

# Using Competitive Dialogue and the Competitive Procedure with Negotiation – Making better choices for better value for money

## Why are these procedures important?

Competitive Dialogue and the Competitive Procedure with Negotiation allow dialogue/negotiation between an awarding body and economic operators about the terms of the contract where the awarding body is not totally sure about the best way of realising its objectives.

## When might they be useful?

When the European Commission devised the Competitive Dialogue procedure it mainly had in mind how it could be used for procuring PPP and economic infrastructure projects.

But experience shows that many of the lessons for the effective use of Competitive Dialogue come from applications beyond these fields.

**Examples of the use of Competitive Dialogue include the following:**

- Construction of social infrastructure such as schools, hospitals/other healthcare facilities, prisons and court buildings;
- Land reclamation schemes (where the area to be reclaimed was uncertain);

- Research studies (where there had been difficulties in determining the form of research outputs and the nature of research methodologies);
- Services such as ICT and human resource management services;
- Supplies such as the acquisition of complex defence equipment.

## What choices does an awarding body have?

The first decision an awarding body has to make before using Competitive Dialogue or the Competitive Procedure with Negotiation is which of these procedures to use. It also has to determine why either is a better procurement route than the Restricted Procedure in terms of achieving the procurement outcomes.

If it wants to use Competitive Dialogue or the Competitive Procedure with Negotiation this must then be legally justified.

In doing so, it is important to understand that there is no *de minimis* test for the use of Competitive Dialogue or the Competitive Procedure with Negotiation. The procedures can be used even if there is only one or two material aspects to discuss in the contract specification or contract conditions. Examples include co-ordination between lots and the use of specialist sub-contractors which fall within the scope of Article 26(4)(a), Directive 2014/24/EU.

The awarding body then needs to decide how to plan the effective use of these procedures to make best use the flexibility which they provide.

**Some of the important choices which awarding bodies need to make include:**

- Which is the best of the different lawful ways of running the dialogue/negotiation? There is considerable legal freedom about what can be discussed in dialogue/negotiation. The key to effective

outcomes is to discuss what will improve value for money for the awarding body.

- What to discuss in the dialogue/negotiation? This helps to steer the dialogue/negotiation by setting out the relevant issues that were not resolved by prior market consultation. This will include the matters the awarding body used to justify the use of the procedure. The rules on Competitive Dialogue confer a power to discuss all issues, but not a legal obligation.
- How many candidates to shortlist for dialogue/negotiation.
- The circumstances on which candidates admitted to the dialogue/negotiation should be eliminated during it. Both, legal and competition/value for money aspects need to be considered.

- The basis on which Contracting Authorities can justify changes made to the contract terms during the dialogue/negotiation.
- What differences there are in practice in the post-tender period between Competitive Dialogue and the Competitive Procedure with Negotiation.
- How might these differences influence when the dialogue/negotiation is closed.

No-one pretends that this is easy. But by understanding the true potential of Competitive Dialogue and the Competitive Procedure with Negotiation and the challenges from using them effectively, awarding bodies, aided by their professional advisers, can add another useful tool in delivering what citizens expect of them.