

# Competitive Dialogue and the Competitive Procedure with Negotiation

## Process overview

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## Competitive Dialogue Procedure – Process overview

Planning and preparation and five implementation phases:

- Choice of procedure
- Selection of candidates
- Dialogue
- Tender evaluation/selection of winning bidder
- Post-winning bidder selection



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## Competitive Dialogue – Key process questions

- Do you have a recorded justification for the use of Competitive Dialogue?
- How can you make best use of the short listing process?
- How should you prepare for/launch the dialogue phase?
- How can/should you conduct the dialogue phase?
- When should you end the dialogue phase and call for final tenders?
- What can/should you do in the post-tender period/after you have selected the winning bidder?

## Competitive Procedure with Negotiation – Process overview

Planning and preparation and four implementation phases:

- Choice of procedure
- Selection of candidates
- Negotiation
- Tender evaluation/selection of winning bidder

## Competitive Procedure with Negotiation – Key process questions

- Do you have a recorded justification for the use of the Competitive Procedure with Negotiation?
- How should you define the minimum requirements?
- How can you make best use of the short listing process?
- How should you prepare for/launch the negotiation phase?
- How can/should you conduct the negotiation phase?
- When should you end the negotiation phase and call for final tenders?
- What can you do in the post tender period?

## Process overview – Practical implications – 1

- Good practice in other procedures is a good guide to good practice in Competitive Dialogue/Competitive Procedure with Negotiation
- Planning Competitive Dialogue/Competitive Procedure with Negotiation is time consuming!
- Planning Competitive Dialogue/Competitive Procedure with Negotiation needs to be more front-end than has often been the case in the past for Negotiated Procedures (NB better planning also needed because of Art. 53(1)/need to make available the procurement documents at the time the contract notice/invitation to confirm interest is published)

## Process overview – Practical implications – 2

- It is essential to have clear objectives for each phase of the process
- All phases are important but the dialogue/negotiation phase is key:
  - Using freedom to discuss key issues
  - Importance of resolving all issues before the call for final tenders
  - Value of competitive environment
- Conducting Competitive Dialogue/Competitive Procedure with Negotiation is time consuming!

## Competitive Dialogue/Competitive Procedure with Negotiation – Key message

- There are, from a legal perspective, many possible ways of implementing Competitive Dialogue and Competitive Procedure with Negotiation - including a range of different lawful ways to run dialogue/negotiation
- BUT
- What is legally permissible is NOT necessarily the same as what is desirable from a value for money perspective - the key is how you use the freedom of what is legally permissible

## Competitive Dialogue – Lawful ways to conduct dialogue (before call for final tenders) – 1

- Outline interim submissions (with/without pricing), dialogue, then detailed interim submissions (often with pricing), further dialogue (with/without elimination during dialogue, with/without a further stage of interim submissions/dialogue pre-final tender)
- Interim technical submissions, dialogue, then interim financial proposals (often with amended interim technical submissions), further dialogue (with/without elimination during dialogue, with/without a further stage of interim submissions/dialogue pre-final tender)
- Calling for a full interim submission (technical and financial) based on draft specification/conditions (i.e. equivalent to tenders) and then starting the dialogue

## Competitive Dialogue – Lawful ways to conduct dialogue (before call for final tenders) – 2

- Dialogue based on draft specification/conditions, calling for interim submissions with same detail/format (both technical and financial) as final tenders, then further dialogue (with/without elimination during dialogue, with/without a further stage of interim submissions pre-final tender)
- Limiting scope of interim submissions to certain aspects of what would be included in final tenders

## Competitive Procedure with Negotiation – Lawful ways to conduct negotiation (before call for final tenders) – 1

- Calling for initial tenders based on draft specification/conditions with same detail/format (both technical and financial) as final tenders and then starting the negotiation (with/without elimination during negotiation, with/without subsequent tenders pre-final tender)
- Negotiation based on draft specification/conditions, calling for initial tenders with same detail/format (both technical and financial) as final tenders, then further negotiation (with/without elimination during negotiation, with/without subsequent tenders pre-final tender)
- Selecting winner based on initial tenders (if right reserved)

## Competitive Procedure with Negotiation – Lawful ways to conduct negotiation (before call for final tenders) – 2

- Limiting scope of initial/subsequent tenders to certain aspects of what would be included in final tenders

## Competitive Dialogue Procedure/Competitive Procedure with Negotiation – Scope of dialogue/negotiation – 1

- In Competitive Procedure with Negotiation award criteria/minimum requirements may not be negotiated
- In Competitive Dialogue “all aspects” can be discussed (but in practice wouldn’t discuss award criteria or what would be “minimum requirements” in Competitive Procedure with Negotiation)
- Dialogue/negotiation can be about contract specification, contract conditions or both
- Dialogue/negotiation can be about outcomes (i.e. what should be delivered) or means of implementing outcomes (i.e. how the Contracting Authority’s preferred outcome can best be delivered)

## Competitive Dialogue Procedure/Competitive Procedure with Negotiation – Scope of dialogue/negotiation – 2

- The actual subjects discussed in dialogue/negotiation can be wide or narrow (i.e. it can be “Restricted Procedure Plus”)
- Examples include road surface type, maintenance frequency, planned/reactive maintenance balance/schedules, private finance sources, public/private finance mix, windfall gain sharing, minimum revenue guarantees, payment mechanism, payment timings, sensitive waste storage methods, new/legacy systems integration, noise abatement measures, construction methods/process constraints e.g. working hours, materials to be used etc., security measures, service continuity arrangements, defining *force majeure*/consequential loss, managing specialist sub-contractors, co-ordination of lots etc

## Competitive Dialogue Procedure/Competitive Procedure with Negotiation – Scope of dialogue/negotiation – 3

- Infrastructure/ equipment installation/testing, quality control procedures, safety procedures, data privacy/security, environmental compliance, staff selection, training and security clearance, equality of service access, future service demand/consistency with territorial policies/operational objectives (e.g. - for transport - future transport integration, population trends, encouraging low-carbon/net zero transport, public-private transport use, impact of digital infrastructure etc.), exercise of contract options, changes requiring Contracting Authority approval, scope/timing of future phases, procurement for future phases in frameworks, COVID 19 impact on pricing/availability of supplies, consortium working/sub-contractor management arrangements, managing interfaces, access to EO records etc.

## Summary of key issues

- The better you understand the possible means of meeting your needs before launching the process, the more you will be able to steer the process
- In general you should not launch the dialogue/negotiation without a clear understanding of the strengths/weaknesses/risks/costs of how your needs will be met i.e. what final tenders might contain
- You need to know in advance what you wish to discuss in dialogue/negotiation and why
- What you discuss in dialogue/negotiation should mainly be linked to the justification for the use of procedure
- Important to define non-negotiable aspects of specification (technical/financial) and non-negotiable contract conditions



## Process overview

## QUESTIONS AND ANSWERS