

Competitive Dialogue and Competitive Procedure with Negotiation – Implementation

Dialogue/negotiation

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Competitive Dialogue Procedure – Dialogue/Negotiation phase – Summary

- Parameters for dialogue/negotiation phase (rules, importance objectives)
- Preparation for dialogue/negotiation
- Launching dialogue/negotiation
- Conduct of dialogue/negotiation
- Closing dialogue/negotiation
- Call for final tenders



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During the dialogue phase the Contracting Authority may:

“Discuss all aspects of the contract with the chosen participants” provided that they ensure equality of treatment among all candidates

During the dialogue phase the Contracting Authority may not:

- Provide information in a discriminatory manner which may give some candidates an advantage over others
- Reveal to the other candidates solutions proposed or other confidential information communicated by candidates participating in the dialogue without their consent (what scope for merging solutions)?
- Disclosure of information from an economic operator by agreement may not be in form of a general waiver (what can a Contracting Authority do?)

Other issues

- Aim of the dialogue is to allow the Contracting Authority to “identify and define the means best suited to satisfy its needs”
- The dialogue may be conducted in successive stages to reduce the number of solutions being discussed

Importance of dialogue phase

- Opportunity for Contracting Authority to resolve all issues before calling for final tenders and thus control the process
- Opportunity for candidates to submit queries to clarify Contracting Authority's needs and any preferences/constraints on how they might be met (i.e. in the contract specification/conditions) and any clarification about the award process

Objectives of dialogue phase

- Finalise call for tenders
- Receive a sufficient number of final tenders to ensure competition (from a value for money as well as a legal perspective)
- Receive final tenders from bidders which are affordable, deliverable, unconditional and meet the Contracting Authority's needs
- Ensure as far as possible that there are “no surprises” at final tender stage

Objectives of preparation for dialogue

- Understanding potential solutions before launch (avoiding a “voyage of discovery”)
- Clarity about procedural steps to be taken and decisions to be made
- Clarity about internal decision making
- Clarity about expected content of dialogue discussions and approach to them

Competitive Dialogue Procedure – Preparation for dialogue phase – 1

- Further development of understanding possible solutions (strengths, weaknesses etc.) NB The term “solution” is not defined in Directive 2014/24/EU
- Determining what to send at start of dialogue (provisionally preferred specification, contract conditions and means of delivery?)
- Ensuring link between interim submissions and final tenders (e.g. reconciled updates)
- Expected form of interim submissions to match outcomes sought/ information needs to assess solutions (scope? detail (including designs)? price?)
- Approach to assessment of interim submissions/response to candidates

Competitive Dialogue Procedure – Preparation for dialogue phase – 2

- Review intention to eliminate or not during dialogue
- Defining rules for conducting dialogue (equality of treatment, maintaining confidentiality)
- Setting interim timetable for dialogue phase (time for dialogue? time to submit for interim submissions? time to assess/respond to interim submissions? time to submit final tenders? time to evaluate final tenders (including time to clarify)? time to conclude contract?)
- Number of sub-phases:
 - Almost certainly more than one sub-phase within dialogue (how many?)
 - Importance of clear objectives for each sub-phase

Competitive Dialogue Procedure – Preparation for dialogue phase – 3

- Further definition of issues the Contracting Authority wants to discuss (NB *Power* to discuss all aspects of contract with candidates is not an *obligation* to do so) e.g. negotiable and non-negotiable elements of contract specification and conditions, scope for bidder alternatives (e.g. use of materials) within offers, Contracting Authority's preferred and acceptable outcome for negotiable issues?
- Review of issues bidders will want to discuss
- Defining basis for contract specification/conditions change during dialogue
- Defining basis for changes to contract during execution

Competitive Dialogue Procedure – Preparation for dialogue phase – 4

- Defining approach to dialogue process:
 - Kick-off meetings with all candidates?
 - How many site visits allowed?
 - Follow up to site visits (bidder requests and responses)?
 - Agenda format?
 - How many individual meetings with bidders?
 - Length of time for individual meetings?
 - Sequencing of individual meetings?
 - Conduct during meetings

Competitive Dialogue Procedure – Preparation for dialogue phase – 5

- Defining approach to dialogue process (continued):
 - Channels of communication between candidates and Contracting Authority
 - Availability (in light of other commitments - especially senior staff)
 - Continuity of own staff?
 - “Parallel team” approach?
 - Approval and circulation of meeting agendas/notes
 - Management of data room by Contracting Authority
- Planned feedback to interim submissions

Competitive Dialogue Procedure – Preparation for dialogue phase – 6

- Communication of indicative timetable and other information to candidates such as, for example, confidentiality arrangements, scope of dialogue, sources of further information, non-negotiable conditions, essential/desirable requirements, KPIs etc.
- Securing asset ownership
- Starting process of securing development consent and other permits and licences
- Definition of acceptable delivery methodologies (technical and, for PPP, financial)
- Consideration of permitted variability in acceptable delivery methodologies

Competitive Dialogue Procedure – Launching dialogue phase – 1

Art.54(1), Directive 2014/24/EU “In....Competitive Dialogue Procedures, Contracting Authorities shall simultaneously and in writing invite the selected candidates totake part in the dialogue” (often called an Invitation to Participate in Competitive Dialogue (ITPD))

Competitive Dialogue Procedure – Launching dialogue phase – 2

- Art.54(2), Directive 2014/24/EU “(The ITPD) must include reference to electronic address on which the procurement documents have been made directly available by electronic means”. (The ITPD) shall be accompanied by the procurement documents, where those documents have not been the subject of unrestricted and full direct access, free of charge...., and have not already been made otherwise available.
- In addition (it) shall include the information set out in Annex IX (Directive 2014/24/EU)”

Competitive Dialogue Procedure – Launching dialogue phase – 3

Annex IX, Directive 2014/24/EU “1. The invitation...to participate in the dialogue....must contain at least:

- Reference to the call for competition published
- Date/address set for start of consultation and language/languages used
- Reference to any....documents to be submitted, in support of verifiable declarations by the tenderer in accordance with Arts.59 and 60 and, where appropriate, Art 62. or to supplement the information referred to in those Articles, and under the conditions laid down in Arts. 59, 60 and 62

Competitive Dialogue Procedure – Launching dialogue phase – 4

Annex IX, Directive 2014/24/EU (continued) “1. The invitation...to participate in the dialogue....must contain at least (continued):

- The relative weighting of criteria for the award of the contract or, where appropriate, the descending order of importance for such criteria, where they are not given in the contract notice, in the invitation to confirm interest, in the technical specifications or the descriptive document.”

Competitive Dialogue Procedure – Launching dialogue phase – 5

ITPD should also ideally include:

- Indicative timetable for dialogue/sub-phases and for remainder of award process
- Procedural rules for dialogue phase (meetings, information flows, 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, process constraints etc.

NB This can be very effectively done if the Contracting Authority launches the dialogue by referring to its preferred specification and contract conditions

Objectives of conduct of dialogue phase

- Resolve all contractual issues before calling for final tenders which must be definitively resolved by that stage i.e. issues about which after call for tenders there can be no further discussion
- Finalise call for tenders
- Receive a sufficient number of final tenders to ensure competition (from value for money as well as legal perspective)
- Receive final tenders which are affordable, deliverable, unconditional and meet the Contracting Authority's needs

Competitive Dialogue Procedure – Conducting the dialogue phase – 1

- Openness and completeness of communication with candidates (especially listening to candidates/"no interruption principle")
- Keeping candidates interested (especially when competition limited)
- Assessing the "no-bid"/bid premium factors
- Recording of meeting notes by Contracting Authority
- Recording decisions by Contracting Authority and basis for them and managing changes during dialogue
- Confirming continuing applicability of circumstances used to qualify candidates for short list

Competitive Dialogue Procedure – Conducting the dialogue phase – 2

- Understanding candidate methodologies (e.g. construction methods, installation testing of infrastructure/equipment, maintenance arrangements, materials to be used, quality control procedures, safety procedures, security of information, environmental compliance procedures, staff selection, training and security clearance procedures, consortium working/sub-contractor management arrangements, integration of solutions etc.)
- Assessing candidates' understanding of Contracting Authority's needs
- Assessing acceptability/sufficiency of detail of designs
- Assessing diversity of sources of supply
- Assessing experience of proposed project manager

Competitive Dialogue Procedure – Conducting the dialogue phase – 3

- Testing candidate solutions (where completely novel) and other special situations (e.g. limited competition, high operational risk, urban development, land reclamation, integration of solutions etc.)
- Assessing candidates' partnering behaviour (e.g. response to draft contract conditions/specification?, availability of key decision makers? continuity of staff at all meetings? change proposals offering value for money to Contracting Authority? absence of gaming? confirmation of unconditionality of tenders? bringing in lenders if project privately financed?)
- Assessing "distance from final tenders" in interim submissions (e.g. detail of designs, acceptability of working methods, financing certainty if private finance)

Competitive Dialogue Procedure – Conducting the dialogue phase – 4

- Avoid providing information in a discriminatory manner which may give some candidates an advantage over others
- Obligation not to reveal confidential information from economic operators without their agreement (how to designate confidential information? how to secure "agreement"? how to resolve disputes?)
- Disclosure of information from an economic operator by agreement may not be in form of a general waiver
- Possibility to conduct negotiations in stages/eliminate candidates using award criteria if mentioned in the contract notice/another procurement document (how and why?)

Competitive Dialogue Procedure – Conducting the dialogue phase – 5

- Assessing sustainability (deliverability) of solution in interim submissions
- Maintaining equality of treatment and confidentiality in feedback on interim submissions
- Determining how to follow up interim submissions/conduct later dialogue phases
- Parallel activities – Finalising development consent and other permits/licences
- Parallel activities – Finalisation of contract management arrangements for construction and operational phases (who, how and how reported and - for operational phase - how often?)

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QUESTIONS AND ANSWERS