

Competitive Dialogue - A tool with many uses

Written by Michael Burnett

and Martin Oder

In Directive 2014/24/EU – the latest EU Public Procurement Directive – Competitive Dialogue was made easier to justify than in the former Directive 2004/18/EC 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.

Competitive Dialogue was initially conceived by the European Commission as a tool for awarding infrastructure contracts and complex service contracts – this blog sets out the potential for how Competitive Dialogue can be used flexibly in a wider range of contracts.

Criteria for Competitive Dialogue

Art 26(4)(a), Directive 2014/24/EU provides that Competitive Dialogue can be used “with regard to works, supplies or services fulfilling one or more of the following criteria:

- (i) The needs of the Contracting Authority cannot be met without adaptation of readily available solutions
- (ii) They include design or innovative solutions
- (iii) The contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial makeup or because of the risks attaching to them
- (iv) The technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical

reference within the meaning of points 2 to 5 of Annex VII (of the Directive)”.

However, the Directive does not set any *de minimis* test for the use of these procedures – it does not, for example, define:

- How much adaptation should be needed to a “readily available solution” to justify use
- What degree of innovation is required to qualify as an “innovative solution”
- What elements or extent of complexity or risks are needed to justify use
- How much of the technical specifications must be unable to be established by other means to justify use.

Nor are grounds cumulative i.e. it is only necessary for a Contracting Authority to demonstrate compliance with at least one of these (broadly expressed) criteria.

In this respect Directive 2014/24/EU is more flexible than Directive 2004/18/EC which provided that “in the case of particularly complex contracts, Member States may provide that where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, the latter may make use of the Competitive Dialogue”.

There are references in Recital 42 to “innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing”.

Recital 43 refers to “complex purchases such as sophisticated products, intellectual services, for example some consultancy services, architectural services or engineering services, or major information and communications technology (ICT) projects”.

These references are not, however, intended to be restrictive or exhaustive, though Recital 43

places some constraints i.e. that “in respect of off-the-shelf services or supplies that can be provided by many different operators on the market, ... Competitive Dialogue should not be used”.

This has created scope for the use of Competitive Dialogue, though of course a Contracting Authority should always have written legal justification to support the use of the procedure.

This ensures compliance with the provision of Art.84(2), Directive 2014/24/EU that “Contracting Authorities shall document the progress of all procurement procedures ... To that end, they shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on communications with economic operators and internal deliberations, preparation of the procurement documents, dialogue or negotiation if any, selection and award of the contract.

How then can Competitive Dialogue be used more widely that had formerly been expected?

Firstly, there is no legal requirement for the use of Competitive Dialogue to embrace both the contract conditions and the contract specification.

Secondly, in the judgement about the use of one of the justifications in Art 26(4)(a), an overall assessment approach is not needed.

The dialogue can be about one or two material aspects of the contract provided that the Contracting Authority can explain why, for example, it could not resolve the issue using prior market consultation or via exchange of experiences with its peers and why dialogue has the potential to improve the value for money secured in the award.

The authors have, for example, had experience of working with a public sector entity which

wanted to improve the quality of research reports it commissioned by using dialogue to develop the format of expected outputs and research methodologies and another which wished to assess how the different aspects of a service could be effectively integrated.

For solutions requiring a high degree of innovation, Competitive Dialogue can also be used to include the opportunity to test prototypes before final development of products and services.

Thirdly, there is nothing to prevent the use of Competitive Dialogue to discuss aspects of the optimal contract management arrangements such as, for example:

- The arrangements for dealing with contract interfaces where a very large contract is awarded in more than one lot with different winning bidders, or where there are interfaces between services which will continue to be directly provided by the Contracting Authority and those to be provided by a third party provider e.g. arrangements for co-ordination between lots
- The economic operator’s arrangements for managing sub-contractors

To summarise, Competitive Dialogue is a tool aimed to help Contracting Authorities and there are legal requirements for its use.

But these legal requirements are not intended to be restrictive and they leave scope for Contracting Authorities which are creative and wish to improve the quality of contracts which they award to do so and thus to secure better value for money for their citizens.

Michael Burnett was the Director of EIPA’s European PPP Forum from 2005 to 2020 and is the author, with Martin Oder, of EIPA’s books “Competitive Dialogue – A Practical Guide” (two editions 2009 and 2015).

Martin Oder is a partner in Haslinger Nagele
Law Firm based in Vienna, Austria.

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