

Competitive Dialogue – Bringing the dialogue to a successful conclusion

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Introduction

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

Previous articles in this series have considered how Competitive Dialogue can now be justified and how to make the best use of the dialogue phase to enable the awarding body to achieve its objectives.

- Competitive Dialogue – How to make best use of the dialogue phase
- Competitive Dialogue – A tool with many uses

In practice, Competitive Dialogue procedures can often be lengthy, with consequences for both the awarding body, which needs to bring the dialogue phase to a conclusion to be able to call for final tenders, and for candidates for whom the dialogue phase usually involves significant costs.

So one of the key decisions for an awarding body is when to close the dialogue phase and call for final tenders.

Article 30(5), Directive 2014/24/EU, states that “The contracting authority shall continue the dialogue until it can identify the solution or

solutions which are capable of meeting its needs”.

Article 30(6), Directive 2014/24/EU, states that “Having declared that the dialogue is concluded and having so informed the remaining participants, contracting authorities shall ask each of them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. Those tenders shall contain all the elements required and necessary for the performance of the project”.

These legal provisions require significant practical skills for an awarding body to use them effectively.

What then are the key issues in practice for an awarding body in closing the dialogue and calling for final tenders?

In practice, they should not close the dialogue until they expect to receive final tenders, which are:

- **Affordable** i.e. within the budget of the awarding body for the contract based on a plausible range of service demand scenarios and ideally not just below the budget;
- **Sustainable** i.e. capable of being delivered by the bidder based on matters including the volume of financial and operational resources (including human resources) over the life of the contract (including asset refresh and maintenance where relevant), supply chain arrangements and the financing approach proposed by the bidder taking account of any reasonably foreseeable potential disruptive factors;
- **Unconditional** i.e. capable of acceptance by the awarding body without any further amendment and thus be capable of being incorporated into the contract documentation, and

- **Consistent** with the requirements of the project as set out in the technical specifications and contract conditions in the call for final tenders, including those which are expressed by the key performance indicators and the success measures for them (such as numerical targets for all user groups).

They should also be delivered by a working methodology which is acceptable to the awarding body (including sourcing of supplies/security of supplies, and equality of outcomes for user groups) and which clarifies the contribution to be made by the different parties to the contract (including where relevant that of other group companies, the various consortium members and of subcontractors).

Put simply, when the dialogue is closed there should be no surprises for the awarding body at the final tender stage and final tenders should confirm what the awarding body is expecting from bidders based on the final dialogue phase.

A sufficient number of final tenders should be received by the awarding body in order to ensure competition in two ways: first, to maximise the possibility of securing value for money, or the best price/quality ratio, as the award basis sets out in Article 30(1), Directive 2014/24/EU; and second, to consider the requirements of Article 66, Directive 2014/24/EU, in cases where the number of candidates has been reduced during the dialogue phase based on the award criteria (as permitted by Article 30(4), Directive 2014/24/EU), provided that there are enough tenders, solutions, or qualified candidates.

The conduct of the dialogue phase and the form of submissions called for during the dialogue phase should lead the awarding body, in addition to complying with the legal requirements for the final tender stage set out in Annex IX, Directive 2014/24/EU, to:

- **Confirm** the form of final tenders, which should be in the same form as earlier

submissions, and require the bidder to set out and explain any differences from the previous submission - especially explanations of any price or methodology change arising from market changes, feedback from the awarding body on the previous submission and/or any changes in the requirements of the awarding body, as discussed in the final dialogue phase;

- **Reconfirm** the importance of the unconditionally of final tenders, including advising the bidders that there should be no assumptions stated in final tenders about the basis of the price or methodology set out other than the requirements of the specification and contract conditions set out by the awarding body (which may include its volume based or price indexation provisions);
- **Remind** candidates that final tenders should contain all elements required and necessary for the performance of the project (including both the construction and operational phases where these are included in the procurement scope);
- **Allow** sufficient time for the receipt of final tenders, which, as Article 47, Directive 2014/24/EU provides, must “take account of the complexity of the contract and the time required for drawing up tenders” and comply with the principle of equality of treatment as between bidders, and
- For privately financed contracts, **remind** candidates that final tenders should be based on finally committed finance.

Conclusion

The issues raised above show that the process of closing the dialogue is challenging (and derives from the effective conduct of the dialogue phase set out in an earlier article) but it is key for an awarding body to achieve the

desired outcomes from the award process using the Competitive Dialogue procedure.

In addition, by the time final tenders are called for, the awarding body needs, in practice, to have substantially completed the arrangements for the evaluation of final tenders and for the management of the execution of the contract,

i.e. have the processes defined and the human resources identified.

More on this topic

If you'd like to deepen your knowledge on the topic of competitive dialogue, have a look at our upcoming course on this topic :