

# Competitive Dialogue and Competitive Procedure with Negotiation – Implementation –

## Post-winning bidder selection

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## Competitive Dialogue Procedure – Scope for change after selection of winning bidder

- Contracting Authority may conduct post-tender negotiation with the winning bidder to “confirm financial commitments or other terms contained in the tender by finalising the terms of the contract” but negotiation must not “materially modify essential aspects of the tender or the public procurement” and “not risk distorting competition or causing discrimination” (Art 30(7), Directive 2014/24/EU)
- What is a material modification?
- What are “essential aspects” of a tender or public procurement?
- Scope not intended to be wide-ranging
- Necessary for private finance/need for financial close



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## Post-award phase – Contract finalisation

- Remedies Directive 2007/66/EC:
  - Minimum standstill obligation period of 10 days between the announcement of award decision to all bidders that have not been excluded definitively and the conclusion of the contract
  - Invalidity of contract in cases where standstill obligation has not been observed
- Compliance with disclosure requirements re negotiations and dialogue (Art 55(2)(d), Directive 2014/24/EU)

## Post-award debriefing

- As an example, the EU Public Procurement Directive 2014/24/EU sets out (at Art. 55) the rules which awarding bodies need to follow in debriefing of unsuccessful bidders
- The key requirement is that the losing bidder should be informed of the “characteristics and relative advantages” of the successful tenderer
- They also need to be informed about the “conduct and progress of any negotiations and dialogue with tenderers”

## Post award phase – Main challenges – 1

- Finalising all outstanding contract terms
- Completing commercial/financial close if using private finance
- Ensuring compliance with standstill provisions
- Ensure that the contract is signed before execution starts
- Confirming the winning bidder's plan for early deliverables
- Finalising detailed designs (if necessary)

## Post award phase – Main challenges – 2

- Preparing a contract guide including key milestones and actions including arrangements where relevant for construction, installation and warranty phases and for maintenance/operation phase (who, how and how reported and - for maintenance phase - how often?)
- Obtaining winning bidder's implementation work plan
- Implementing the contract management arrangements including personnel/performance validation arrangements
- Ensuring that there sufficient knowledge/skills transfer from procurement team to contract management team

## Post award phase – Main challenges – 3

- Ensuring that the contract awarded is not materially different from the advertised contract (again to minimise risk of legal challenge from those who chose not to express interest in the contract or made offers)
- Ensuring that the procurement is still value for money relative to how this is defined before the procurement was launched
- Ensuring that the winning bid still better than the next best bid
- Ensuring that all the winning bidder's commitments documented

## Competitive Dialogue and the Competitive Procedure with Negotiation – Post-winning bidder selection

### QUESTIONS AND ANSWERS