

Procurement Policy

Information Note 04/06 – 31 July 2006

Practical guidance on the use of Competitive Dialogue

Issue

1. To provide some tips to help in the use of Competitive Dialogue; to reduce the risk of inappropriate use of the Negotiated procedure; and to invite input for the development of further guidance.

Dissemination

2. You are encouraged to circulate this PPN widely within your department, agencies, NDPBs and other bodies for which you are responsible.

Contact

3. Enquiries about this paper should be addressed to the OGC Service Desk on 0845 000 4999 servicedesk@ogc.gsi.gov.uk

Background

4. Competitive Dialogue is a new procurement procedure introduced in the EU Public Sector Procurement Directive (2004/18/EC) and implemented into UK law via the Public Contracts Regulations SI 2006/5 with effect from 31 January 2006.

5. Guidance about Competitive Dialogue has been published by both OGC and the European Commission. As this is a new procedure there is uncertainty amongst contracting authorities and bidders about its operation in practice.

Detail

6. Contracting authorities which have been using the procedure since January this year are gaining experience of the procedure's practical implementation. Some of the more common questions being asked of OGC, HMT, 4ps and

department PFUs have led to the recognition that this experience should be shared. Hence the attached note “Competitive Dialogue: Practical tips for Operation” is provided to address some of the aforementioned uncertainty.

7. OGC intends to produce further guidance based upon the experiences of those applying Competitive Dialogue in practice. To assist us in this, we would appreciate you sharing your experiences of Competitive Dialogue with us and perhaps providing a case study to illustrate particular approaches or difficulties.

Procurement Policy Division
Office of Government Commerce

As procurement professionals will be aware, Competitive Dialogue is a new procurement procedure introduced in the EU Public Sector Procurement Directive (2004/18/EC) and implemented into UK law via the Public Contracts Regulations SI 2006/5 with effect from 31 January 2006. This note's purpose is to draw the attention of contracting authorities to the new procedure; to provide some tips to help contracting authorities using Competitive Dialogue; and, to mitigate any risk of inappropriate use of the Negotiated Procedure.

OGC has published guidance¹ on Competitive Dialogue and the European Commission has published an Explanatory Note². However, since this is a new procedure and the Directive has little about the procedure's practical implementation, there remains considerable uncertainty amongst contracting authorities and bidders, about the operation of Competitive Dialogue in practice.

Competitive Dialogue is a flexible procedure for use in complex projects where there is a need for the contracting authority to discuss all aspects of the proposed contract with candidates. In the past many complex projects were procured via the Negotiated Procedure. With the introduction of Competitive Dialogue as an alternative procedure the Commission has reiterated that Negotiated Procedure is only available in "exceptional cases".

The following is list of practical matters which contracting authorities need to consider. It is by no means exhaustive.

- Early consideration has to be given to the procurement procedure that will be used. The justifications for the procedure selected should be fully documented, legal advice sought as appropriate and the decision discussed with relevant sources of procurement expertise (e.g. Departmental Commercial Directorates or Private Finance Units, OGC, 4ps, etc.) as required;
- The appropriateness of using the Open or Restricted Procedures should be considered. For complex projects there is no presumption that Competitive Dialogue will be the most appropriate form. Its use has to be justified with the reasoning behind the choice of procedure documented;
- Competitive Dialogue will be used for the vast majority of complex procurements, with very few such projects being procured under the Negotiated Procedure which should only be used in truly "exceptional" circumstances. Again, its justification and reasoning will need to be documented;
- The procedure under which a procurement is being undertaken has to be stated in the OJEU notice. Once stated, it is not generally possible to change to an alternative procurement procedure (except that the Negotiated Procedure can be used where a previous open, restricted or competitive dialogue procedure was discontinued due to irregular or unacceptable tenders) without cancelling the procurement and issuing a new OJEU notice;

1 <http://www.ogc.gov.uk/index.asp?id=1004559>, dated January 2006

2 http://europa.eu.int/comm/internal_market/publicprocurement/docs/explan-notes/classic-dir-dialogue_en.pdf

- There is the possibility of challenge if a procurement is inappropriately undertaken using the Negotiated Procedure, by the Commission or other parties with an interest in the procurement (including potential bidders). Any such challenge is likely to result in significant delays to the procurement and may require the contracting authority to re-run the procurement under an appropriate procurement procedure with significant cost and time delay implications;
- Under Competitive Dialogue the contracting authority must choose the most economically advantageous tender (MEAT) “on the basis of the award criteria laid down in the contract notice or the descriptive document”.
 - For Competitive Dialogue the award criteria to be used need to be given relative weightings and made available in the descriptive document. As a very limited alternative, where it is not possible to establish weighting in advance, the importance of the award criteria should be listed in descending order;
 - The early stages of Competitive Dialogue (including market soundings, Prior Information Notices, OJEU, expressions of interest and pre-qualification) are similar to the other Procedures (Open, Restricted and Negotiated). The major changes from prior practice occur once the Invitation to Participate in Dialogue has been issued;
 - There is concern, so far untested, that Competitive Dialogue will result in higher bid costs for both the public and private sectors. This will be dependent on the ability of the contracting authority to undertake the procurement in an efficient and effective manner, the number of parties involved in the dialogue and the length of the dialogue process. Contracting authorities therefore need to consider at an early stage, and in detail, how the dialogue stage will be undertaken and inform prospective bidders how it will be conducted. Contracting authorities should consider how many pre-qualified bidders should be invited to partake in the dialogue³ and how (if appropriate) the number of “solutions” might be reduced during the dialogue stage;
 - Under the Competitive Dialogue procedure the contracting authority, once it “can identify the solution or solutions, which are capable of meeting its needs” should declare that the dialogue is concluded.
 - Participants are then invited to “submit their final tenders”. As only minor changes can be made to bids following the submission of final tenders, all commercial and pricing issues of any substance need to have been resolved prior to the request for final tenders.

³ Subject to the provisions as outlined in *The Public Contracts Regulations 2006* detailing the minimum number of economic operators shall be not less than 3

- The regulations allow for the final tenders to be “clarified, specified and fine-tuned at the request of the contracting authorities” and the Contracting Authority may request the “tenderer identified as having submitted the most economically advantageous tender” to “clarify aspects of the tender or confirm commitments contained in the tender”. However, in order to avoid the possibility of challenge the scope of these clarifications, specifications, fine-tuning and confirmations will necessarily have to be limited. Following the receipt of final tenders there is no scope to negotiate with any bidder either pre- or post- the appointment of a preferred bidder beyond the clarification mentioned above.

Competitive Dialogue does not necessarily represent a major or fundamental change to the way in which complex procurements have been undertaken in the past. It reinforces many of the best practice messages, including:

- Undertaking a thorough assessment of the need and objectives of the procurement, ensuring affordability and approvals considerations are addressed at an early stage and ensuring that there are limited, if any, changes in scope during the procurement process;
- Ensuring the procurement process is conducted in an efficient and effective manner which minimises costs and maintains competition; and
- Ensuring contractual terms and risk allocations are settled during the competitive stage of the procurement process.

The scale of the challenge for contracting authorities will depend on the degree to which they have previously procured projects under what can be demonstrated as best practice. Procurement under the Competitive Dialogue procedure will place an additional emphasis on the need for much earlier thought, planning, preparation and detailed work being undertaken by the contracting authority and result in less ability to flex the procurement process and terms during the course of the procedure compared to the negotiated Procedure.

There is the possibility that the introduction of this new procedure, which provides the contracting authority less scope for variation during the process, combined with the Alcatel standstill⁴ provisions, may result in an increased risk of challenge.

OGC and other centres of procurement capability within the public sector will develop more detailed guidance and assistance for dissemination to the wider procurement community. This will be greatly assisted by contracting authorities providing feedback on their experiences, issues and problems with Competitive Dialogue.

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⁴ See OGC's guidance on this at http://www.ogc.gov.uk/embedded_object.asp?docid=1004842