

Competitive Dialogue – How to make best use of the dialogue phase

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In Directive 2014/24/EU– the latest EU Public Procurement Directive – Competitive Dialogue was made easier to justify than in the former directives and thus is more readily available for use. It was also introduced as an available procedure in the utilities sectors in Directive 2014/25/EU.

Recital 42 of the Directive noted that Competitive Dialogue “has shown itself to be of use in cases where Contracting Authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions”.

But experience shows that Competitive Dialogue is difficult to implement effectively for complex infrastructure and ICT projects and to modernise public services in the current fiscal climate.

The dialogue phase: indispensable for the successful application of Competitive Dialogue

The dialogue phase is the key to the successful application of Competitive Dialogue – this blog sets out some key issues about how to plan and conduct the dialogue phase to ensure that the award process achieves its aims for the awarding authority.

Art. 30(3), Directive 2014/24/EU permits Contracting Authorities to “discuss all aspects of the contract with the chosen participants” subject to equality of treatment considerations –

this is also provided for the utilities sectors in Art 48(3), Directive 2014/25/EU.

The importance of the dialogue phase is that it is an opportunity for Contracting Authority to resolve issues associated with the contract conditions and specification and how they will be realised before calling for final tenders.

However, the key to success in running a successful dialogue phase is that the ability to discuss all aspects is not the same as saying that it is desirable to do so – in particular economic operators have long expressed concerns about the costs to them associated with lengthy and unstructured dialogue.

Put simply, experience has shown that there are, from a legal perspective, many possible ways of implementing Competitive Dialogue – including a range of different lawful ways to conduct a dialogue.

BUT what is legally permissible is NOT necessarily the same as what is desirable from a value for money perspective – the key is how a Contracting Authority use the freedom of what is legally permissible.

It is, for example, important for a Contracting Authority to:

- Define the issues it wants to discuss in the dialogue phase e.g. negotiable and non-negotiable elements of the contract specification and conditions and scope for bidder alternatives (e.g. use of materials) within offers
- Anticipate issues bidders will want to discuss, to which effective market consultation before launching the procedure can contribute
- Expected bidder requests for clarification and the response procedure to be used to such requests.

In addition to the legal requirements for the launch of the dialogue phase set out in Art.54

and Annex IX, Directive 2014/24/EU it is helpful for a Contracting Authority to set out, both for its own benefit – particularly in terms of mobilising its own internal resources – and the benefit of candidates :

- The procedural rules for the dialogue phase (meetings foreseen, conduct of meetings, information flows/data security, content and timing of expected interim submissions etc.)
- Further information on the Contracting Authority's needs and requirements, including essential and desirable requirements, scope for dialogue, key contract conditions, performance standards expected, process constraints etc

This can be very effectively done if the Contracting Authority launches the dialogue by referring to its preferred specification and contract conditions (and in some cases its preferred means of delivery), what the current authors have referred elsewhere (see “Competitive Dialogue – A Practical Guide”, Burnett M. (with Oder M.), EIPA, 2015) as the “provisionally preferred solution”.

The importance of conduct of the dialogue phase

The conduct of the dialogue phase will always be challenging but potential benefits of its contribution to the effective use of Competitive Dialogue (identified as long ago as 2010 in a study by the EIB's European PPP Expertise Centre) are still relevant, e.g.,

- “Competitive dialogue forces the private sector to come up with solutions while there is still a competitive pressure. In addition, there are good reasons to believe that, if properly implemented, the structure of the procedure itself allows achievement of greater transparency of the procurement process and helps secure a level playing field for all bidders”

- “Improved price discipline... the procedure tends to leave “less opportunities for scope and price creep” and limits the battle to preserve the contract terms with the preferred bidder”.

In the conduct of the dialogue phase, the openness and completeness of communication with candidates (especially listening to candidates) will be important as well as building trust with candidates by not stretching the obligation not to reveal confidential information from economic operators without their agreement by pressurising candidates to agree to such sharing.

In this respect the European Commission's recent initiative to support the professionalisation of public procurement “ProcurCompEU – the European competency framework for public procurement professionals” is of real value – particularly the soft competences related to behavioural skills referred to in Competence 8 – Supplier Management and Competence 9: Negotiations.

Secondly, the Contracting Authority will need to ensure that it:

- Understands potential solutions before launch of the dialogue (avoiding the dialogue becoming a “voyage of discovery into the unknown”)
- Considers how much variability it will permit in acceptable delivery methodologies i.e. acceptable variations from its *ex ante* preference
- Has a process of anchoring of conclusions of discussions with candidates during the dialogue and decisions made i.e. confirmation during the dialogue of what has been decided in the process .

All of which is challenging but worth doing properly to effectively apply an award procedure created to help get better procurement outcomes.

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The views expressed in this blog are those of the authors and not necessarily those of EIPA.

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