

# DBULLETIN

## HM Treasury's Verdict on Competitive Dialogue

In November 2010 HM Treasury ("HMT") published its 'Review of Competitive Dialogue' which followed 18 months of consultation with the public and private sectors on the use of Competitive Dialogue in practice. Its conclusions are mixed as although it was agreed that, where used appropriately, Competitive Dialogue can be a valuable procurement tool, it appears that there are common misuses of the procedure leading to it becoming 'burdensome and expensive'.

Competitive Dialogue was introduced in 2006 by the Public Contracts Regulations and more than 1200 Competitive Dialogue procurements have been undertaken in the United Kingdom since its introduction. Under Regulation 18, Competitive Dialogue can be used for 'particularly complex contracts' where a contracting authority is not objectively able to 'define the technical means... capable of satisfying its needs... or specify either the legal or financial make-up of a project or both'. The procedure was intended to provide greater flexibility in the procurement of these complex contracts where the contracting authority considers that the open or restricted procedures would not be appropriate.

HMT found that where used properly, Competitive Dialogue maintains competition, imposes discipline on the parties to the procurement, establishes good working relationships between the public and private sectors and delivers improved solutions. However, it also identified numerous issues with how Competitive Dialogue is implemented and many examples of bad practice by contracting authorities. The main problems identified by HMT are set out below.

### **Inappropriate use of Competitive Dialogue**

There is widespread concern in the private sector that the Competitive Dialogue procedure is inappropriately used by the public sector. This concern appears to be borne out in HMT's findings which revealed that 44% of projects were for contracts for 5 years or less; 52% had a capital value of less than £5m; and 41% had a services value of less than £5m. The comparatively low cost and duration of these contracts would suggest that they would not necessarily meet the 'particularly complex' criteria in Regulation 18.

The Review highlights the importance of the pre-procurement phase and recommends that more consultation with the market should be carried out before a particular procurement route is chosen and commenced. This will enable contracting authorities to better define their requirements and thereby target their procurement process. This will also help to address one of the key concerns of the private sector that contracting authorities use the Competitive Dialogue procedure as a form of 'free consultancy' in order to tailor their requirements during the procurement process. The Review recommends focusing the Competitive Dialogue on seeking solutions to 'known unknowns' to ensure that the dialogue centres on those issues which require dialogue.

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## **Lack of experience and skills gap**

Few contracting authorities have prior experience of Competitive Dialogue and therefore those leading the process are more often than not doing so for the first time. Where there is repeat experience within contracting authorities, the Review found that there was limited knowledge sharing and therefore the benefits of valuable know-how were still not felt. The Review concedes that inconsistent guidance from central government may have exacerbated the problem.

This is an important area as a strong leadership team within the contracting authority is invaluable – they should have the necessary the technical, financial, legal and commercial awareness needed to run a successful Competitive Dialogue.

## **The importance of down selecting and closing dialogue**

HMT highlight the importance of down selecting the number of bidders participating in the Competitive Dialogue at appropriate stages. This is permitted by Regulation 23 as long as the 'number of economic operators to be invited to participate at the final stage is sufficient to ensure genuine competition'. The Review reveals that in the past more bidders than were necessary to ensure this 'genuine competition' were kept in the process for too long - 15% of the Competitive Dialogue's which they consulted had taken 6 or more bidders through to final bid submission. This is a cause for concern, especially when considered in conjunction with the level of abortive bid costs which have been incurred by each bidder.

In addition to identifying a reluctance to down select, the Review also recognizes that the close of dialogue is often delayed whilst discussions with bidders are prolonged. The Review puts this down to an 'overly prudent approach' to Regulation 26 which states that following the final

bid submission a contracting authority may only request that a bidder 'clarify, specify or fine tune a tender' and only to the extent that this does not 'involve changes to the basic features of the tender or the call for tender when those variations are likely to distort competition or have a discriminatory effect'. The Review seems to suggest that this has been interpreted too cautiously. However, this is balanced against the Review's conclusion that one of the positive outcomes of Competitive Dialogue is that the issue of protracted post-preferred bidder discussions has been successfully addressed. It appears therefore that this positive outcome may only have been achieved by having these protracted discussion prior to the close of dialogue.

## **Barrier to smaller enterprises?**

Due to the increased bid costs required in comparison to other procurement routes, even large, experienced companies are hesitating before entering a Competitive Dialogue. The Review is concerned that Competitive Dialogue is perceived as being inaccessible for small and medium sized enterprises as they may not have the resource base or knowledge to enable them to participate successfully. The Review confirms that the bid costs incurred during the procurement increase from an average of 2-3% of the contract size to 5-6% in a Competitive Dialogue. Furthermore, all the participating bidders have been required to spend what would previously only have been required to be spent by a preferred bidder – partly perhaps due to the over cautious interpretation of 'fine tuning' mentioned above.

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## Practical recommendations

The Review makes a number of practical recommendations to help improve the use of Competitive Dialogue in the future. In summary these are:

- It should not be considered to be the default procedure by contracting authorities.
- Contracting authorities should publish a justification document setting out why they have chosen to use Competitive Dialogue.
- Pre-procurement preparation should be improved by early engagement with the market and robust planning.
- Contracting authorities should be wary of requesting too much information from bidders and holding unnecessary meetings.
- Contracting authorities should seek to focus every request for information from bidders on their evaluation criteria.

For information and advice on making the best use of the Competitive Dialogue procedure, please contact:

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