Competitive Dialogue: a critical monologue

Penri Desscan and Simon McCann

www.morgan-cole.com

delivering high quality legal services from offices in wales and southern england

© Morgan Cole 2012
Competitive Dialogue – what is it?

- Negotiation with multiple providers (minimum 3)
- To establish:
  - Contracting authority’s (CA) needs/specification
  - All major financial/commercial terms
- Structured process (can include intermediate stages)
- Ends in final competitive tender from all participants, followed by award to winner
- No “preferred bidder” negotiation stage
Advantages over previous single “preferred bidder” route

- Preferred bidder was often selected on incomplete/inadequate information - CD allows fuller scrutiny
- Single PB in a strong bargaining position - CD competitive
- “Deal drift” - CD more structured and CA can set agenda
- Cost - though 3+ bidders, CD often cheaper because incentive to limit costs and conclude negotiations quickly
- Clearer audit trail/easier to show vfm
- CD more compliant - less risk of challenge
Disadvantages

• Cost – three or more bidders instead of one
• Complexity – needs careful planning and management
• Resource intensive
• Harmonising solution at final tender stage – can “best bits” of bidders’ solutions be borrowed to form final spec?
• Bidder ignorance – some still try to hold back on committing / giving full answers in false hope can negotiate post-tender
Problem with implementation

• No case law yet on Competitive Dialogue procedure itself
• Some high-level guidance and policy notes from HMT/OGC and EU Commission
• Very little guidance available on the detailed processes
• So - look to core procurement principles (equal treatment, non-discrimination and transparency), other relevant law/practice and basic common sense
When to use Competitive Dialogue

• “Particularly complex contract” (Reg 18(1)), which means:
  • Unable to define technical means of meeting needs; or
  • Unable to specify legal or financial make-up.
• Discretion wider than Negotiated Procedure
• “Obligation of diligence” – (guidance) consider and document reasons for using CD
• Adequate resource needed - particularly technical and financial
• NB: NOT mandatory for “Part B” services (e.g. health and social care), but does provide good audit trail/vfm, and is a fully compliant process
Setting the scope

- Market research/testing
- Take early, detailed financial advice on (a) bidder strength checks and (b) financial model – putting it off to later stages wastes time and cost
- Keep initial scope broad and flexible to allow for possible changes
- Adopt a “funnel” approach and avoid u-turns
- Affordability and outline cost
Scoping – Institutionalised PPPs

- IPPPs - collaborations between public and private bodies to establish mixed-capital entities to perform public contracts
- “Teckal” in-house exception doesn’t apply where there is any private involvement – “Stadt Halle” case (2006)
- Procurement rules also apply to subsequent awards of public contracts to the entity
- Scope must therefore include both the “relationship” and the award of future contracts (via a framework or a long-term services contract) – EU Commission Interpretative Communication on IPPPs (2008)
First step - the Contract (OJEU) Notice

- Works, services or supplies (II.1.2)? Estimate values of, e.g.
  - Construction cost (including design and fit-out)
  - New IT - off the shelf (supply) or bespoke (service)?
  - Transfer of legacy equipment/data migration (services)
  - Post-completion maintenance - services

- Getting categorisation wrong can cause problems later

- Value and options (II.2) – include all foreseeable “extras” (particularly extensions to contract term)

- Additional users – MUST name or use clearly defined class
Second step - pre-qualification ("short-listing")

• Three parts:
  - Exclusion (e.g. for fraud, tax evasion, insolvency)
  - Assessment (technical competence, financial standing)
  - Selection (picking the best 3/+)

• Assessment - can only ask for limited info permitted by Regs.

• Selection - can use objective, non-discriminatory criteria provided stated in advance in the OJEU notice (Reg 18(12)). (Practice – refer to in OJEU notice and state in detail in PQQ

• Can ask for wider info here – but must be clear about how used. MUST give weightings and scoring mechanism
Third step – the Competitive Dialogue

• Begins with Invitation to Participate in Dialogue (ITPD)
• ITPD must contain:
  ▪ “descriptive document” - outline statement of needs (Reg 18(5)(b))
  ▪ Contract docs, or website/data room address (Reg 18(16))
  ▪ Routine info - dates, addresses, references etc (Reg 18(18))
  ▪ Criteria and weightings (Reg 18(18))
• Bidders can ask for further info (Reg 18(19))
• Equality of opportunity/access to information (Reg 18(21)(b))
Competitive Dialogue – process (1)

• No fixed process - free to choose (must be fair and transparent)

• Consider key elements, what level of commitment needed, and by when, e.g. -
  ▪ Degree of detail of design/specification needed to award
  ▪ Implementation plan/testing/transfer procedure
  ▪ Pricing and payment mechanism, KPIs, financial penalties
  ▪ Risk allocation and legal contracts

• Process needs to fit scheme - don’t slavishly follow precedent
• One often-used example (NB is example only):
  ▪ Include request for interim tender with ITPD
  ▪ First round of dialogue meetings
  ▪ Tenders submitted and evaluated
  ▪ Feedback, scores and potential elimination (if weeding out in stages)
  ▪ Revised ITPD issued to surviving bidders
  ▪ Second round of dialogue meetings
  ▪ Invitation to Submit Final Tenders issued
  ▪ Final Tenders submitted and evaluated
  ▪ Standstill period, clarifications (NOT re-negotiation) and sign contract
Controlling the process - how? (1)

- Set the timetable - and stick to it
- Data room/portal for all tender docs – ensures equal access
- Contract docs:
  - produce early and limit number of reviews
  - use reasonable terms to shorten negotiations
  - use matrix to record and resolve issues
  - warn bidders of negative effect of too many amendments
Controlling the process - how? (2)

- Risk - be open-minded about allocation – value for money?
- Criteria – don’t over-complicate or hide (“Newham” case)
- “Dry run” for final tenders – avoids bidders accidentally ruling themselves out
- Include a moderation / second view element in evaluation, to spot any risks / issues in first-line evaluation
- Transparent, lean approvals process. Approvers shouldn’t try to re-negotiate the deal
Criteria and weightings (1) - the effects of “Newham”

- **Lettings International -v- Newham** – transparency principle requires that:
  - all criteria, sub-criteria and weightings be disclosed
  - criteria etc must be applied as disclosed

- **First lesson** - disclose **everything** at start – all criteria, weightings, sub-weightings and methodology

- **But** - can you change the criteria/weightings during the CD process? Requirements may change during process
Criteria and weightings (2)

• Regs – must evaluate using criteria stated in descriptive document (Reg 18(27)) & weightings must be stated in ITPD (Reg 18(18)(d))

• NB Criteria to evaluate stages/final bid as set out in DD

• Comp dialogue an iterative process - DD is “living document”

• In principle, no reason why can’t adapt criteria/weightings where justified by changes to requirements / DD

• MUST Fully disclose criteria/weightings in advance of each stage

• Avoid changing head criteria/weightings and beware of risk of discrimination
Converging solutions and confidentiality (1)

- Dialogue ends when one or more solutions identified (Reg 18(24) & (25))
- In practice, most buyers will want final tenders on a near-common solution
  - vfm
  - consistency in marking
  - excluding bidders with unacceptable solutions improves competition
- But can you share aspects of bidders’ solutions to come up with a common final spec?
Converging solutions and confidentiality (2)

- Regs - can’t disclose solutions or confidential info unless bidders agree (Reg 18(21)(c))
- Get their consent at the start to sharing reasonable, broad aspects of solutions - not pricing, trade secrets or IP. Ask them to sign statement agreeing to this as part of ITPD
- Get them to identify those specific aspects of their tender to be treated as confidential and reasons why - also useful for Freedom of Information purposes
Fourth Step - the Final Tender

- Authority must be able to identify one or more solutions meeting its needs (Reg 18(24)). So make sure there is enough technical and financial certainty to make this decision.
- CA notifies Bidders that Dialogue is concluded and invites Final Tenders – must state deadline (Reg 18(25))
- Final Tender – must contain all elements necessary for the performance of the project. I.e. must be a complete tender, capable of being accepted. No “Preferred Bidder” stage. (Reg 18(26) & (28)
- No post-tender negotiation permitted. Only “clarification, specification and fine-tuning”.


Fifth Step – Evaluation and Award

• Must ONLY use criteria, weightings and scoring methodology disclosed - *Newham*.

• Must ensure evaluation panel has sufficient expertise and resource. Consider moderation / second view

• Keep good audit trail – brief objective reasons for scores

• *Aquatron* – v- *Strathclyde Fire* – panel didn’t keep adequate records, applied criteria wrongly and used undisclosed criteria – severely criticised for their lack of understanding – bidder won £122k loss of profits
Sixth Step – Notification of decision

- Regs as amended 2009 & 2011 – must notify award decision as swiftly as possible (in practice, e-mail)(Reg 32(1))
- Notice to all bidders, and also all who applied to participate, UNLESS already notified of exclusion AND 3 months passed (Reg 32(18))
- Must include (Reg 32(2)(a), (b) & (c))—
  - Criteria/weightings used
  - Score of recipient (PQQ or interim score if weeded out earlier)
  - Score of winner (if recipient lost)
  - Identity of winner
Form of notice

- Also MUST (Reg 32(2)(d))—
  - Set out standstill period, deadlines, and date when will sign contract

- State (in winner’s notice) that this is not a contract or a promise to award a contract, and that the process may have to be suspended or cancelled if a challenge is received

- NB MUST give reasons at start of standstill period - Extract scores in tabular form from scoring matrix used at evaluation – gives consistency. Show weighted scores against each criterion/sub-criterion

- Time limits do not start to run until you have done this (30 days or up to 3 months)
Reducing risk of ineffectiveness (1)

• Biggest risk – 2\textsuperscript{nd} ground – (a) breach of Reg 32 requirements which means claimant couldn’t get claim in before contract entered into; AND (b) a substantive breach of other procurement rules which affected chances of winning

• E.g. Not giving sufficient reasons / time before signing contract, plus some other alleged breach

• [Grounds 1 and 3 unlikely to apply to Competitive Dialogue – (1) failure to use OJEU notice and (3) non-compliance with framework requirements]
Reducing risk of ineffectiveness (2)

- Get Reg 32 (reasons and standstill time) right – only need to defeat one part of claim to avoid ineffectiveness.

- NB time – 10 days runs from midnight at end of the day notice is sent – so following day is day 1. Time ends at midnight at the end of day 10 UNLESS this is a non-working day. If so, extend so ends at midnight at the end of next working day.

- Reasons – need to be sufficient for bidder to understand (a) the process and how evaluated and (b) whether they have grounds for claim. Do NOT need to be exhaustive.
Reducing risk of ineffectiveness (3)

- At end of standstill period, issue a notice to all recipients of the standstill notice, confirming entry into the contract.
- This cuts challenge period from 6 months from entry into contract down to 30 days from date of notice (Reg 47(E)(2) & (5)).
- ONLY works if you have already given sufficient reasons in the standstill notice.
- What are “sufficient reasons”? 
Reduction of risk of ineffectiveness (4)

- Reasons – need to be sufficient for bidder to understand (a) the process and how evaluated and (b) whether they have grounds for claim. Do NOT need to be exhaustive.

- The summary of reasons need only explain why the unsuccessful tenderer was unsuccessful, and the characteristics and relative advantages of the successful tenderer. In particular, “The trigger is intended to be a clear and relatively short document or statement, in order to lessen commercial uncertainty. It is undesirable to have a period dependent on a long and potentially contentious document. Something shorter and easier to deal with is provided for” (Alstom –v- Eurostar and Siemens, 2011).
Look ahead to New Directive
Current status

- Consultation Jan-Apr 2011
- Proposal for a Directive issued Dec 2011
- Now goes to Council of Ministers and European Parliament
- Could be further changes as subject to negotiation
- Due for implementation in Member States June 2014
- Usually up to 2 further years allowed for implementation
Results of Consultation

- Most responses from UK, Germany and France
- Clear majority of stakeholders wanted simpler, more flexible rules
- Particularly wanted competitive procedure with negotiation
Competitive Procedure with Negotiation

- Not much detail yet. Intended to be more flexible
- Prior publication of OJEU required
- “Qualitative selection” to negotiate – doesn’t appear to be minimum number
- Must not change description, criteria or key requirements – may be unduly limiting
- Preliminary tender, then negotiate with selected candidates
- Negotiations – no detail except compliance with transparency and non-discrimination principles
- Final tender stage
Competitive Dialogue: a critical monologue

Penri Desscan and Simon McCann