



COMPETITIVE DIALOGUE PROCEDURE: HOW TO DIALOGUE COMPETITIVELY BUT CORRECTLY

To the lay reader, the Competitive Dialogue Procedure (CDP) may sound like a euphemism for an argument. Here we show you how to manage the procurement process so it doesn't end in one (i.e. a legal challenge).

When can the CDP be used?

It is important to remember that the CDP can only be used for "particularly complex contracts" where the public authority is not able to objectively define the legal and/or the financial make up of a project and/or the technical means of satisfying their needs or objectives. In the context of complex regeneration schemes, the CDP could be used where there a number of different design, financial, contractual, phasing, planning, and technical solutions which could bring about the economic, social and environmental regeneration of an area.

There could be a mix of landholdings including some public land, some private land and some third party interests. There could be a need for a Compulsory Purchase Order to assemble the site. Traditionally, the CDP has been used to procure Building Schools for the Future schemes (such as part of Coventry's Swanswell Initiative) and other PPP/PFI projects but it has also been used to procure large scale, complex mixed-use developments.

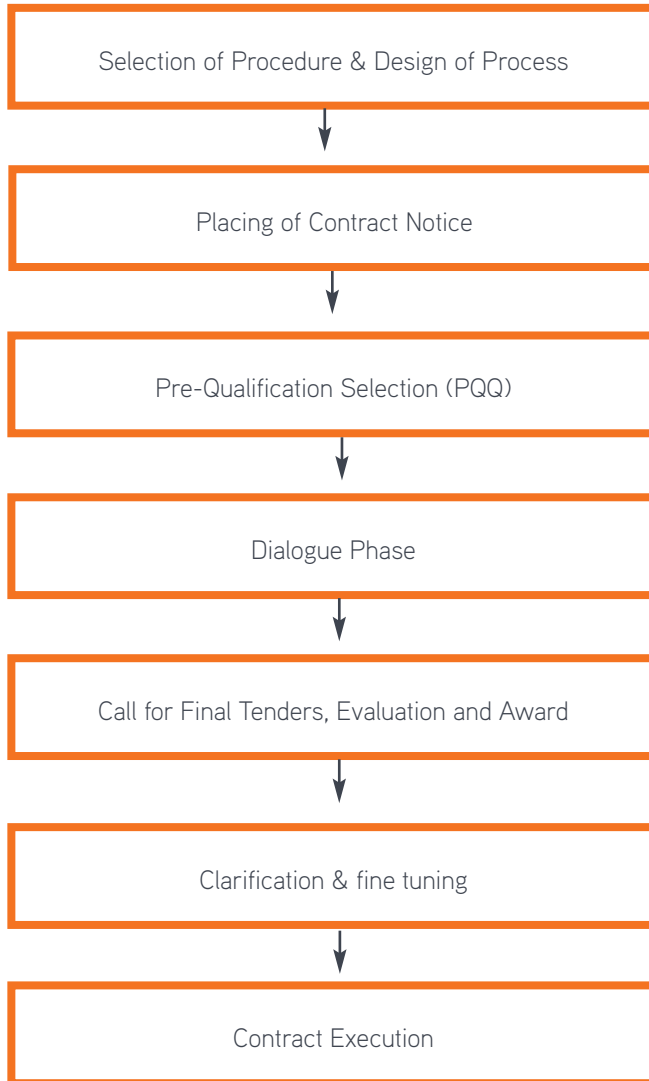
development off the ground, and the CDP may allow the Authority to do this. For example the CDP may allow the Authority to explore with bidders whether a traditional development agreement, a joint venture arrangement, the establishment of a company limited by shares in which the public sector partner has a majority share, or a limited liability partnership is the best means of achieving its objectives. However,



In the current economic climate there may be merit in exploring various contractual structures which allow the partners to share risk and reward in order to get the

there are some stringent and technical requirements as to when the CDP can and cannot be used and legal advice should always be sought on whether the CDP is available in the particular circumstances.

Outline of the Competitive Dialogue Process

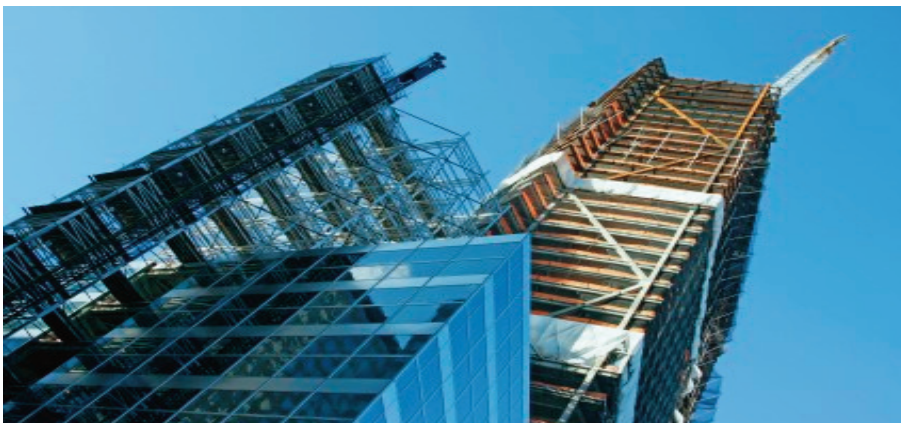


The focus of this article is on the Competitive Dialogue Phase. However, it is important to have a broad understanding of the process as a whole. Before the dialogue commences, in common with other procedures there will usually be a pre-qualification selection stage (commonly known as a “PQQ Stage”) during which the Authority can eliminate bidders if they fail to meet minimum standards of economic or financial standing, technical or professional ability or are otherwise ineligible. Under the rules, at least three bidders must be invited to dialogue after pre-qualification.

The Competitive Dialogue Phase

It is the Dialogue itself which gives the Authority the flexibility to explore and develop potential solutions in detail. Its aim is to identify and define the means best suited to satisfy the Authority’s needs. The Dialogue can cover “all aspects of the contract”. Dialogue sessions could, in the regeneration context, cover bidders’ design proposals, planning strategy, environmental and technical issues, financial proposals, and contractual and legal structures including the allocation of risk and reward. For a successful Dialogue, the following principles should be adhered to:-

- At all times the Authority must bear in mind the EU principles of transparency, equality of treatment and non-discrimination. All bidders must be treated the same and allowed equal time to dialogue the issues. The priority in which they are allocated meetings should be rotated to ensure that no one bidder is favoured over another.



There should be no “cherry picking” of the best ideas from each bidder’s proposal without the consent of all bidders. In practice, this can be a real issue because the Authority will naturally want to use the best ideas. However, bidders are generally reluctant to agree to disclosure. The dialogue should be managed carefully to ensure that there is no-cross fertilisation of ideas which could lead to a legal challenge after selection when an aggrieved bidder realises that one of its ideas has been used. Although more costly and time demanding, this means individual meetings must be held with bidders rather than joint meetings.

The Invitation to Dialogue request (ITD) should include details of the award criteria by which bids will be evaluated against and their weightings. If any sub-criteria are to be used it is important that they are also disclosed to bidders prior to submission of final tenders. Generally speaking, the criteria should not be changed during the dialogue process because that is open to challenge on the basis that any adjustment favours one bidder over another.

Two of the central criticisms of the CDP are that the costs which bidders have to expend at risk are excessive and that it can take far too long to conclude the dialogue. In practice, there is a real risk if the process is not managed carefully that bidders will pull out. It is important that this is prevented

because there needs to be a sufficient number of bidders left to submit final tenders to allow for genuine competition. If not, the process may have to be re-run.

It is therefore important to identify and narrow the issues in advance and throughout the Dialogue as efficiently as possible to minimise the bidders’ costs. Where possible, meetings should be timetabled in advance and the agenda circulated. However, flexibility should be allowed during the dialogue to discuss issues and solutions that were not originally envisaged. In order to reduce the bidders’ costs, as much information should be provided by the Authority at an early stage: for example, copies of legal title investigations and site surveys commissioned by the Authority which identify key issues.

OGC guidance on the Building Schools for the Future (BSF) Programme proposes that as many issues as possible should be dealt with before the CDP process is initiated and urges authorities to engage early with partners to identify their needs. This is itself a process that needs to be managed very carefully to ensure that there is fair and equal treatment without any undue prejudice. For example, if there are general discussions with the development sector (including potential bidders which are designed at identifying the Authority’s needs, will a developer not involved be prejudiced?

To reduce the risk and cost which bidders are exposed to, it is recommended that the Authority consider reducing the number of bidders again during the Dialogue stage - i.e. in addition to the initial reduction carried out

at the PQQ selection stage. To do this, the Authority must reserve this right in OJEU Contract Notice. In practice, this reduction could be facilitated by asking bidders to submit their outline solutions. These outline solutions could be assessed against the Authority’s evaluation criteria, with only the best being selected to continue with the dialogue. Bidders could then be asked to submit detailed priced technical solutions. Further dialogue sessions are likely to follow this stage to explore the solutions and resolve outstanding issues. However, it is important to remember that the number of bidders invited to submit final tenders must be sufficient to allow for genuine competition.

Call for Final Tenders

The Dialogue should continue until the Authority has identified the solution(s) which meet its needs, including key contractual terms. To facilitate this, the Authority may request fully developed and priced draft bids before concluding the Dialogue.

Bids must be assessed in accordance with the evaluation criteria previously disclosed to bidders and selected on the basis of the Most Economically Advantageous Tender (MEAT). It is important to note that the selection of evaluation criteria can be a very technical area where professional advice might be needed.

A common practical point is that where the development of the Authority’s own land forms part of the project, there will usually be some internal tension between the regeneration department’s desire to prioritise quality and social, economic and

environmental aspects of a bid over financial return and the property department's desire to prioritise the return to achieve best value/consideration. In practice, a balance needs to be struck but a decision made prior to commencing the CDP as to which will ultimately take priority and in what proportion. So as to prevent delay, it is vital that issues such as this are fully considered by the Authority in advance of the dialogue in the context of its value for money, best consideration and well-being obligations and powers.

Post Selection Fine Tuning

Once a final tender is selected, under the CDP there can be no post tender negotiation. There must be no changes to the basic features of the tender if they are likely to distort competition or have a discriminatory effect. Hence the danger of closing the dialogue too early. The only thing that the parties are permitted to do is "clarify, specify or fine tune" the tender. In practice, this means it is important for a developer to get its funders on board as early as possible to minimise the risk of challenge. If, for example, a funder requires alterations to the terms which materially alter the financial return, that could be open to challenge by an aggrieved bidder. This may not always be possible given funders' reluctance to be committed at an early stage.

The OGC's guidance on the BSF programme suggests that matters such as the detailed design, detailed site surveys, investigation of legal title, lenders requirements, due diligence, detailed planning applications, finance, and the performance mechanism of

a project may be left to post-selection stage. It suggests that RIBA Stage D designs are sought for final tenders with Stage E designs being worked up for the contract itself.

There is clearly some tension between this guidance and the European Commission's own view which is much more restrictive. These elements could involve an element of negotiation which could prejudice a third party and be open to legal challenge. The decision of what to defer to post selection should therefore be handled with extreme care and legal advice should be sought. The Authority can minimise these risks by commissioning its own legal title investigations and site surveys before the process commences and disclosing these to bidders.

However, attempting to resolve all issues prior to closing the Dialogue could be seen as too burdensome a risk for bidders and scare them off. If asking the bidders to finalise the detail is unduly burdensome it may be legitimate in limited circumstances to defer that to after selection provided the detail remains within the parameters of the bidder's final tender.

Conclusion

As is well known since 2008 there has been a significant increase in legal challenges by aggrieved bidders to procurement processes. It is possible that one reason for this is because there are less opportunities in the market place during the credit crunch, with those coming second less likely to move on after having invested so much money and time at risk. Bidders are also generally more

aware of their rights. Equally, now is the very time when authorities (following Coventry's lead) should be urged to use their regeneration powers to bring forward development and stimulate the economy. Authorities should (where appropriate) consider taking advantage of the flexibility of the CDP to allow them to enter into a meaningful dialogue with the private sector and draw upon its knowledge and expertise. Provided sufficient time and effort is spent upfront in planning and managing the process carefully there is no reason why a CDP should not be a success. However, Authorities must appreciate that the rules governing the use of the CDP are quite stringent and technical and legal advice should be sought at the outset of the process. If this is not done, there remains a real risk of a legal challenge which could force the Authority to re-run the entire process again. As a result bidders may lose confidence in the Authority, which could jeopardise the project as a whole.

For further information, please contact Luke Plimmer, Associate in the Property Department at Martineau on 0800 763 1428 or luke.plimmer@martineau-uk.com or, for Martineau's work in Coventry, Clive Read, Partner on 0800 763 1439 or clive.read@martineau-uk.com or Michael Lawrence, Partner on 0800 763 1376 or michael.lawrence@martineau-uk.com

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