects of a tender and are thus likely to distort competition<sup>224</sup>
- Changes to a tender that shift the economic balance of the contract in favour of the contractor relate to essential terms (i.e. basic features or substantial terms) of the contract and are most likely to entail a distortion of competition to the detriment of potential competitors<sup>225</sup>
- Amendments to the final tender or winning tender that would change the

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<sup>223</sup> As noted above, a strict interpretation of Art 29(6) and Art 29(7) would suggest that *no changes at all* can be made to “basic features” of a tender and “substantial aspects” of the winning tender, as opposed to the restrictive approach advocated here by the authors, which advocates permitting changes in very exceptional and unforeseen circumstances and certain non-material changes in narrowly defined circumstances.

<sup>224</sup> ECJ Case C-87/94, *Commission v Belgium (Bus Wallons)*.

- identity of the winning bidder<sup>226</sup>
- Changes which, if known about at the time that final tenders were submitted, would have enabled bidders to submit a different tender<sup>227</sup>
- Changes to price are almost always an important condition of a public contract and thus a basic feature of a tender and a substantial aspect of the winning tender likely to affect competition
- Changes significantly extending the scope of the contract to encompass services/works not initially covered by the call for tender are very likely to distort competition
- Changes not being part of the initial contract that, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted (e.g. because other parties, or more parties than those having expressed an interest, would have been interested had they known about the change at the beginning of the procedure)<sup>228</sup>
- Changes which determine a non-compliant tender to be compliant in contravention of the principle of equal treatment<sup>229</sup>
- Changes which relate to matters within the control of the Contracting Authority or the winning bidder at the time that final tenders were called for
- Changes which relate to matters where provision for change was not made by the Contracting Authority in the call for final tenders.

As regards the circumstances in which **variations might be permitted**, these may be summarised as potentially including:

- Where justified on the public policy, public security or public health grounds referred to in Recital 6, Directive 2004/18, though, as noted by the Commission in the PPP Green Paper at p. 16, these exceptions are always to be construed very narrowly and must not be used as a disguised method to discriminate against certain tenderers. Furthermore, the reasons for allowing such variation must not have been known at the beginning of the award procedure – it is obvious that the Contracting

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<sup>225</sup> ECJ Case C-454/06, *Pressetext Nachrichtenagentur GmbH v Republik Österreich Bund and others*.

<sup>226</sup> ECJ Case C-57/01, *Makedoniko Metro and Mikhaniki AE v Elliniko Dimosio*.

<sup>227</sup> See *CAS Succhi di Frutta v Commission*, ECJ Case C-496/99.

<sup>228</sup> This is a difficult judgment to make in practice and clearly Contracting Authorities cannot be entirely immune from the risk of challenge based on the unknown and difficult to anticipate intentions of a potentially very broad class of persons so, in practice, the test is one of reasonableness.

<sup>229</sup> See Case C-243/89, *Commission v Denmark (Bridge on the Storebaelt)*.

Authority, had they been known, could have incorporated them into the award procedure from the beginning

- The converse of the matters listed above, with the following interpretation:
  - Amendments arising from change of law or administrative regulations outside the control of the Contracting Authority may be grounds for permitting variation
  - Grounds for the use of the Negotiated Procedure without notice such as “major inconvenience” and “strict necessity” should not be included in the grounds for permitting variation, though “unforeseen circumstances” might be<sup>230</sup>
  - Matters arising since the submission of final tenders which might fundamentally affect the need for, or the affordability of, the service by the Contracting Authority, the ability of bidders to deliver it economically<sup>231</sup> or the crystallisation of matters referred to in the contract as material adverse changes which would allow bidders to withdraw their offer of finance may be causes for variations
  - Amendments to tenders may be permitted if they would be regarded as clarifying and supplementing the content of tenders in the Open and Restricted Procedures, according to the 1989 joint statement of the Commission and the Council referred to above e.g. which arise from straightforward arithmetical errors visible on the face of the tender, which correct the period of validity of a tender,<sup>232</sup> which correct the failure to submit a document provided that the overwhelming majority of documents have been submitted and the failure to submit a document does not accord the bidder an opportunity to improve its tender, which are straightforward confirmation by the bidder of compliance with procedural rules or acceptance of contract terms or ones which can, if referred to a bidder, be answered with a simple affirmative or negative answer and which do not accord the bidder an opportunity to improve its tender<sup>233</sup>

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<sup>230</sup> These will not necessarily be restricted to matters which typically fall within the contractual definition of *force majeure* and may include matters such as adverse weather conditions which will often contractually fall within the category of relief events.

<sup>231</sup> Determining what constitutes a matter which fundamentally affects the need for the service or the ability of all bidders or any one bidder to deliver it economically is not, of course, an easy judgment, though matters such as, for example, a collapse of the world financial market, an increased terrorist threat or major technological change. These matters might, of course, be valid grounds for the cancellation of a tender procedure.

<sup>232</sup> See Case T-211/02 *Tideland Signal Ltd v Commission*. The ECJ also referred to the principles of proportionality and sound administration, which are consistent with the examples referred to in this section.

- Non-material changes arising before the selection of the winning bidder may be permitted if the Contracting Authority can demonstrate that they would not have a differential effect on bidders, i.e. would impact equally all bidders and insofar as they would not have changed the scope of original interest in being short listed for the contract, do not arise from matters within the control of the Contracting Authority or bidders at the time that final tenders were called for, would not change or risk changing the identity of the winning bidder and relate to matters where provision for change was made by the Contracting Authority in the call for final tenders
- Non-material changes arising after the selection of the winning bidder may, even if they change the economic balance of the contract in favour of the winning bidder, be permitted insofar they would not have changed the scope of original interest in being short listed for the contract, would not have enabled losing bidders to submit a different tender, do not arise from matters within the control of the Contracting Authority or the winning bidder at the time that final tenders were called for, would not change or risk changing the identity of the winning bidder and relate to matters where provision for change was made by the Contracting Authority in the call for final tenders.<sup>234</sup>

As regards the question of the materiality of permitted changes, in the *Pressetext* case the ECJ, as noted above, found that some of the amendments (including a price reduction and an increase of rebates) to the initial contract that have not been agreed upon in the initial contract were “not material” even though they related to a basic feature of the contract. Even though some guidance can be drawn from this case, the authors are of the view that it is in practice impossible to set numerical parameters or even a range within which changes to contract clauses would always have to be regarded as immaterial. Numerical parameters are hard to set, in particular in view of the fact that there is very little case law and even if there were it is clear that the findings would have to be assessed against the facts of each case individually. Where changes may or may not be permitted depending on their quantum, the Contracting Authority has to attempt to determine for

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<sup>233</sup> See Case T-19/95 *Adia Interim SA v Commission*.

<sup>234</sup> Thus the scope of the strictly limited areas (see Table 2) which in PPP contracts may not be fully resolved at the time that the winning bidder is selected i.e. finalisation of interest rates for loans, specification of detailed room designs and identification of sub-contractors should be identified by the Contracting Authority and notified to bidders at the time that final tenders are called for.

itself what degree of change constitutes an immaterial change. It is in any case advisable to insert into each contract a mechanism that allows the parties to take into account certain changes that will become necessary during the contract duration.<sup>235</sup> This requires some thinking ahead, which can be expected from a diligent Contracting Authority in any case. If this were the case any change carried out on the basis of such change mechanism incorporated into the initial contract can be justified much more easily than changes that need to be carried out without there being such a contractual clause.

Possible guidance may also be drawn (though this would not necessarily be a guide to how the ECJ or a national court would interpret the admissibility of a given level of change) from the fact that:

- Variations of less than 5% would not, in most professional contexts, be regarded as material, taking together the overall value of all the gross quantitative variations irrespective of their direction
- In the London Underground PPP state aid decision (see above) the Commission accepted that changes to the contract arising from negotiations after the selection of the preferred bidders which might, at maximum, increase by 6.8% the amount payable to one of them did not, in the particular circumstances of the case, breach state aid rules.

Thus the question of the materiality of permitted changes is one which will need to be determined on a case by case basis.

## **MANAGING THE POST TENDER PERIOD EFFECTIVELY**

### **Objectives**

As noted above, the key objectives for the Contracting Authority in the post tender period are to:

- Resolve the issues which must be definitively resolved before the winning bidder is selected, i.e. there could be no further discussion about them once the winning bidder has been selected (see above, Table 2)
- Reach the maximum possible resolution of the contract terms which could not be fully resolved at the point that the winning bidder is selected (see above, Table 2)
- Ensure that the winning bidder selected is the one which has submitted the tender which is the most economically advantageous tender according to the award criteria and is both credible and sustainable

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<sup>235</sup> Such as for changes in law, changes in services, refinancing etc.

- After the selection of the winning bidder and before the conclusion of the contract to finalise all the remaining contract terms which required some clarification and confirmation (further detail) of commitments in the winning tender, i.e. to ensure that all contract terms are finalised before the contract is signed such that, at the point when the contract is concluded, the service provider can commence the construction phase and the Contracting Authority can monitor its implementation. Put simply, there should be no matters unresolved at the point of conclusion of the contract
- Adopt a restrictive approach (minimising the extent to which changes are made to the contract after tenders have been submitted and even more so after the selection of the winning tender), to what is done while “clarifying”, “specifying” and “fine-tuning” tenders and “clarify aspects of (the winning) tender” and “confirm commitments in (the winning) tender”.

The effective conduct of the earlier phases of the process will enable the Contracting Authority to take a restrictive approach to what can be done in the post tender period, and thus to ensure that the post-tender period is as short as possible (bearing in mind, of course, that this is desirable to actually ensure that the project delivery can begin). This includes the period between the point of time when the winning tenderer is appointed and the point of time when the contract is concluded.

### **Development of guidelines for the post tender period**

As noted above, Directive 2004/18 leaves open important issues with regard to the Competitive Dialogue Procedure such as the exact scope of the concepts of “clarifying, specifying and fine-tuning final tenders” or “clarifying aspects of, confirming commitments in, the winning tender”. So far, there is practically no case law on the Competitive Dialogue Procedure in the ECJ and very little in national courts. The legal uncertainty caused by this lack of clear guidelines might lead Contracting Authorities to refrain from using this new procedure and drive them – despite the legal risk going along with this option – to use the Negotiated Procedure instead with which it is much more familiar.

The effective application of the Competitive Dialogue Procedure, in particular with a view to a restrictive approach, thus requires the development<sup>236</sup> and, of course, implementation in practice, of guidelines developed in advance of the receipt of tenders as to what constitutes “clarifying, spec-

ifying and fine tuning of tenders received” and “clarifying and confirming commitments in the winning tender”.

These guidelines need to be consistent, at least, with Directive 2004/18,<sup>237</sup> ECJ<sup>238</sup> and national case law relevant to procurements conducted under procedures other than Competitive Dialogue,<sup>239</sup> the Commission’s Explanatory Note on Competitive Dialogue<sup>240</sup> the PPP Green Paper<sup>241</sup> and national guidance.<sup>242</sup>

The development of such guidelines, which could act to reduce the uncertainty deriving from the evolution of law through decisions in individual cases, represents a step with which the authors concur towards what one commentator has referred to as “positive, principled law making” even though its effect would be purely declaratory.<sup>243</sup> This is particularly true given that the sources cited above do not necessarily provide comprehensive and consistent guidance as to what a Contracting Authority should and should not do.

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<sup>236</sup> Though such guidelines would need to be adopted by an individual Contracting Authority for a particular award process, in practice there would be template guidelines available for customisation, which, as the authors argue below, (see Chapter 6) should be developed at European and national level.

<sup>237</sup> Including, in particular, in this context, Recital 2 (setting out the Treaty principles relevant to public procurement and the public procurement principles derived from them), Art 29 (the provisions on Competitive Dialogue) and Art 31 (the provisions on the use of the Negotiated Procedure without prior publication).

<sup>238</sup> These include cases referred to above such as Case C-87/94, *Commission v Belgium (Bus Wallons)*, Case C-243/89, *Commission v Denmark (Bridge on the Storebaelt)*, Case C-337/98, *Commission v France*, Case C-496/99, *CAS Succhi di Frutta SpA v the Commission*, and Case C-454/06 *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund) and others*.

<sup>239</sup> For a helpful summary of examples of the different approaches in national law can be, see Vito Auricchio, “The problem of discrimination and anti-competitive behaviour in the execution phase of public contracts”, *Public Procurement Law Review*, Sweet and Maxwell, Issue 5, 1998, p. 113 *et seq.* Many of the examples cited in this article arise from construction law cases, which the authors commend as a complex but helpful source of guidance in this matter, particularly as it can sometimes be very difficult accurately to establish sub-surface ground conditions in advance of actual work, especially where deep tunnelling is involved.

<sup>240</sup> In particular, in this context, Section 3.3.

<sup>241</sup> In particular, in this context, Section 2.3. which refers to the phase after the selection of the private partner.

### Content of guidelines for the post-tender period<sup>244</sup>

To be useful, the content of the guidelines need, non-exhaustively, to address, at minimum, the following issues:

- What the Contracting Authority considers to be the “basic features” of a tender and “substantial aspects” of the winning tender
- In what circumstances might variation be permitted in the “basic features” of a tender and “substantial aspects” of the winning tender without risking the distortion of competition or discrimination.

### Key tasks in the post tender period

As regards the conduct of the post-tender phase itself, it is also important for the Contracting Authority to ensure that it:

- Continues to comply with the legal requirements for equality of treatment, non-discrimination and confidentiality, including, and in particular, maintaining strict equality of time on its own part and that of bidders for clarifying, specifying and fine tuning of tenders received relative to the matters to be addressed in the tenders
- Does not, except in exceptional circumstances arising from matters outside the control of the Contracting Authority at the time that final tenders were called for, change its requirements for the contract in a way which would materially impact on the economic balance of final tenders already received
- Does not change the previously agreed award criteria, or weighting of them
- Evaluates the final tenders in accordance with the agreed award criteria and guidelines for scoring them.<sup>245</sup> This means, *inter alia*, that the Contracting Authority, in evaluating tenders:
  - Must apply the award criteria, sub-criteria and weightings un-

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<sup>242</sup> As noted above, the principles set out Commission’s decision in the *London Underground* state aid case may also be relevant to the development of such guidelines.

<sup>243</sup> See Michael Bowsher, “EU Procurement: The Regulation of Negotiations, Changes and Extensions of Contracts”, Monckton Chambers, March 2002.

<sup>244</sup> For the avoidance of doubt, the authors are well aware that, as will be clear from a review of the breadth and content of the above sources of authority, the development of guidelines is likely to be a far from easy task.

<sup>245</sup> For the avoidance of doubt, the authors do not here seek to list all issues relevant to the evaluation of tenders, but aim to highlight what, in their experience, are the most common mistakes made by Contracting Authorities.

- changed to evaluate the tenders submitted
- Should prepare in advance, and apply in practice, guidelines for the scoring of tenders
- Must not take into account any factors not included in the award criteria
- Must not take into account any factors not included in the tenders submitted
- May, if it has included sustainability and credibility in the award criteria, assess the risks associated with the deliverability of the bid made, though this is not intended to confer unrestricted freedom of choice on Contracting Authorities<sup>246</sup>
- May exclude tenders for failure to comply with procedural requirements and must generally do so for tenders submitted late
- Must award the contract to the most economically advantageous tender
- May confirm that any update in the final tender of information required at short listing stage for the short listing of a bidder does not alter the capability of the tenderer to be short listed and thus to submit a tender
- Must ensure that it can reconcile interim submissions with final tenders
- Applies the principles of equality of treatment and non-discrimination between tenderers in respect of the matters such as the composition of the Evaluation Committee and the information taken into account, which must be relevant and properly documented
- Does not, except in exceptional circumstances arising from matters outside the control of the Contracting Authority at the time that final tenders were called for, change any law or administrative regulations within its control which would materially impact on the economic balance of final tenders already received
- Has an appropriate strategy in place for the resolution of post tender/post winning bidder issues (which includes ensuring that no fundamental issues are re-opened by bidders)
- Should avoid delay in its evaluation of final tenders and the requests for

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<sup>246</sup> See ECJ Case C-19/00 *SIAC Construction Ltd v the County Council of the County of Mayo*, where one of the issues at stake was the extent to which the tendered price was likely to be the ultimate cost. The Contracting Authority relied on the judgment of an expert to assess the difference between the two and it was ruled that they could do so in defined circumstances. It is not clear to what extent different scenarios may be taken into account in this type of assessment, though this appears to have allowed by the ECJ in the *Esedra* case (see above).

the information necessary for it to clarify, specify and fine tune tenders received or to clarify and confirm commitments in the winning tender<sup>247</sup>

- Allows reasonable but not necessarily unlimited time for bidders to respond to the Contracting Authority’s requests to “clarify”, “specify” and “fine-tune” tenders and “clarify aspects of (the winning) tender” and “confirm commitments in (the winning) tender”
- In the case of PPP contracts, tracks movements in market interest rates which might impact on the terms on which finance is finally available to the winning bidder
- Complies with the Alcatel standstill requirements
- Complies with the legal requirements for the notification of contract award both to bidders<sup>248</sup> and to OJEU<sup>249</sup>
- Obtains a robust legal opinion that the contract finally awarded is consistent with the contract advertised
- Confirms that the project as procured is still affordable and still value for money as compared to alternative ways of realising the project considered at the time that the original options appraisal was developed
- Documents all the commitments of the winning bidder in such a way as to ensure that fulfilment of those commitments can be tracked even when those who were responsible for conducting the procurement procedure are no longer engaged with the contract
- Maintains a complete and auditable trail of contacts and exchange of information between the Contracting Authority and bidders and documents the reasons for any changes made to tenders and/or the contract documentation in the post-tender phase
- Finalises the arrangements for the operation of the contract management team (staffing, procedures, information systems etc.)
- Documents and implements a strategy for how to respond to losing bidders, particularly where, as advocated here, bidders are required to come with committed finance.

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<sup>247</sup> The consequences of significant delay were in part the reason for the changes to the contract which were examined in the Case C-337/98, *Commission v France (Rennes Urban Railway)*, though good procurement practice and project management ought to ensure that the delays which occurred in that case are very rare.

<sup>248</sup> See Art 41, Directive 2004/18.

<sup>249</sup> Art 35, *ibid.*

### **Key challenges in the post tender period**

The most difficult challenge for a Contracting Authority is, as noted above, likely to be what constitutes a material change to a tender.

In addition, other difficult judgments<sup>250</sup> are likely to be in respect of:

- Responding to bids which the Contracting Authority considers to be based on either implausible and/or unsustainable assumptions
- The degree of risk bidders are expected to take in respect of changes in the terms on which finance is available in the case of PPP schemes
- The further detail of designs between those submitted at final tender stage and the conclusion of the contract, which should not materially impact on either the cost of the project or the outcomes to be achieved
- Ensuring that changes in proposed sub-contractors arising after the short listing stage do not impact on the ability of the bidder/winning tenderer to deliver the contract and would not have changed the short listing decision
- Ensuring that changes in the ownership of the service provider (or one of the Consortium members) arising after the short listing stage do not impact on the ability of the bidder/winning tenderer to deliver the contract and would not have changed the short listing decision
- Applying rigour in the final judgment about whether or not the contract continues to represent value for money, given the effort which has been invested to that stage and the impact of the need to re-open the procurement process on the service needs of the Contracting Authority<sup>251</sup>
- Responding to developments within the business of the winning bidder which may call into question their ability to deliver the contract
- Dealing with late challenges to the procurement process, with the need to strike a balance between rapidly disposing of challenges which are frivolous, unfounded and/or malicious and being open to respond seriously to challenges which may be based on a genuine failure to conduct the procurement process properly.<sup>252</sup>

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<sup>250</sup> Assuming that there are no fundamental changes in market conditions which affect the need for the service, the ability of bidders to deliver it economically or, in the case of a PPP, the ability of bidders to raise finance.

<sup>251</sup> Similar pressures have, in the authors' experience, resulted in late concessions being made to the winning bidder, a temptation which should be resisted, difficult though this may sometimes be.

<sup>252</sup> In reaching this judgment, a Contracting Authority will need to take account of the national review procedures with which they must comply if the bidder does not accept the rejection of a complaint and the propensity of those responsible for the review procedures to favour either bidders or Contracting Authorities.

## Financial close

In PPP contracts, there are different times at which the financial close of the contract – normally understood as the point when financing agreements have been executed and conditions precedent (e.g. hedging arrangements) have been satisfied or waived and thus draw downs are now permissible – could be effected.<sup>253</sup>

The main options for the timing of financial close are to realise it at the same time as contract conclusion or, more commonly, to give the winning bidder, having submitted the complete financial documentation (except for loan interest rates and the terms of hedging) a short period defined in the contract, typically between 14 days and one month, to achieve financial close. If financial close must be realised at the same time as contract conclusion it becomes a procedural requirement of the award procedure, whereas in the second case, it becomes a contract condition to be performed after the conclusion of the contract. Thus the debate about the timing of financial close rests mainly on how in practice any failure to achieve it can be enforced in either case. As a means of effecting any enforcement which may be necessary the Contracting Authority could require a tender guarantee, typically 1%-3% of the value of the bid, which can be claimed by the Contracting Authority if the bidder fails to effect financial close, whether or not this occurs at the same time as, or shortly after, contract conclusion.

The approach to this matter does not, however, affect the substance of the approach advocated in this book that all terms and conditions of the contract should be finalised prior to the conclusion of the contract. Furthermore, the fact that financial close may occur shortly after contract conclusion does not imply that any changes can be made to the *terms of the loan*, as opposed to the *price of the loan*. Nor does it imply that lenders can withdraw their support for the loan, except in the exceptional circumstances referred to in the material adverse change clause of the lenders' commitment letter.

## TIMING OF THE ALCATEL STANDSTILL

As noted above, a standstill period, designed to enable dissatisfied losing bidders to challenge the award of the contract before it is signed with the winning bidder, has been a requirement in procurement processes since the

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<sup>253</sup> There is no uniform or unique definition of "financial close" but the above cited seems to be the most frequently used in practice.

ECJ judgment in the *Alcatel Austria* case.<sup>254</sup>

The availability of effective remedies to enable those having, or having had, an interest to challenge such decisions is relevant to all award processes, but particularly so to complex contracts which qualify for the use of Competitive Dialogue and which are thus likely not only to be of high value but also prestigious.

But it remains a point of debate amongst legal commentators about precisely when, in a Competitive Dialogue procedure, the standstill period should be invoked.

From the case law of the ECJ and the Remedies Directive the following principles can be deduced:

- In the *Alcatel Austria* case<sup>255</sup> the ECJ had to decide whether the Remedies Directive 89/665 requires that award decisions must be able to be challenged before review bodies prior to the conclusion of the contract. This case related to the review system provided by the Austrian Federal Procurement Act of 1993 which did not contain any obligation on the Contracting Authority to make the award decision itself known to the tenderers. The award decision was a purely internal decision by the Contracting Authority that at the point of time when it was received by the successful tenderer led to the conclusion of the contract under Austrian civil law. The review body responsible for hearing complaints, however, was only empowered to set aside unlawful decisions before and until the contract has been concluded. After the contract had been concluded the review body was only empowered to decide on whether or not the award had been unlawful possibly leading to damages but not to the setting aside of the award decision or the cancellation of the contract that had been concluded on the basis of an unlawful award decision. In practice, the unsuccessful tenderers did not have any knowledge about the point of time at which the Contracting Authority took its award decision and at which it was communicated to the successful tenderer. And when they got to know that the award decision was taken in favour of one of their competitors the contract had been already concluded which meant that the only remedy still available for the aggrieved tenderers was damages. The ECJ found that it must always be possible for a tenderer to challenge the award decision,<sup>256</sup> which was referred to by the ECJ as “the most important decision of the Contracting Authority”,<sup>257</sup> before a review body.<sup>258</sup> The ECJ found that the Reme-

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<sup>254</sup> ECJ judgment in Case C-81/98, *Alcatel Austria AG and others v Bundesministerium für Wissenschaft und Verkehr*.

<sup>255</sup> *Ibid.*

dies Directive 89/665 draws a distinction between the stage prior to the conclusion of the contract, and the stage subsequent to its conclusion, in respect of which a Member State may, according to the second subparagraph of Art 2(6), provide that the powers of the body responsible for the review procedures are to be limited to awarding damages to any person harmed by an infringement. As from the date of the *Alcatel Austria* judgment it was clear that Contracting Authorities were obliged to observe a standstill period after having taken the award decision and prior to the conclusion of the contract<sup>259</sup>

- In infringement proceedings initiated by the Commission against Spain the ECJ had the opportunity to reiterate its findings in the *Alcatel Austria* judgment and, in addition, to clarify that the Member States' duty to enable tenderers to have the award decision reviewed also entails the duty to inform the tenderers of the award decision before the conclusion of the contract. Moreover, the ECJ has held that in order to guarantee the effectiveness of the Remedies Directive 89/665 a reasonable period must pass between the moment when the award decision is communicated to the unsuccessful tenderers and the conclusion of the contract to allow them to bring applications to set this decision aside, including applications for interim measures<sup>260</sup>
- The Remedies Directives 89/665 and 92/13 (in the version prior to their amendment provided for by Directive 2007/66) do not, however, contain either the explicit obligation to communicate the award decision or to observe a standstill period between the award decision and the conclusion of the contract. These obligations could only be deduced from the case law of the ECJ. The Community legislator felt it necessary to include these minimum standstill and information obligations into the Remedies Directives in order to improve their effectiveness and amend-

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<sup>256</sup> Art 2(1)(b) of Remedies Directive 89/665 does not define the decisions taken unlawfully which a party may ask to have set aside. The Community legislator confined itself to stating that such decisions include those containing discriminatory technical, economic or financial specifications in the documents relating to the contract award procedure in question.

<sup>257</sup> *Ibid.*, Recital 38.

<sup>258</sup> *Ibid.*, Recital 43: "It follows from those considerations that the combined provisions of Art 2(1)(a) and (b) and the second subparagraph of Art 2(6) of Directive 89/665 are to be interpreted as meaning that the Member States are required to ensure that the Contracting Authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages."

ed them to that effect. Directive 2007/66 amending the Remedies Directives 89/665 and 92/13<sup>261</sup> thus not only provides for a minimum standstill obligation<sup>262</sup> but also for a definition of the minimum information which the Contracting Authority is obliged to send to tenderers together with the award decision.<sup>263</sup> The award decision must be accompanied by a summary of the relevant reasons in accordance with Art 41(2) of Directive 2004/18, subject to the provision of Art 41(3), and a precise statement of the exact standstill period applicable pursuant to national law transposing the Directive 2007/66. Art 41(2) obliges the Contracting Authority, on request from the party concerned, to inform:

- Any unsuccessful tenderer of the reasons for the rejection of his tender, including – if applicable – the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements
- Any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer.

In addition, Member States are obliged to provide that a contract which has been awarded by a Contracting Authority prior to the elapsing of the minimum standstill period must be considered ineffective by a review body.<sup>264</sup> The provisions of Directive 2007/66 must be implemented by

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<sup>259</sup> *Ibid.*, Recitals 40-42:

“(40) The argument based on the lack of an intervening period between the decision awarding a contract and the conclusion of the contract is irrelevant. The fact that there is no express provision in that connection cannot justify interpreting Directive 89/665 in such a way as to remove decisions awarding public contracts systematically from the purview of the measures which, according to Art 2(1) of Directive 89/665, must be taken concerning the review procedures referred to in Art 1

(41) With regard to the time which must elapse between the decision awarding a contract and its conclusion, the United Kingdom Government also states that no such time is specified in Directive 93/36 and that the Directive’s provisions, as Arts 7, 9 and 10 thereof show, are exhaustive

(42) All that need be stated in that regard, as the Advocate General noted in points 70 and 71 of his Opinion, is that those provisions correspond to the equivalent provisions in the directives which preceded Directive 89/665, the first recital in the preamble to which states that they “do not contain any specific provision ensuring their effective application”.

<sup>260</sup> ECJ judgment of 3 April 2008, Case-C444/06, *Commission v Spain*, Recitals 36 *et seq.* See also Martin Oder, “Remedies prior to the conclusion of a contract – A note on the judgment of the Court of Justice in *Commission v Spain*”, Public Procurement Law Review, Sweet and Maxwell, Issue 5, 2008, NA 212 *et seq.*

<sup>261</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665 and 92/13 with regard to improving the effectiveness of review procedures concerning the award of public contracts.

- the Member States by 20 December 2009 at the latest
- It follows from the above cited case law and the provisions of the Remedies Directives that the standstill obligation has to be observed after the award decision has been taken and notified to the tenderers. The award decision is not defined explicitly in the Remedies Directives. Usually it is referred to as the decision according to which the Contracting Authority makes public its intention to all tenderers concerned to award the contract to the successful tenderer.<sup>265</sup> The award decision is usually the last decision taken by the contracting Authority before it concludes the contract. This requires that all issues have been resolved, i.e. there are no further changes that will modify the terms and conditions under which the contract will be concluded.<sup>266</sup>

There remains the separate issue of the *length* of the *Alcatel* standstill i.e. whether or not a Contracting Authority should allow for a longer standstill than the minimum period of 10 calendar days now incorporated into the revised Remedies Directive (Directive 2007/66) at Art 2(a) or whether a requirement to do so is incorporated into national law. There are differences of view amongst Member States. Austrian law provides, for example, at present for a 14 day standstill period. The minimum 14 day standstill period

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<sup>262</sup> See Art 2(a), Directive 89/665. At least 10 calendar days with effect following from the day following the date on which the contract award decision is sent to the tenderers concerned by fax or electronic means (15 calendar days if other means of communication are used).

<sup>263</sup> See Art 2(a)(2) sub-para (4), Directive 89/665.

<sup>264</sup> See Art 2(d). The consequences of a contract being declared ineffective are a matter of national law, which may provide for retroactive cancellation of the contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed (in the latter case the Member States must provide for alternative penalties in accordance with Art 2(e)(2), i.e. the imposition of fines on the Contracting Authority or the shortening of the duration of the contract).

<sup>265</sup> According to the new Art 2(a) of the Remedies Directives all tenderers who have not yet been definitively excluded from the award procedure are deemed to be concerned. An exclusion is definitive if it has been notified to the tenderers concerned and has either considered lawful by an independent review body or can no longer be subject to a review procedure (because, for example, the time period foreseen by national law during which an application for review of the exclusion decision taken by the Contracting Authority has expired without the tenderer concerned having brought an application before the competent review body).

<sup>266</sup> The latest guidance in the United Kingdom leaves the matter open, simply saying that it should happen when all “matters material to the decision to award the contract to the winning bidder have been resolved” i.e. that “there will be no further changes that will modify the terms under which the contract will be concluded”. See “Competitive Dialogue in 2008 – Joint Guidance from HM Treasury and OGC”, June 2008, p. 30.

will however – as a consequence of the amendment to the Remedies Directive allowing for the shorter period of 10 calendar days – be reduced to the minimum required by the new Remedies Directive, if the proposal recently put forward to the Parliament is adopted without changes to this point. The United Kingdom’s implementing regulations for Directive 2004/18 provide for a minimum of 10 days (Public Contracts Regulations 2006, SI 2006/05, Regulation 32).

To what extent is it legally possible for the Contracting Authority to trigger the standstill period by declaring a specific decision as being the award decision?

Neither the Remedies Directive nor the case law of the ECJ prevents the Contracting Authority from shaping the procedure in accordance with its requirements provided that it respects the limits set by the provisions of the Procurement Directives and the fundamental EC Treaty principles governing procurement i.e. the principles of transparency, non-discrimination and equal treatment of tenderers. But it is also clear that the Contracting Authority cannot structure its procedure in a way to circumvent procurement law or to curtail the rights given to tenderers by EC procurement law, in particular the right of all tenderers to be informed about the award decision and have it reviewed before the contract is concluded.

Thus, even though the Contracting Authority enjoys some discretion as to which decision it takes at which point of time in the procedure it cannot, for example, avoid the exercise of the rights given to tenderers by the law by referring to decisions according to the name given to them rather than by their content. So, a decision which is referred to as the award decision by the Contracting Authority but which in reality does not have the legal status of an award decision cannot trigger the standstill obligation. This does not mean, however, that the lawfulness of such a decision to which a Contracting Authority erroneously refers to as the award decision cannot be challenged by a tenderer concerned. It might still be a decision taken within the framework of a procurement procedure within the sense of Art 1 of the Remedies Directives and thus be open for review.

In view of these principles, at what point of time in a Competitive Dialogue procedure should or must the standstill period be invoked?

In the Competitive Dialogue there are (at least) two points of time conceivable for the application of the standstill obligation:

- At the time of selection of the winning tenderer; or
- At the time after the winning tender – where necessary – underwent the process of clarification and confirmation of commitments prior to the conclusion of the contract.

Ideally, the final tender of the winning bidder would not need to be changed at all, allowing the conclusion of the contract to be a procedural formality. Where there is no need to ask the successful tenderer to change its final tender, i.e. where there are no aspects to be clarified or commitments to be confirmed, the selection decision can be seen as the decisive and final act taken by the Contracting Authority and thus can also be regarded without doubt as the award decision.<sup>267</sup>

But, in reality, even if the optimal (restrictive) approach to the changes to tenders in the post tender period and the resolution of contractual issues recommended above is followed, even after the appointment of the winning tenderer a number of issues remain, as a rule, to be resolved. This will require the Contracting Authority to use its power to ask the successful tenderer for clarifications of aspects of, and confirmations of commitments in, its final tender, for example with regard to the completion of the financial documentation, more details of designs etc.<sup>268</sup> It thus seems more likely that there will be some changes that modify the content of the contract, even though these will not be substantial in the sense interpreted above.

There are a number of considerations which the Contracting Authority may wish to take into account in determining when to trigger the standstill obligation in the Competitive Dialogue procedure:

- The Contracting Authority might want to invoke the standstill obligation at the point of time at which it selected the winning tender because, in practice, it wants to communicate to bidders the outcome of the evaluation and, clearly, the selection of the winning bidder is in any event a decision able to be challenged.<sup>269</sup> It is also most likely to be challenged, so, from a practical point of view, there is an argument for invoking the

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<sup>267</sup> The Contracting Authority enjoys discretion as to the further procedure it foresees between the selection of the winning tenderer and the conclusion of the contract. As discussed above, the Contracting Authority will want to limit the post tender evaluation steps to the minimum necessary and to see to it that the contract is concluded as quickly as possible after it has selected the winning tenderer. The Contracting Authority should thus ask the winning tenderer to confirm the commitments made in its final tender prior to the conclusion of the contract, for example to submit final designs and the complete financial documentation in accordance with the financial term sheets and the financial model submitted at final tender stage (see above). As a consequence, the winning tenderer will have to fulfil these obligations in order to have the contract awarded to it if financial close is at the time of contract conclusion or, if, as noted above, financial close is shortly after the date of contract conclusion, within the agreed period after contract conclusion to avoid the possible risk that the Contracting Authority could exercise its right to cancel the contract and seek damages for failure to effect financial close. The Contracting Authority will also have to set out in its invitation to tender which steps it intends the tenderers to take prior to the contract award, in particular the criteria which it will use for assessing compliance with these requirements.

*Alcatel* standstill at that stage, in order to “limit” review procedures to that point of time.<sup>270</sup> Furthermore, if the optimal approach to the Competitive Dialogue procedure recommended here is used, the terms of the contract already agreed at the point that the winning bidder is about to be selected should not differ in any fundamental respect from the contractual arrangements at the conclusion of the contract

- On the other hand, if the standstill period is invoked after the selection of the winning bidder but before the stage of further clarification and/or confirmation of commitments other bidders may very well be more willing to bring an application for review rather than after the clarification/confirmation stage (i.e. immediately before the conclusion of the contract when all the terms of the contract have been finalised). Their willingness to initiate a review procedure, on the other hand, might decrease the more time has elapsed between the selection decision and the conclusion of the contract. By the time of the conclusion of the contract they may have accepted their loss in the sense that they have turned their energies to another opportunity. In addition, the procedure subsequent to the selection of the winning tender might lead to certain – though limited – changes to the final tender which might prompt the other tenderers to have the legality of those changes reviewed again before the conclusion of the contract. This argues in favour of invoking the standstill obligation at the very end of the Competitive Dialogue procedure.<sup>271</sup>

In view of the above considerations the authors conclude the following:

- If the standstill period were to be invoked at the point of time at which the winning bidder is selected this would in effect mean that the selection decision would be defined as the award decision in the sense of the

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<sup>268</sup> In The Explanatory Note on the Competitive Dialogue the Commission sets out at Footnote 35 (in Chapter 3.3 End of the dialogue, final tenders and award of the contract) that the possibility of confirming undertakings at the very last stage before the conclusion of the contract but after the identification of the most economically advantageous tender has been provided in particular in order to take account of the reluctance of financial institutions to subscribe to firm undertakings before this stage of the procedure. This is – to a certain extent – contradictory with the Commission’s statement in the first paragraph of Chapter 3.3 that the final tenders submitted in the Competitive Dialogue Procedure must contain all the elements required and necessary for the performance of the project and that they are therefore to be regarded as complete tenders. In order to regard a tender as complete and final, however, the support received from the financing institutions at the time of submission of the final tender must, as noted above, be firm and not subject to the positive outcome of further due diligence and other escape clauses (with the exception of the so called “MAC-clause” – materially adverse changes, i.e. grave circumstances that are outside the control of the financing institutions and the tenderer).

Remedies Directive. This means that no changes at all can be made to the terms and conditions of the contract to be concluded after the selection decision. The Contracting Authority will thus have to state in this decision that it intends to award the contract to the winning tenderer. Along with this it would have to inform all tenderers not yet excluded about the reasons for its decisions based on the evaluation of the final tenders in accordance with the award criteria. Though any subsequent changes will not be substantial (with the term “substantial” being defined broadly, if the optimal approach to the post-tender phase is followed), this option seems to conflict with the Contracting Authority’s practice to ask the winning tenderer to clarify aspects of its tender and to confirm commitments in it which entails, in many cases, at least some changes to the final tender. Any changes at all might endanger the status of the selection decision as award decision which, in turn, places the Contracting Authority at risk when it intends to conclude the contract without further standstill. Also, the legality of the procedure might be put into question on the basis of the changes implemented after the selection of the winning tender, even though there may be practical difficulties in a tenderer obtaining the information necessary to mount a challenge on this basis or on the fact that the contract ultimately signed with the winning bidder is allegedly materially different from that on which the final tenders were called for

- The safer option thus seems to be to apply the standstill obligation at the

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<sup>269</sup> It is clear that the selection decision made on the basis of the award criteria is to be regarded as a decision within the sense of Art 1, Remedies Directive and which thus is open for review. This does not mean, however, that the tenderers must be able to bring an application against the selection decision right after it has been communicated to them. It is subject to the review system provided for by the national legislator. The Remedies Directives do not require that every decision must be capable of review immediately after they have been taken. For example, a national review system which provides that applications for review against some decisions can only be brought together with challenges of the award decision seems to be in compliance with the prerogatives of the Remedies Directives. This can be inferred from Case C-214/00, *Commission v Spain*, where the ECJ held that the Commission failed to prove that the Spanish review system providing for such limitation provides inadequate judicial protection. Accordingly, the Austrian legislator designed the review system in line with these parameters, allowing aggrieved tenderers to bring applications only against specific decisions listed exhaustively by the law (“gesondert anfechtbare Entscheidungen” in accordance with § 2 No 16 Federal Procurement Act 2006) within certain time limits. All decisions not explicitly listed can only be challenged together with an application against a listed decision. For example, the selection decision of the winning bidder in the Competitive Dialogue procedure is not listed as decision capable of review i.e. it must be challenged together with the award decision (which is listed as decision open to review).

point immediately before conclusion of the contract when all the terms of the contract have been finalised, so that any challenge is based on the actual contract to be signed. This means that there will be no further changes at all to the contract when the award decision is taken and communicated to the tenderers. It minimises the risks set out in the previous paragraph and does not, of course, prevent any disaffected bidder from challenging a process at or just before the time that the winning bidder is selected.<sup>272</sup>

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<sup>270</sup> Irrespective of the timing of the standstill, there remains the issue of what information should be provided to losing bidders to enable them to consider mounting a challenge, and in particular whether or not it is desirable to disclose the scores of the plaintiff relative to that of the winning bidder. Such disclosure is not required by Art 41, Directive 2004/18 or Art 2(a), Directive 2007/66, if it is not to be considered as award decision. For a discussion of the issues arising see Adrian Brown, “Applying *Alcatel* in the context of Competitive Dialogue”, *Public Procurement Law Review*, Sweet and Maxwell, Issue 6, 2006, p. 332 *et seq.*

<sup>271</sup> In Member States where the selection procedure (or other acts of the Contracting Authority) may be made subject to review this might have as a consequence that the Contracting Authority might be subjected to justify its actions in more than one review procedure.

<sup>272</sup> As noted above, the national review system might provide for specific limits regarding the admissibility of applications against the selection decision. In any case, it must be ensured that the tenderer concerned has the right to bring an application against the selection and the award decision prior to the conclusion of the contract.

## CHAPTER 6 – The Future of Competitive Dialogue – Conclusions for effective implementation in the EU

### OVERVIEW

The use of Competitive Dialogue by public authorities wishing to award complex and high value contracts is very explicitly linked with the implementation of PPP and likely to be used extensively for the award of PPP contracts. It has the potential to make the use of PPP easier but needs to be applied with great skill and care by Contracting Authorities and needs greater clarification about how it should be used.

The conclusions drawn here are also grounded in a number of key ideas (see pp. 7-8) i.e.:

- **The importance of legal certainty** i.e. the assurance that the process for the award of a contract will, if conducted according to known and well defined rules, lead to an outcome which is less likely to be successfully challenged. This is particularly important for long term, high value transactions such as PPP
- **The need for public procurement procedures to be primarily driven by the need to secure value for money**, defined, for example by the Treasury in the UK, as “the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user’s requirement”
- **The principle that value for money can best be secured by using a transparent and competitive form of procurement appropriate to the significance of the transaction.** This is crucial because of budgetary and service quality pressures on public authorities and their need to finance infrastructure investment and deliver public services
- **The idea that legislative provisions, administrative regulations and good practice procedural guidance should underpin the public sector’s pursuit of value for money i.e. that what is legally permissible is not necessarily the same as what is desirable in securing value for money**

- **The idea that more extensive use of the Competitive Dialogue Procedure as compared to the Negotiated Procedure with notice is desirable to achieve the aim of securing value for money for the public sector.** Much of what is regarded as good practice in the Negotiated Procedure is relevant to Competitive Dialogue but the Negotiated Procedure has in practice often been applied in a manner not calculated to optimise value for money.

The application of Competitive Dialogue is currently in what may be termed an experimental phase. Different approaches are being used for its implementation, in particular:

- In the dialogue phase where different decisions are being made about the number of phases in the dialogue, the objectives of the dialogue sub-phases, how the phases are conducted, the time taken in the dialogue phase, the information to be requested from bidders in the dialogue sub-phases, how solutions should be refined in the dialogue phase, whether or not elimination of solutions should occur during the dialogue phase and, crucially, the position which the Contracting Authority needs to arrive at by the end of the dialogue phase
- In the post-tender phase, where there are different interpretations of the terms “clarifying”, “specifying” and “fine-tuning” tenders<sup>273</sup> and of the position which the Contracting Authority needs to arrive at when the winning bidder is selected
- In the phase following the selection of the winning bidder, where there are different interpretations of the terms and “clarify aspects of (the winning) tender” and “confirm commitments in (the winning) tender”<sup>274</sup>
- The point at which the mandatory Alcatel standstill period should or must be applied.

Thus, it is a key contention of this book that there are clear benefits to standardising the approach to the application of Competitive Dialogue and that there are clear pointers to aid the development of an optimal methodology to promote value for money for the public sector.

**Put simply not all methods of applying the Competitive Dialogue Procedure are equally valid and there are key choices for a Contracting Authority to make.**

The scope and aim of the optimal methodology, which incorporates much of what is regarded as good practice in the Negotiated Procedure, is

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<sup>273</sup> See Art 29 (6), Directive 2004/18.

<sup>274</sup> See Art 29 (7), Directive 2004/18.

not to tell Contracting Authorities how to exercise all the choices available to them such as, for example, the objectives of the contract, the required performance standards they should expect and what short listing or offer evaluation criteria should be applied. It does however require them to be clear about these matters before launching the procurement and aim to highlight the processes to be followed in making the choices and the factors to be taken into account in exercising them.

It is also argued that the way the dialogue phase is conducted is the key driver of the entire Competitive Dialogue Procedure, with implications for the phases which come before and after i.e. the pre-OJEU phase, the short listing phase, the post-tender phase and the phase after the selection of the winning bidder.

Since Competitive Dialogue is a public procurement procedure specified by Directive 2004/18 it is necessary to address internal project governance issues and the need for a contract strategy which would arise irrespective of the procurement procedure chosen. In addition, the key elements of the optimal approach in securing value for money in the application of Competitive Dialogue are that:

- Prior to the launch of the award procedure the Contracting Authority has developed a clear understanding of the strengths and weaknesses of potential solutions for meeting the contract objectives (including performance potential, key technical characteristics, life cycle costs, sustainability, and risks associated with them) based on effective market assessment and prior technical dialogue where necessary and conducted in accordance with Treaty principles and the public procurement principles which derive from them
- Prior to the launch of the award procedure the Contracting Authority needs to confirm and document the justification for the use of the Competitive Dialogue Procedure and obtain a robust legal opinion supporting its use
- It is necessary to make decisions about the contract strategy specific to the Competitive Dialogue Procedure such as how the dialogue phase will be launched, how long it will last, the number of sub-phases there will be in the dialogue phase, the objectives of dialogue sub-phases, information to be requested in dialogue sub-phases, the methods to be used for discussion with the short list, the methods to be used for gathering information in the dialogue phase (e.g. written submissions, collaborative web site, diagrams/drawings, formal presentations, minuted meetings etc.) and for providing information to short listed entities (availability of personnel, scheduled meetings, physical/electronic data rooms etc.), the decision about payments to bidders, the decision about whether

or not elimination of solutions will occur during the dialogue phase, the need for, and format, of interim submissions to be made during the dialogue phase, the decision about when to conclude the dialogue phase and the format of the final offers etc.

- The short listing phase should be used to develop the Contracting Authority's ideas about its provisionally preferred solution for its needs as well as to select a short list of candidates, all of whom are potentially capable of meeting its needs and are judged likely to bid
- The dialogue phase should generally be based on consulting the short listed parties on the Contracting Authority's provisionally preferred solution to its needs, developed in advance of the dialogue phase, rather than on an investigative approach which leaves the development of the solution primarily to the short listed entities. To achieve this, the Contracting Authority should launch the dialogue phase by tabling contract documentation, as the basis for the dialogue, setting out its provisionally preferred solution, which will include key contract conditions, a detailed output-based performance specification for the operational phase of the contract, detailed functional/performance-related design specifications for all elements of the infrastructure for the construction phase of the contract, contract performance standards and contract monitoring mechanisms. This documentation will, in effect, represent the Contracting Authority's proposed risk allocation for the contract
- The dialogue phase should comprise the following sub-phases:
  - Initial discussions with candidates including time for them to consider the Contracting Authority's provisionally preferred solution and discuss it individually with the Contracting Authority
  - Interim submission sub-phase, including the preparation of the call for interim submissions by Contracting Authority, the submission of interim submissions by short listed entities and the assessment of the interim submissions by the Contracting Authority
  - Further individual discussions with short listed entities following the interim submission sub-phase
  - Completion of the final preferred solution by the Contracting Authority and the call for final tenders
- Following the dialogue phase, final tenders should then be called for on the basis of the Contracting Authority's final preferred solution which would enable bidders to submit substantially unconditional bids. This may incorporate scope for different parts of the solution to be delivered differently when the Contracting Authority judges it to be appropriate e.g. where there are situations where competition can only be stimulated by admitting different approaches to part of the solution e.g. different

methods of electronic tolling

- A restrictive approach, consistent with the definition used in the joint Commission and Council of Ministers' statement issued in 1989,<sup>275</sup> should be adopted to what is done while “clarifying”, “specifying” and “fine-tuning” tenders and “clarify aspects of (the winning) tender” and “confirm commitments in (the winning) tender”, thus using the provisions of Article 29 of Directive 2004/18 to underpin the structured approach to the procurement of major infrastructure projects which have represented good practice in the Negotiated Procedure.
- The evaluation of offers will be based on how the bidder proposes to deliver the final preferred solution, the sustainability of risks associated with their proposals and the price at which they will do so, rather than an assessment of substantially different solutions
- During the period between the selection of the winning bidder and the conclusion of the contract, all issues should be finalised in sufficient detail such that at the point of the conclusion of the contract the service provider can commence the construction phase and the Contracting Authority can monitor its implementation. Put simply, there ought to be nothing unresolved at the time of the conclusion of the contract.

The ability to implement the core approach set out above is underpinned by a number of other key ideas i.e. that:

- There is a need – unaffected by the financial crisis – to bring about equality of status between on the one hand the public sector and on the other both the large and increasingly globalising and consolidating private sector service providers and the predominant influence exercised over PPP by lenders. Put simply, if the public sector does not manage the market for PPP, then service providers and lenders will control it – to do this requires better co-ordinated, appropriately resourced, well-informed, active and skilled market management by the public sector at all levels, using the power which public authorities have as buyers in many markets, bringing schemes to market in such a way and at such a time as to optimise competition
- The need to develop a provisionally preferred solution will require significant input at an early stage of the award process through pre-OJEU market consultation/technical dialogue (which may require appropriate external professional advice) and skilful application of, and effort in, the short listing phase. But, in reality, the effort needed has to be made by the Contracting Authority in any event in order to effectively manage

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<sup>275</sup> See OJ L210, 21 July 1989.

the process. So it represents bringing forward the necessary engagement of the Contracting Authority rather than additional work or costs

- The approach means that the Competitive Dialogue Procedure should be, as was always possible and desirable in the Negotiated Procedure, applied in a manner akin to what might be called a flexible application of Restricted Procedure, using the freedom provided by the Competitive Dialogue procedure to discuss contractual issues in a framework defined by the Contracting Authority rather than by the short listed entities and reduce the risk that there might be absence of sufficient prior planning on the part of a Contracting Authority
- The Contracting Authority will need to genuinely listen to candidates during the dialogue phase and be prepared to amend the provisionally preferred solution if market conditions have changed during the dialogue phase or if they are otherwise persuaded by the candidates that it is desirable. This could arise if any aspects of the provisionally preferred solution would seriously undermine the likelihood of competition (i.e. the likelihood of the short list not bidding as opposed to bidding (which could, for example arise if the candidates who are actually on the short list have materially different views from those included in the pre-OJEU market consultation) or materially affect the extent to which the Contracting Authority could secure value for money because it might lead to a bid premium<sup>276</sup>
- The fact that, because the Contracting Authority has developed a provisionally preferred solution and a final preferred solution based on market consultation and technical dialogue, there should be relatively limited solution design and innovation which it has not captured. Thus the practical effect of such concerns of market operators about loss of business secrets related to solution design is likely in most cases to be limited<sup>277</sup>
- In many types of infrastructure/public service provision there have now been sufficient prior examples for template solutions capable of being

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<sup>276</sup> The key judgment is, as noted above, is to distinguish between what market operators *say* they will do as opposed to what they *actually* will do when faced with the prospect of winning a significant contract. These are not, in the authors' experience, by any means the same thing.

<sup>277</sup> It has been the authors' experience that attempts to address such concerns have, in practice been more ones of perception than reality in the sense that people and ideas tend to circulate freely around the construction and service sectors (and sometimes through professional advisers). Thus attempts to frame a process to control design-related business secrets may, in fact constrain the objective of Contracting Authorities to achieve value for money without, in practice, benefiting participants.

customised to form the basis of the Contracting Authority's planning and for the risks to be well understood by service providers and, in the case of privately financed PPP, also by lenders

- The workability of the concept of a final preferred solution is based on the idea that, though short listed entities may not necessarily regard it as optimal or necessarily the solution which they would, ideally, have liked to offer, the solution is one against which they are technically capable of bidding and does not include elements which would act as barriers to bidding. Pressures within potential supplier organisations to bid, as opposed to not bid, will work in the Contracting Authority's favour here, so the skill will be to work out in the dialogue what are the *real* deal breakers
- Bidders should be required to submit tenders with committed finance from lenders on terms acceptable to the Contracting Authority. This avoids the situation when, after the selection of the preferred bidder or winning tenderer, and the removal of competition, the Contracting Authority may be faced with a series of new negotiating points raised by the lenders. This means in practice that lenders need to play an active part in the dialogue phase of Competitive Dialogue Procedure so that their needs can form part of the overall contract negotiations prior to final tenders being submitted.

The conclusions set out the main areas in which reforms are proposed and bring together the various threads developed in detail earlier in the book. They also set out the actions to be taken at EU level, national level and by Contracting Authorities to implement these ideas.

#### **ACTIONS AT EUROPEAN LEVEL**

There are two proposed areas for action at European level.

#### **Guidance from the Commission to clarify the existing legal framework**

There are four matters in which further guidance from the Commission to define the legal framework for the Competitive Dialogue procedure (thus providing greater legal certainty) would be desirable i.e.:

- Indicating that, in general, it will not initiate infringement procedures against a decision by a Contracting Authority to use the Competitive Dialogue Procedure (as opposed to challenges about how it has been ap-

plied) except where there is clear evidence of intent **in the choice of the procedure** to frustrate Treaty principles or the Public Procurement principles derived from them.

While the use of the Competitive Dialogue Procedure must be objectively justified, for the Commission to regularly scrutinise and challenge the decision to use the Competitive Dialogue Procedure would undermine the key purpose of the introduction of the procedure i.e. to provide an alternative to the frequent resort to the Negotiated Procedure, which is intended to be an exceptional procedure.

In particular the Commission needs to be sensitive to the possible paradox that the more effort a Contracting Authority makes, and the more experience it has, the more difficult it may, on a narrow interpretation of the criteria for the use of Competitive Dialogue, become to justify its use. The optimal approach to the Competitive Dialogue advocated in this book requires a Contracting Authority to develop a significant understanding of its needs and how they might be met in order stay more effectively in control of the award process and thus maximise the likelihood of securing value for money in the award process. Thus, it would be perverse if Contracting Authorities which choose to conduct a Competitive Dialogue Procedure in this way were to be at risk of legal challenge

- Guidance on the conduct of the procedure, and particularly for the dialogue phase, to identify precisely how a Contracting Authority can comply with principles of confidentiality, equality of treatment and non-discrimination, thus minimising the risk of legal challenge
- Clarification of the reference in the January 2006 Explanatory Note which at page 6 states that “Given that recourse to Competitive Dialogue presupposes that the contract is “particularly complex”, it seems almost tautological that the conditions for not weighting the award criteria should therefore be met when the contract is awarded by this award procedure – Contracting Authorities may instead limit themselves to mentioning the criteria in decreasing order of importance”.

This statement potentially risks giving too much discretion to Contracting Authorities in applying the award criteria and thus there should be no automatic link between the use of Competitive Dialogue and acceptance that Contracting Authorities could limit themselves to mentioning the criteria in decreasing order of importance

- Clarification in a further Explanatory Note by the Commission of what is permissible in the context of “clarifying, specifying and fine tuning” tenders after the receipt of final tenders and “clarifying aspects of the (winning) tender” and “confirming commitments contained in the (win-

ning) tender” after the selection of the winning tender. The key to achieving value for money in major contracts is maintaining competition as close as possible to contract signature. A tighter definition of what is and is not permitted would act to counter any tendency to interpret the procedure as permitting the continuation of the current practice of substantial negotiations in a single tender environment with the winning bidder.

### **Promotion of legal certainty by the ECJ**

The ECJ could help to promote greater legal certainty, if, in its judgments, it were to:

- Determine what makes a contract a particular complex contract and thus clarify this concept for Contracting Authorities
- Determine the meaning of the terms “clarifying, specifying and fine tuning” tenders after the receipt of final tenders and “clarifying aspects of the (winning) tender” and “confirming commitments contained in the (winning) tender” after the selection of the winning tender.

### **ACTIONS AT NATIONAL LEVEL**

There are four proposed areas for action at national level.

#### **Developing a good practice approach to planning and implementing Competitive Dialogue**

The key components of an optimal model for planning and implementing Competitive Dialogue are to determine:

- What Contracting Authorities need to have achieved in the pre-OJEU, short listing phase, dialogue phase, post-tender phase, at the point where they select the winning bidder and at financial close. These are set out above in Table 2 (**see pp. 58-70**)
- The good practice approach to be used in each stage of the process, which Contracting Authorities should adopt in all but occasional circumstances justified by exception.

The good practice approach relates to all stages of the Competitive Dialogue Procedure i.e.:

- The conduct of the pre-OJEU phase (**see pp. 83-96**)
- The conduct of the short listing phase (**see pp. 96-102**)
- The conduct of the dialogue phase (**see pp. 102-138**)
- Concluding the dialogue and inviting tenders from short listed entities (**see pp. 139-141**)
- The conduct of the post-tender phase (**see pp. 143-184**).

The practical application of good practice approach set out above, may, of course, be subject to national variations about how they will be expressed, different emphases in different Member States according to the particular issues arising in the implementation of public procurement generally and the Competitive Dialogue Procedure in particular and of implementation instruments used e.g. as between guidelines, administrative regulations and primary legislation.

It may also be necessary, insofar as the Commission does not, as recommended above, provide guidance on the European legal framework, to provide national best practice guidance on:

- How a Contracting Authority can comply with the principles of confidentiality, equality of treatment and non-discrimination during a Competitive Dialogue Procedure
- What is permissible in the context of “clarifying, specifying and fine tuning” tenders after the receipt of final tenders and “clarifying aspects of the (winning) tender” and “confirming commitments contained in the (winning) tender” after the selection of the winning tender.

### **Applying the Alcatel standstill**

- Ensuring that it is standard practice to apply the Alcatel standstill at the point when the contract is concluded i.e. when all the terms of the contract are finalised
- Ensuring that losing bidders have had the opportunity to follow up the information in the standstill notice by allowing, in general, a standstill period of a minimum of 14 working days as opposed to the minimum of 10 working days usually required in the revised Remedies Directive.

### **Implementing the European legal framework effectively at national level**

National courts should underpin the ECJ's approach (see above) to the choice of Competitive Dialogue as an award procedure, the approach to determining whether or not a Contracting Authority had complied with the principles of confidentiality, equality of treatment and non-discrimination and to what is permissible in the post-tender phase.

### **Alignment of other legislation to facilitate the effective implementation of Competitive Dialogue**

National administrations should ensure that other legislation facilitates rather than obstructs the effective implementation of the optimal approach to the implementation of Competitive Dialogue and in particular planning, licensing, land acquisition, and site access rules. This is critical to the ability of bidders to submit unconditional bids at final tender stage.

Contracting Authorities should, for example, be able to ensure, as soon as possible and, in any event no later than the time that the call for final tenders is launched, that:

- They have ownership<sup>278</sup> of the land on which the infrastructure will be constructed and land associated with its construction e.g. access roads to a hospital site
- They have completed and can make available to short listed entities the Environmental Impact Assessment and any site surveys<sup>279</sup>
- They are able to allow short listed entities access to the site so that they can conduct their own site surveys
- Definitive planning consent can be granted for the construction and operation phases of the infrastructure on the basis of the scope of the design brief, the objectives of the construction phase, the performance standards for the operational phase and the operating constraints defined by the Contracting Authority in the contract documentation.

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<sup>278</sup> Or an irrevocable right to acquire it at an agreed price.

<sup>279</sup> This does not, of course, remove from short listed entities the responsibility to ensure that they have conducted their own site surveys or derogate from the principle typically enshrined in the contract that bidders will not be compensated by the Contracting Authority for any failure to undertake their own enquiries.

## **ACTIONS BY CONTRACTING AUTHORITIES**

There are two key areas for action by Contracting Authorities.

### **Application of the good practice approach to implementation of the Competitive Dialogue Procedure**

Clearly, the idea that there is an optimal approach to the implementation of the Competitive Dialogue procedure means that Contracting Authorities should, as noted above, apply it except in particular circumstances duly justified by exception and notified to national public procurement supervisory authorities.

### **Other measures to enhance the effective implementation of award procedures using Competitive Dialogue**

Contracting Authorities can also enhance the effectiveness of the implementation of Competitive Dialogue by ensuring that they:

- Recognise the importance of the need to devote time and resources to plan and implement the Competitive Dialogue Procedure
- Set selection and evaluation criteria for contracts such that there is clarity in the short listing process about the experience and qualifications which the applicant is relying on, and, at the award stage, who will deliver which elements of the service. This will enable Contracting Authorities to form a judgment about the acceptability of any future changes in the identity of service providers or the investors in the PPP
- Recognise that much of what is regarded as good practice in the Negotiated Procedure is relevant to Competitive Dialogue and could substantially underpin its effective application. In particular, Contracting Authorities should aim to ensure that the selection of winning tender does not happen until all substantial terms and conditions affecting the price and delivery of a project have been settled while there is still competition.

## **END PIECE**

The conclusions in this book are unapologetic and ambitious in the sense that they aim to set out a good practice approach for the use of the Compet-

itive Dialogue Procedure to award PPP contracts which should be used in the majority of cases. They are driven by the sole objective of ensuring that the public sector optimises the likelihood that it will obtain value for money in the award of long-term high value contracts, which PPP often are.

In doing so, there is no intent to stifle the creativity of Contracting Authorities in applying the optimal approach intelligently or using it to achieve their service delivery objectives. Nor is there any intent to deprive Contracting Authorities of the benefit of the innovation of the private sector service providers or professional advisers. The key point lies in the timing of the inputs of Contracting Authorities and service providers. In that sense the optimal approach places effective planning and preparation where it belongs in good procurement practice i.e. as the foundation of the procurement process, albeit often one undermined by shifting political pressures.

Nor is there any intent to suggest that an experimental period in the use of the Competitive Dialogue Procedure has not been beneficial – the diversity of practice to date has enabled the proposed optimal approach to blend existing good practice in the Negotiated Procedure, emerging practice in the application of Competitive Dialogue and the authors' experience. In that sense the conclusions in this book are evolutionary not revolutionary.

The authors' aim is that, by providing a clear road map for the use of Competitive Dialogue, the book will also help to overcome some of the caution about the use of the procedure in many EU Member States, as reflected in the different extent of its use across the EU. In turn, this is intended to be an aid to helping the objective of the enactment of Competitive Dialogue – to provide public bodies with sufficient flexibility to award complex contracts in a manner consistent with the principles of transparency and equality of treatment, and the rights of market operators – to be realised.

The stakes in terms of the need to improve Europe's infrastructure and the effective implementation of key European policies, such as compliance with environmental legislation and the completion of the Internal Market, at an affordable cost are too high for it to fail.



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