



# Competitive Dialogue in 2008

OGC/HMT joint guidance on using the procedure

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## 1. Introduction

- 1.1 In March 2004 the European Commission published Directive 2004/18/EC. Amongst other things, this introduced the new Competitive Dialogue procurement procedure. It was anticipated at the time that it would largely replace the negotiated procedure except for the most exceptional projects.
- 1.2 The Office of Government Commerce (OGC) published initial guidance<sup>1</sup> on the Competitive Dialogue procedure when the new Regulations<sup>2</sup> came into force on 31 January 2006 and issued a later Procurement Policy Note<sup>3</sup>. There are links to these and other guidance notes in Appendix B (while some tend to relate to specific sectors, some of them also have more general applicability).
- 1.3 As with all new procedures there has been some uncertainty about how to undertake Competitive Dialogue in practice. A substantial number of these procurements have got underway over the last two years, covering a broad scope of projects and using a wide range of approaches. This variety in methods is understandable, considering the relatively short time since the procedure was introduced and the limited range of experience and guidance that has been available.
- 1.4 In the interests of improving both consistency and efficiency in public procurement, OGC and the Treasury, working with advisors PricewaterhouseCoopers, have developed this guidance. It is based on discussions with a range of Contracting Authorities, practitioners, bidders and advisors with direct experience in undertaking some of these procurements.
- 1.5 It provides a practical insight on how to use the new procedure to help Contracting Authorities, and others, to undertake them. It is not a rulebook or a detailed instruction manual, rather it contains advice and suggested approaches based on the experiences of people who have used, or are currently using, the procedure. It is intended to complement, rather than to replace, existing guidance on Competitive Dialogue.
- 1.6 The guidance focuses on issues that are directly relevant to the introduction of the Competitive Dialogue procedure. Undertaking a public procurement, particularly of a complex nature, involves taking account of many different aspects and considerations. However, this guidance is not, and should not be taken as representing, a comprehensive manual on how to undertake all aspects of complex public procurements. For example, it does not address how to evaluate complex procurements. Although this is an important issue, it is not specific to procurements undertaken using the Competitive Dialogue procedure but applies to all complex procurements and is a considerable subject in itself.
- 1.7 The guidance is relevant to any complex procurement where the Competitive Dialogue procedure is used, from major computer networks, integrated transport systems, complex framework agreements, Private Finance Initiative (PFI) and other forms of Public Private Partnerships (PPPs). The inclusion of private finance in PFI projects and the complexities

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<sup>1</sup> OGC guidance on the Competitive Dialogue Procedure in the new Procurement Regulations

<sup>2</sup> The Public Contracts Regulations 2006 (as amended)

<sup>3</sup> Procurement Policy Note: Practical Guidance on the use of Competitive Dialogue  
<http://www.ogc.gov.uk/documents/ProcurementPolicyCompetitiveDialogue.pdf>

that can result from this specifically impact on the way people undertake such procurements in practice. Guidance relating to PFI-specific issues is highlighted in blue text boxes. Generic best practice and other key points that are not PFI-related are highlighted in yellow text boxes.

- 1.8 Complex procurements, by their nature, often have some unique features. It is not therefore practicable to seek to identify and address all of the issues or circumstances that can potentially arise in the full range of complex procurements. The approach taken in developing this guidance has been to outline a general structure, which should be applicable to most Competitive Dialogue procurements.
- 1.9 The reader therefore needs to apply the general approach set out in this guidance intelligently to the practical circumstances of the specific procurement. Contracting Authorities should also consult sector specific guidance, where that is available, and use their own judgement and experience of the market in which they are operating.
- 1.10 This guidance does not replace the need for a Contracting Authority to consider properly the requirements, circumstances and constraints of a particular procurement and, where appropriate, to take professional advice. It is the responsibility of the Contracting Authority to comply with all relevant legal and procurement policy requirements.
- 1.11 In developing this guidance the Treasury and OGC have interviewed a number of Contracting Authorities to ensure it takes account of practical experience gained in the new procedure. It should be stressed, however, that at the time of publication there have only been a small number of completed procurements, so there is limited practical experience and no case law about the new procedure on which to draw. For this reason the guidance cannot be as definitive as many of those involved in its production would ideally want it to be about what is, or is not, permissible. However, the guidance does, for example, provide some insight into the scope for post-dialogue clarification, and suggests an approach for the handling of unforeseeable events occurring during the latter stages of the procurement. The expectation is that this guidance will be updated from time to time, in the light of further experience and any relevant case law or guidance from the Commission.
- 1.12 Feedback on its use so far is that, when conducted well, Competitive Dialogue has many benefits. In particular, it avoids protracted negotiations with preferred bidders, when the Contracting Authority is usually in a weak negotiating position. Both Contracting Authorities and bidders have said that the quality of outcome under a Competitive Dialogue procedure can be preferable to that often achieved in the past under the negotiated procedure, especially where there is a need to refine the authority's requirements through a process of dialogue with engaged bidders beyond what was previously undertaken through initial market testing.
- 1.13 However, following the Competitive Dialogue procedure is not easy. To effect a satisfactory result requires significant preparation, planning, and effort by the Contracting Authority. This includes early consideration of the likely number of bidders to involve and the number of stages/down-selections to undertake, and the likely balance of higher costs from a more complex process against the benefits in terms of likely increased value for money. Thorough preparation, planning and communication with the supplier market is good practice under any procurement, but is fundamental to Competitive Dialogue.
- 1.14 The Contracting Authority needs to ensure that it has enough skilled and experienced people in place at all stages of the procurement. In general Competitive Dialogue procurements demand a greater input in terms of staffing, advice and support than other

procedures, and the Contracting Authority needs to ensure that this challenge is addressed from the pre-procurement stage onwards.

- 1.15 Overall the procurement costs under the Competitive Dialogue procedure are likely to be higher for both Contracting Authorities and for bidders than under the negotiated procedure, as more bidders will usually be involved in detailed discussions and the submission of detailed bids. The bidder community has highlighted the higher costs incurred by those bidders who complete the dialogue but are ultimately unsuccessful, whereas the costs for a successful bidder may be comparable to those under the negotiated procedure.
- 1.16 Suppliers have also highlighted concerns about the protection of their intellectual property, specifically the risk of bidders' ideas being shared with competitors during the dialogue process. These risks may have existed before competitive dialogue was introduced, as similar discussions happen when the competitive negotiated procedure is used. However, the issue is a significant concern for industry and therefore needs careful handling during procurement.
- 1.17 The following guidance begins by highlighting the legal framework and describing briefly the other procurement procedures and factors to consider in deciding the correct procurement approach to use. It then describes the main elements in a Competitive Dialogue procurement, looking at the key stages in the process:
- pre-dialogue activities, such as project set-up, planning and preparation before the contract is advertised;
  - the dialogue phase, which includes how to manage the dialogue meetings, organisation and resource requirements, and prepare for the closure of dialogue;
  - the post dialogue phase, which covers the call for final tenders, competition issues and the scope for clarification of bids at the final tender and preferred bidder stages; and

The guidance then concludes with a summary of the key points discussed.

## 2. Public Procurement – Background

### The Legal Framework

- 2.1 Procurement by the public sector (public procurement) is governed by legislation cascaded down from the European Union (EU). There is a general requirement that the following principles, derived from the Treaty of Rome (The EU Treaty), should be applied to all public procurements:
- equal treatment;
  - non- discrimination; and
  - transparency<sup>4</sup>.
- 2.2 These principles are embodied most notably in a general requirement for public procurements of an appropriate type and value to be advertised openly in the Official Journal of the EU. They should also be used as the main guide to interpreting the meaning of more detailed requirements where there is any uncertainty, including the new provisions for Competitive Dialogue.
- 2.3 In March 2004 the then existing four procurement Directives were consolidated into, and replaced by, two new Directives: Directive (2004/18/EC)<sup>5</sup> and Directive (2004/17/EC)<sup>6</sup>.
- 2.4 The former is often referred to as the “Classical (or Classic) Directive”, the latter the “Utilities Directive”. The provisions relating to the Competitive Dialogue procedure are contained in the Classical Directive. There is no provision for the application of the Competitive Dialogue procedure for procurements regulated by the Utilities Directive.
- 2.5 The Classical Directive was transposed into domestic law through The Public Contracts Regulations 2006 (Statutory Instrument 2006 No.5) (as amended), which came into force on 1 January 2006, replacing previous Regulations.
- 2.6 There are various exemptions from these Regulations for certain types of procurements, for example some military purchases. Even where exemptions apply, for complex procurements it may still be sensible to follow the Competitive Dialogue process to ensure that a structured, rigorous, well-managed and competitive process is used where public money is being spent to ensure value for money.
- 2.7 There is a range of other EU and domestic legislation and requirements (including competition law, State Aids, and contract and public law) that are relevant to public procurement. Although these are matters that Contracting Authorities need to be aware of, they are not specifically relevant to Competitive Dialogue so are not covered further in this guidance.

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<sup>4</sup> Article 2 – Classical Directive; Regulation 4(3) The Public Contract Regulations 2006

<sup>5</sup> [http://ec.europa.eu/internal\\_market/publicprocurement/legislation\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm) - on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

<sup>6</sup> [http://ec.europa.eu/internal\\_market/publicprocurement/legislation\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm) - coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

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### **Wider Policies**

- 2.8 Government bodies need to follow relevant government policies as well as the law. Managing Public Money<sup>7</sup> sets out for Accounting Officers the central importance of delivering value for money<sup>8</sup>, which is entirely compatible with the legislative regime as it is based on fair and open competition. The Treasury has developed specific guidance relating to PFI procurements and other bodies<sup>9</sup>. OGC issues guidance and sets standards covering wider procurement topics. Again, these issues are not covered in any greater depth in this guidance, as they are not uniquely relevant to the Competitive Dialogue procedure.
- 2.9 Local Authorities and other public bodies will also be subject to various internal rules, such as standing orders, which they are required to follow when undertaking procurements.

### **Coverage**

- 2.10 This guidance and the Regulations apply to England, Wales and Northern Ireland and have no formal application to other jurisdictions. However, as the Directives and general principles apply to other jurisdictions, in the absence of specific guidance, Contracting Authorities in other jurisdictions may wish to follow the general approach set out here.

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<sup>7</sup> [http://www.hm-treasury.gov.uk/documents/public\\_spending\\_reporting/governance\\_risk/psr\\_managingpublicmoney\\_index.cfm](http://www.hm-treasury.gov.uk/documents/public_spending_reporting/governance_risk/psr_managingpublicmoney_index.cfm)

<sup>8</sup> Value for Money is the optimum combination of whole life cost and quality (or fitness for purpose) to meet the users requirements and does not always mean choosing the lowest cost

<sup>9</sup> [http://www.hm-treasury.gov.uk/documents/public\\_private\\_partnerships/ppp\\_index.cfm](http://www.hm-treasury.gov.uk/documents/public_private_partnerships/ppp_index.cfm)

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### 3. Choice of Procurement Procedure

#### Main Procedures

- 3.1 The Regulations provide four main procurement procedures<sup>10</sup>:
- i) under the Open procedure any interested party is invited to tender and those who respond to the OJEU notice receive full contract documentation. There is no ability to shortlist candidates by undertaking a pre-qualification process and contract negotiations are not allowed;
  - ii) under the Restricted procedure, Contracting Authorities undertake a pre-qualification process and invite only short listed candidates to tender. Contract negotiations are not allowed;
  - iii) under the Competitive Dialogue procedure, Contracting Authorities undertake a pre-qualification process and then invite short listed candidates to participate in a dialogue process during which any aspects of the project may be discussed and solutions developed. The Contracting Authority can continue the dialogue until it identifies one or more solutions that are capable of satisfying its requirements. It then closes the dialogue and invites final tenders. Only limited discussion and clarification is permitted once the dialogue stage has closed which does not amount to “negotiation”; and
  - iv) under the Competitive Negotiated procedure, Contracting Authorities undertake a pre-qualification process and then issue an invitation to negotiate. There are no detailed rules as to how the negotiations should take place and unlike the Competitive Dialogue procedure there is no formal end to the negotiation phase before contract signature. In practice there has often been substantial negotiation following the appointment of a preferred bidder when competitive tension is no longer present.

#### Determining the Correct Procedure

- 3.2 Historically, given the practical limitations associated with the use of the Restricted procedure, the Competitive Negotiated procedure has been used for most UK complex procurements. The European Commission questioned the appropriateness of this practice, arguing that substantive negotiations with a preferred bidder could distort competition. Contracting Authorities also struggled to negotiate successfully in the absence of competitive tension. The European Union introduced the Competitive Dialogue procedure to fill the gap between the Restricted and Competitive Negotiated procedures.
- 3.3 It is clear that the intention was that, with the introduction of the Competitive Dialogue procedure, there would be far less use of the Negotiated procedure than there has been in the past. OGC's 2006 Guidance on Competitive Dialogue<sup>11</sup> states that “the negotiated procedure should only be used in very exceptional circumstances”.
- 3.4 The Competitive Dialogue procedure can only be used for “particularly complex contracts”<sup>12</sup> where at the outset the Contracting Authorities:

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<sup>10</sup> There are also accelerated variants of the Restricted and Competitive Negotiated procedures

<sup>11</sup> OGC guidance on the Competitive Dialogue Procedure in the new Procurement Regulations – January 2006

<sup>12</sup> Regulation 18 - The Public Contracts Regulations 2006

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- are not objectively able to define the technical means (...) capable of satisfying their needs or objectives; and/or
- are not objectively able to specify the legal and/or financial make-up of the project<sup>13</sup>.

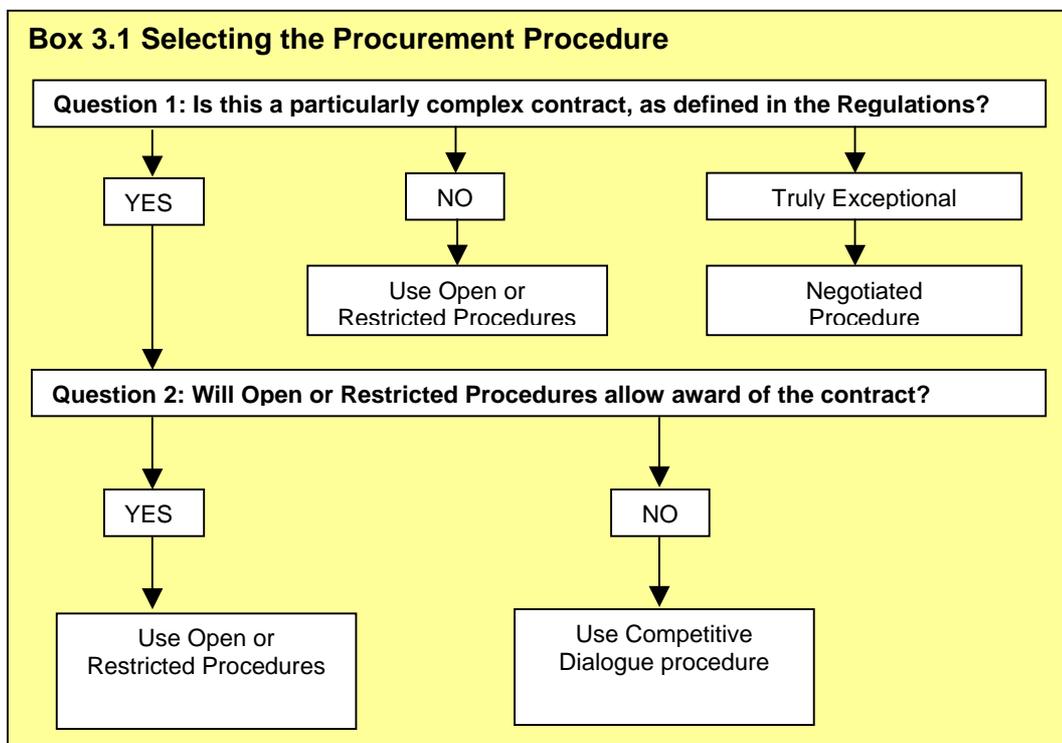
In addition the Contracting Authority must “consider that the use of the Open or Restricted procedure will not allow the award of the contract”<sup>14</sup>.

3.5 The Explanatory Note<sup>15</sup> published by the European Commission gives some further analysis of what is meant by technical, and legal or financial, complexity. Its key points included that:

- Contracting Authorities have an obligation of diligence: if they can define the technical resources necessary or establish the legal framework, the use of the Competitive Dialogue is not permitted;
- Technical complexity can exist in potentially two broad scenarios, either of which would justify use of Competitive Dialogue where the Contracting Authority cannot:
  - define the technical means used to achieve the prescribed solution; or
  - determine which of several possible solutions would best satisfy its needs.

Examples of legal and financial complexity include Contracting Authorities wanting a facility (e.g. a school, hospital or prison) constructed and managed for a long period. (Building Schools for the Future<sup>16</sup> provides further relevant guidance.)

3.6 In simplified terms, the diagram below outlines the assessment process for Contracting Authorities when considering which procurement procedure to undertake.



<sup>13</sup> Regulation 18 (1) - The Public Contracts Regulations 2006

<sup>14</sup> Regulation 18 (2) - The Public Contracts Regulations 2006

<sup>15</sup> Commission Explanatory Note – Competitive Dialogue – Classic Directive

**Box 3.2 Selection of Negotiated procedure for any projects**

Any Contracting Authority considering using the Negotiated procedure should clearly set out the justification in writing, after seeking advice from its commercial department, legal team and lawyers and/or external professionals as appropriate before advertising the Contract Notice in the OJEU. Contracting Authorities should be aware that the European Commission may scrutinise any use of the Negotiated procedure.

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<sup>16</sup> BSF Guidance Note – Classification of the Contract and Choice of Procedure under the EU Procurement Rules for the Building Schools for the Future Programme

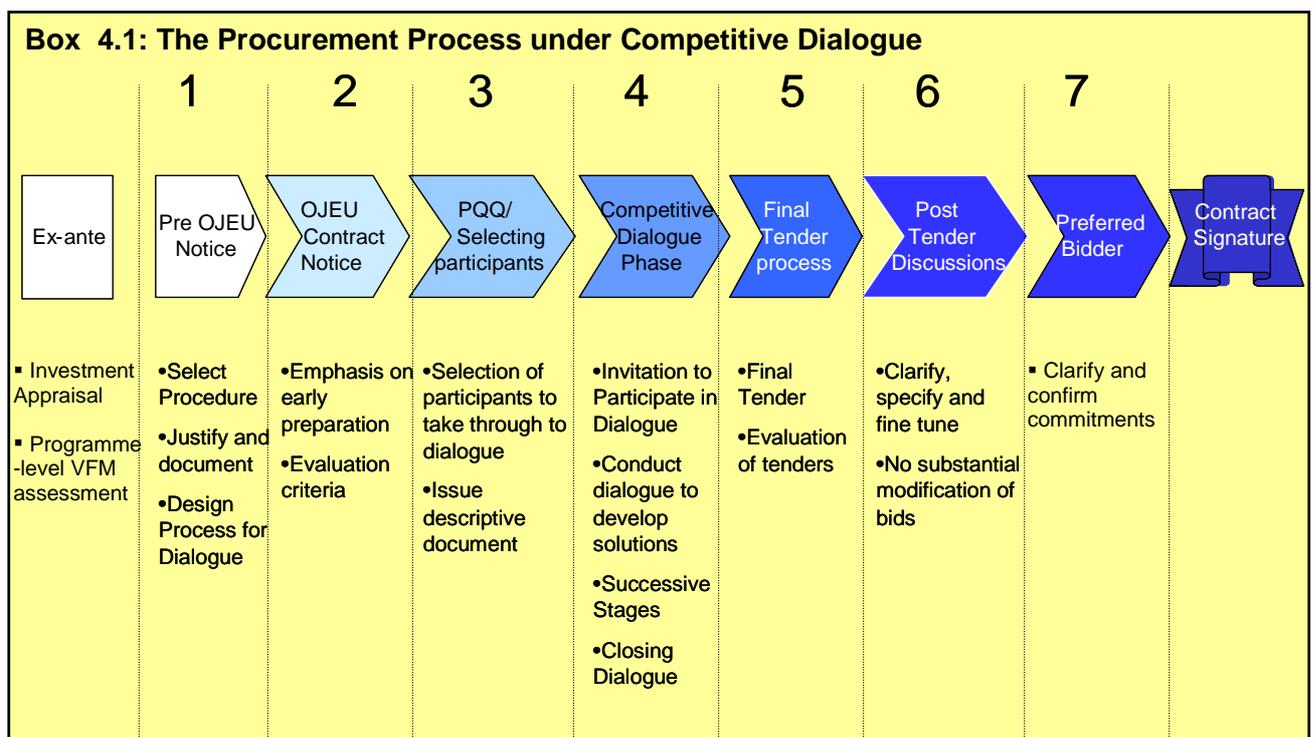
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## 4. Key Stages in a Competitive Dialogue Procurement

### Overview

4.1 Complex projects tend to have unique features, so there is no absolutely standard way in which the Competitive Dialogue procedure should be undertaken. Contracting Authorities will need to structure the procurement process in a way that ensures their objectives can be met efficiently and effectively. This guidance divides the procurement process into three phases and seven stages, as set out below and in Figure 4.1.

- **Phase 1: Pre-dialogue**
  - Stage 1: Planning and initial preparation (pre-OJEU notice);
  - Stage 2: OJEU contract notice to short-listing of bidders via PQQ
  - Stage 3: Selection of bidders and preparation for the dialogue stage;
- **Phase 2: Dialogue**
  - Stage 4: The dialogue;
- **Phase 3: Post-dialogue**
  - Stage 5: Submission of Final Tenders and Bid Evaluation;
  - Stage 6: Bid Clarification; and
  - Stage 7: Preferred Bidder to Contract Close.



- 4.2 As with any procurement the Contracting Authority needs to manage the transition from contract closure, through, development and construction (depending on the nature of the project) to operation, and to put in place appropriate contract management procedures. However, as these stages are outside the Competitive Dialogue procedure they are not covered in this guidance.

### **General Comparisons with Other Procedures**

- 4.3 The process up to the point at which shortlisted candidates are invited to participate in dialogue is broadly similar to the processes undertaken in the Restricted and Negotiated procedures. However, the requirement formally to start and end the dialogue stage is a new feature, as there is less room for manoeuvre for the Contracting Authority and bidders after dialogue has been closed.
- 4.4 The more structured nature of the procurement process and the restrictions on all parties at its later stages requires early, detailed and rigorous planning. The procurement process must be undertaken within the terms and the boundaries set in the Contract Notice and any subsequent documents (which must themselves stay within the boundaries set in the Contract Notice). Early and detailed preparation, including engagement with the potential supply market, is essential and investment at this stage is likely to produce a more effective and shorter procurement process, better overall value for money, and reduce some of the risks associated with undertaking complex procurements.

### **Bidder Concerns**

- 4.5 Bidders have raised some early concerns about the Competitive Dialogue procedure. These include bid costs, protection of bidders' intellectual property/commercially confidential information, procurement timetables, and the costs associated with the early involvement of funders and due diligence on PFI projects. These are addressed in the next section although whether, and the degree to which, these concerns are fully realised will depend on actual experience.

## 5. Undertaking A Competitive Dialogue Procurement

### Overview

This Chapter forms the main body of the guidance. Each of the seven stages described in the process diagram is further developed below, though not always separately as many of the stages are interdependent, and later stages need substantial advance consideration during earlier stages.

Therefore the following guidance is structured around five broad areas, which are linked to the overall sequence of events, but generally address themes that are much broader than the specific process stage to which they relate:

- pre-procurement planning to advertisement of the Contract Notice (encompassing stage 1 and a broad range of future considerations);
- advertisement of the Contract Notice through to short-listing of bidders for dialogue (encompassing stages 2-3 and future considerations);
- the dialogue stage (encompassing stage 4 and some post-dialogue considerations);
- final tender to appointment of preferred bidder (encompassing stages 5 & 6 and final future considerations); and
- preferred bidder to contract close (encompassing stage 7).

### Phase 1: Pre-Dialogue

#### 5.1 Stage 1: Planning and Initial Preparation (pre-OJEU notice)

##### Project Controls

5.1.1 Before embarking on Competitive Dialogue, as with other procurement procedures, a Contracting Authority should have: a fully developed and robust business case; considered practical planning issues (such as the provision of data/data rooms, governance and approvals); clearly defined objectives; a high degree of confidence about affordability; and have identified fully any other constraints or risks. Early and comprehensive consideration of these issues is equally important and potentially more so when using Competitive Dialogue.

##### Evaluation and Award Criteria

5.1.2 General provisions of the Regulations (such as evaluation requirements, the use of variant bids or standstill requirements) apply equally to Competitive Dialogue as they do for other procedures.

5.1.3 For other procedures the Regulations allow a choice between two overall contract award criteria: the Most Economically Advantageous Tender (MEAT); or lowest price. However,

Competitive Dialogue only permits use of the MEAT criteria<sup>17</sup> (it is anyway government policy to use MEAT (i.e. value for money) criteria, rather than lowest cost). The Regulations require that the evaluation criteria, i.e. the criteria that collectively will be used to evaluate bids, be set out in either the contract notice or in the descriptive document.

- 5.1.4 Evaluation is a complex subject in its own right and, as a whole, is beyond the scope of this guidance. However, OGC has published much guidance on tender evaluation, which may also be applicable to Competitive Dialogue, and OGC will develop further guidance on evaluation for complex procurements during 2008/09.

### **Justification**

- 5.1.5 It is recommended that Contracting Authorities document clearly their rationale for using the Competitive Dialogue procedure before starting procurement, setting out why the project is considered to be particularly complex, and why the Open and Restricted procedures are not appropriate.

### **Bid Costs**

- 5.1.6 Bidders need to develop their final bids more completely under Competitive Dialogue than has been the case under most Negotiated procedures. Taken in isolation, this is likely to mean higher bids costs for those submitting final bids who are subsequently unsuccessful. Offsetting that, however, the imposition on the Contracting Authority to do more preparation before the start of formal procurement should mean a smoother, and potentially a shorter, process. In principle the costs for the winning bidder should be no more than under the negotiated procedure, and increased competitive tension should deliver better value for money for the Contracting Authority and the taxpayer, provided the Competitive Dialogue process is well managed and costs are minimised.

#### **Box 5.1: Funding bid costs**

The Regulations<sup>1</sup> state “the contracting authority may specify that payments may be made to a participant in respect of the participant’s expenses incurred in participating in the Competitive Dialogue procedure”. As there is no similar statement for the Negotiated procedure<sup>1</sup> some take this to mean that there is (more of) a presumption that Contracting Authorities should make such payments under the Competitive Dialogue procedure. HMT Policy, however, remains that there should be a strong presumption against contributing to bid costs – though it can be justified where there are legitimate concerns about competitive tension that cannot otherwise be addressed – and needs to be judged on a case by case basis.

- 5.1.7 To establish and maintain competitive pressure it is in Contracting Authorities’ interests to do as much as they can to attract bidders to take part in the procurement and keep them involved during the process. Managing bid costs will be key to achieving this. Furthermore, bid costs are generally charged back to the Contracting Authority through payments made under the resulting contract, so there are strong financial incentives for Contracting Authorities to minimise bid costs.

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<sup>17</sup> Regulation 18(27) - The Public Contracts Regulations 2006

**Box 5.2: Managing bid costs**

In seeking to manage overall bid costs (for bidders and the Contracting Authority) the following should be considered:

1. Providing information to bidders at an early stage and in an appropriate format;
2. Undertaking condition and other surveys at an early stage;
3. Setting a tight but realistic timetable and keeping to it;
4. Undertaking the procurement process in an efficient and effective manner, including:
  - Ensuring sufficient capacity and capability in the procurement team (including any advisers);
  - Preparing Contracting Authority position papers on all areas for dialogue in advance of the dialogue sessions so bidders have enough time for analysis and to develop their responses;
5. Ensuring approval processes are undertaken at an appropriate stage and within appropriate timescales;
6. Considering ways to reduce the costs associated with due diligence;
7. Providing title reports and authority site surveys.

**Market Sounding / Early Supplier Engagement**

5.1.8 The Contracting Authority has to assess if the potential supplier market is likely to provide genuine competition. Relevant activities may include:

- Market research;
- Market soundings, for example through the publication of a Prior Information Notice (PIN) in the OJEU; and
- Industry days to explain the project to potential bidders, thereby encouraging interest and later participation.

5.1.9 Where there are serious concerns about the level of bidder interest the Contracting Authority should consider delaying the start the formal procurement process. It may need to change the parameters of the project to make it more attractive, to reduce perceived barriers to entry or involvement, or to undertake other market creation or stimulating activities.

**Shared Understanding of the Competitive Dialogue Procedure**

5.1.10 At least for some time to come many of those undertaking a Competitive Dialogue procedure will not have had previous experience of using it. It is therefore particularly important for the Contracting Authority to ensure that the process is made clear to all parties including how it differs from other, more familiar, procedures. This applies as much to those in the public sector as to bidders and third parties (such as sub-contractors and funders).

- 5.1.11 All parties need to be fully aware of the limited room for manoeuvre following the closure of the dialogue and the implications of this. It is particularly important that the parameters of the requirement and bids are subject to full internal approvals before Invitation to Submit Final Tender (ITSFT) and final bid submission respectively,

### **Other Key Planning Considerations**

- 5.1.12 Under Competitive Dialogue the Contracting Authority needs to anticipate as far as possible the issues and factors that may impact or constrain the procurement, to ensure it can proceed in an efficient and effective manner
- 5.1.13 In managing this, the Contracting Authority needs to balance the benefits of clarity and certainty against flexibility. Striking the right balance requires serious consideration at an early stage and a good understanding of the project, the proposed procurement and the broader market environment in which it will be undertaken and delivered. Giving a clear signal to the market about what is required and how the process will be run is likely to encourage effective bidder participation and a good outcome. Where the Contracting Authority has not done the necessary planning work needed to ensure that the selected approach is the right one, it will not be able to change tack later when the defects in its preparation become apparent – if it cannot operate the procurement process within the parameters set for the competition (outlined in the Contract Notice and other competition documents) then it may have to cancel the procurement and start again.

#### **Box 5.3: Planning to resource the dialogue stage**

It is important to make early plans, as bidders and the Contracting Authority will need to make substantial arrangements for resources, people and advisers for the dialogue meetings. During the dialogue stage the Contracting Authority may have to undertake a number of detailed dialogue meetings with multiple bidders while progressing the overall process, which can be very demanding on the procurement team.

One approach is to use two teams. One team develops the dialogue issues, undertakes the dialogue meetings and feeds back the outcomes of the dialogues to the second, main procurement team, which concentrates on developing the Contracting Authority's response, amending the authority's requirements in light of the dialogue, and taking responsibility for the overall procurement process. To be successful both teams need to be fully aware of what the other is doing.

- 5.1.14 Where it cannot anticipate the future likely outcome of events with confidence, the Contracting Authority should consider agreeing with bidders how the balance might best be struck. However, it should not seek to defer necessary but difficult decisions without justification, which could lead to the problems of lack of bidder interest described above.
- 5.1.15 As part of the planning stage, the Contracting Authority needs to ensure any other bidder concerns are addressed including the protection of intellectual property and commercially sensitive information, and timetable requirements.
- 5.1.16 It should decide if it wants all bidders to concentrate on a common proposition, which will be developed and refined during the dialogue process, or to come up with different technical and commercial approaches reflected in different contract terms. In any event the

Contracting Authority needs to ensure equal treatment, non-discrimination and the protection of relevant bidder information.

**Box 5.4: Early planning & PFI funding competitions**

Where there will be third party funding under PFI contracts the early involvement of funders needs to be considered at the planning stage, including whether the Contracting Authority is likely to require bidders to undertake a funding competition, and the extent to which funder due diligence and approvals will need to be undertaken and achieved prior to the closure of dialogue<sup>1</sup>.

## **5.2 Stages 2 & 3: OJEU Contract Notice, Short-listing of Bidders via PQQ, and Preparation for the Dialogue Stage**

### **Contract Notice**

5.2.1 The advertising requirements are no different under the Competitive Dialogue procedure than under other procedures<sup>18</sup>. The Contract Notice placed in the OJEU will state that the procurement is being undertaken under the Competitive Dialogue procedure. The notice should also state:

- the award criteria;
- if there is an intention to limit the number of participants that will be invited to participate in dialogue;
- if there is an intention to use stages of dialogue to reduce further the number of bidders or solutions; and
- if variant bids are allowed.

### **Descriptive Document**

5.2.2 The Regulations<sup>19</sup> require the Contracting Authority to set out its needs and requirements either in the Contract Notice or in a Descriptive Document. After publication of the Contract Notice, the Contracting Authority will normally provide additional information about the project and its intended procurement to interested parties, which may be done in the form of a Project Information Memorandum (PIM) or a Descriptive Document.

5.2.3 There is no particular required form for a Descriptive Document. In practice a PIM or an Invitation to Participate in Dialogue (ITPD - see below) and subsequent requests for solutions or final bids will all include information about the Contracting Authority's needs and requirements and as such will all function as Descriptive Documents.

### **Pre-qualification / Number of Bidders**

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<sup>18</sup> Regulation 18(4) and Regulation 42 - The Public Contracts Regulations 2006

<sup>19</sup> Regulation 18(5) – The Public Contracts Regulations 2006

- 5.2.4 The requirements for pre-qualification and short-listing of interested parties are the same for the Competitive Dialogue procedure as for the Restricted and Negotiated procedures<sup>20</sup>. The Contracting Authority may limit the number of bidders (minimum and maximum) invited to participate in the dialogue, and should indicate the criteria or rules that will apply to the pre-qualification process.<sup>21</sup>
- 5.2.5 The number invited to participate in the dialogue needs to be sufficient to ensure genuine competition<sup>22</sup>, and must be a minimum of three provided there are that many suitably qualified candidates. In assessing whether effective competition is likely to be achieved and maintained throughout the competitive stage of the procurement, the Contracting Authority will need to consider the number of bidders, the likely strength of those bidders, their interest in the project and their desire to complete the procurement process. This is a matter of professional judgement. It will depend on the nature of the project, the way in which the procurement is likely to progress, and the market environment in which the procurement is taking place.
- 5.2.6 Where there is an inadequate bidder response the Contracting Authority must consider if the procurement should proceed or not.(See later text box on Single Bidder Situations).
- 5.2.7 At the start of the dialogue stage the Contracting Authority may not know the range of pre-qualified bidders' solutions that could satisfy its needs. Inviting only a small number of bidders to put forward proposed solutions risks reducing the range of potentially innovative solutions and competitive intensity. However, inviting too many bidders could result in some bidders, who could have enhanced competition, dropping out because of the perceived lesser chances of winning.
- 5.2.8 There are also practical issues for the Contracting Authority if it invites too many bidders to dialogue, in undertaking detailed and lengthy dialogues with each of them. Practice to date has shown that the resource consequences for the Contracting Authority are very significant, adding to pressure on procurement costs and timetables. Against this, the Contracting Authority needs to consider carefully how many down-selections to undertake in order to narrow the field, also bearing in mind that the down-selecting process is itself resource intensive.
- 5.2.9 Although the Regulations refer to deselecting solutions as opposed to bidders, applying the award criteria to deselecting solutions will have the effect of deselecting the bidders who propose those solutions. Where an individual bidder has developed only one solution, the deselection of that solution entails the elimination of the bidder concerned. Where a bidder has developed more than one solution and all of that bidders' solutions have been deselected, then the Contracting Authority is entitled to eliminate that bidder from participating further in the competition.

### **Approach to the Dialogue**

- 5.2.10 The aim of the dialogue is for the Contracting Authority "to identify and define the means best suited to satisfying [its] needs"<sup>23</sup>. A number of issues relating to how the dialogue will be managed will require consideration well in advance of the dialogue stage. These key issues are discussed below.

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<sup>20</sup> Regulations 23-26 – The Public Contracts Regulations 2006

<sup>21</sup> Regulations 18(12) - (14) – The Public Contracts Regulations 2006

<sup>22</sup> Regulation 18(13)(a) – The Public Contracts Regulations 2006

<sup>23</sup> Regulation 18(20) - The Public Contracts Regulations 2006

### **Equal Treatment and Commercially Confidential Information**

5.2.11 The Contracting Authority “may discuss all aspects of the contract with the participants during the dialogue”<sup>24</sup>. It must ensure equality of treatment amongst bidders and specifically:

- shall not provide information in a discriminatory manner which may give some tenderers an advantage over others; and
- may not reveal to the other participants solutions proposed or any commercially confidential information communicated by a participant in the dialogue without that participant’s agreement<sup>25</sup>.

These requirements are the same as for other procedures but are expressed more explicitly in the case of the Competitive Dialogue procedure.

5.2.12 It is not appropriate for the Contracting Authority to use one bidder’s commercially confidential information to enhance other bidders’ technical solutions or to merge two or more technical solutions into a single optimal solution. This provision provides bidders with a level of assurance that the procedure will be undertaken in a confidential manner that protects their intellectual property.

5.2.13 However, the word “dialogue” has led to bidder concerns that there may be a greater danger of inappropriate use of individual bidders’ intellectual property and other commercially sensitive information compared to the Negotiated procedure.

5.2.14 To address this concern, the Contracting Authority should set out in detail how it will undertake the dialogue process. One potential mechanism for managing the treatment of intellectual property or commercially sensitive information would be for bidders to identify, and agree with the Contracting Authority, which parts of their solutions are specific to them and should be treated as confidential, and those that are generic in nature and therefore permissible to share with other bidders. Having an agreed understanding of what constitutes bidder intellectual property allows the Contracting Authority to ensure its protection.

### **Preparing the Invitation to Participate in Dialogue (ITPD)**

5.2.15 The Contracting Authority sends an ITPD to the short-listed candidates, which opens the dialogue stage. The ITPD will normally restate the Contracting Authority’s needs and requirements and set out how it will conduct the dialogue – i.e. defining the number of phases and submissions that will form the component parts of the dialogue stage, and the award sub-criteria for the remainder of the procurement process.

5.2.16 The ITPD should set out the topics that the Contracting Authority expects to be subject to detailed dialogue. Where possible it should outline its preferred approach to handling those topics, telling bidders its reasoning and any constraints they should be aware of, or have to take into account in developing their response. This will allow each detailed dialogue session to be focused on the Contracting Authority’s specific requirements and needs, minimising the time bidders spend developing unacceptable propositions. The ITPD may be

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<sup>24</sup> Regulation 18(21) (a) - The Public Contracts Regulations 2006

<sup>25</sup> Regulation 18(21) - The Public Contracts Regulations 2006

described as the Descriptive Document, though other documents issued during the procurement process may also have served this function, depending upon the approach taken.

### **Structuring the Dialogue Phase**

5.2.17 The Regulations provide little guidance on how to structure or conduct a dialogue in practice, beyond that it:

- may “take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or in the descriptive document”<sup>26</sup>; and
- may continue “until [the Contracting Authority] can identify one or more solutions, if necessary after comparing them, capable of meeting its needs”<sup>27</sup>.

So the Contracting Authority can structure the dialogue into a number of different phases if this suits its purpose. It may require bidders to provide submissions during, and/or at the end of, the dialogue stage. If it wants to reduce the number of solutions and bidders during the dialogue phases, it can evaluate these submissions using the pre-stated award criteria. It should ensure that it gives itself the option of down selecting during the dialogue stage by stating this as a possible intention either in the Contract Notice or in both the Contract Notice and the Descriptive Document.

### **Communications**

5.2.18 It will often be useful to hold a bidders’ day to outline and explain first hand the proposed approach to dialogue.

5.2.19 The Contracting Authority will also need to consider at what stage the need for due diligence, staff consultation (if relevant) and other stakeholder communications should happen. Issues that might arise from these will need to be addressed before the end of the dialogue stage and therefore need to be factored into the overall process planning and be reflected in the timetable.

### **Process Considerations**

5.2.20 Practical experience so far has shown that it is often sensible for the Contracting Authority to focus the earliest phase of dialogue on bidders’ proposed technical solutions, and on some of the key commercial issues. The Contracting Authority needs to understand the likely technical solutions to develop its commercial requirements and sufficiently detailed contractual terms before the end of dialogue.

5.2.21 It is reasonably common to send bidders an Invitation to Submit an Outline Solution (ISOS) as the basis of the submission required at the end of the first phase of dialogue. The solutions submitted by bidders may, or may not, be used as the basis for a down-selection of solutions using the stated award criteria.

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<sup>26</sup> Regulation 18 (22) - The Public Contracts Regulations 2006

<sup>27</sup> Regulation 18 (24) - The Public Contracts Regulations 2006

- 5.2.22 If there are concerns about the likely affordability of the potential solutions, the Contracting Authority might ask bidders to submit indicative costs as part of their ISOS submissions at the end of the first phase of dialogue. These would not be binding and would not normally be evaluated as part of any down selection that may take place at this stage. As with much else, the Contracting Authority needs to balance its desire for indicative costs with the additional burden this will impose on bidders at this point. This dialogue stage is analogous to an Invitation to Submit an Outline Proposal (ISOP), which some Contracting Authorities have used under the Negotiated procedure in the past.
- 5.2.23 The second stage of dialogue might then involve the remaining bidders in the refinement of the outline solutions and development of their commercial and contractual aspects. The Contracting Authority could then require bidders to submit a detailed and priced technical solution at the end of this second stage, based upon a draft contract by issuing an Invitation to Submit a Detailed Solution (ISDS). This is analogous to an Invitation to Negotiate (ITN) stage, which has been common practice under the Negotiated procedure.
- 5.2.24 There is no requirement for all bidders to submit a priced solution on the basis of a single identical contract. The basis of the proposed contractual arrangements may vary due to the different technical natures of alternative solutions or because bidders have different preferences about a range of issues including risk allocation, the basis of the proposed payment mechanism and financing arrangements. The Contracting Authority will, however, need to consider how to evaluate different bids in order to determine the most economically advantageous tender.
- 5.2.25 The Contracting Authority may again down-select based on an evaluation of these submissions.
- 5.2.26 Depending on the degree to which the submissions at the end of the second stage meet its needs and requirements, the Contracting Authority may undertake further stages of dialogue. Given the limited room for manoeuvre or ability to change final bids after the end of the dialogue stage, it is important to have a high level of confidence that all the issues that need to be negotiated are fully addressed and concluded during the dialogue.
- 5.2.27 Therefore the Contracting Authority should request a fully developed and priced draft bid based on an agreed contractual position before the dialogue stage is concluded. It can then assess the likelihood that final tenders, once received, will be compliant and acceptable. This submission may be broadly comparable to a Best and Final Offer (BAFO) submission, which some Contracting Authorities have used under the Negotiated procedure. However, the degree to which BAFO submissions have sometimes been renegotiated in the past will not be acceptable under the Competitive Dialogue procedure.

**Box 5.5: Structuring the dialogue**

The approach to structuring a dialogue phase, including the number of stages, the types and bases of submissions required and the intention to down-select or not, should depend on the specifics of the project and the wider procurement process. Where the Contracting Authority's needs or requirements are well advanced or where the solution design is more developed or informed, a one-stage process may be appropriate. However, for example, where a proof of concept may be needed, more stages may be required as described above.

5.2.28 A well planned and prepared dialogue phase, followed by a procurement process that is based on the predefined plan, should minimise the costs for the Contracting Authority and bidders, lead to better outcomes, and reduce the risk of challenge on the grounds of a lack of transparency in the process.

## **Phase 2: Dialogue**

### **5.3 Stage 4: The Dialogue Stage**

#### **Conducting Dialogue Meetings**

5.3.1 There is no specific required way in which to conduct individual dialogue rounds or meetings. It is for the Contracting Authority to develop a detailed process and any related procedures that suits its requirements, subject to dealing with all bidders in a manner that ensures equal treatment and results in a non-discriminatory and transparent process.

#### **Scheduling**

5.3.2 As outlined earlier, it is good practice for the Contracting Authority to have set out the dialogue topics and a detailed timetable for the individual dialogue discussions for at least the first stage of dialogue as part of the ITPD. This helps all bidders to assemble the necessary personnel to plan for and attend the various dialogue sessions. If appropriate the Contracting Authority should also provide more detailed papers setting out the issues to be covered, and any further information, before each individual dialogue session commences.

#### **Communications**

5.3.3 Where the Contracting Authority needs to communicate matters of relevance to all bidders, it is generally good practice to hold forums that include all bidders. This ensures that everyone receives the same information at the same time and in the same way, and lightens the resource burden on the Contracting Authority. A popular way to achieve this is to hold a bidders' day early on in the dialogue phase, to tell participants how the dialogue phase as a whole will be structured, how the various stages will be undertaken, and how the individual dialogue sessions will be conducted. It also allows bidders to seek clarification on any issues.

5.3.4 Except in these circumstances it will usually be more appropriate to conduct dialogue sessions on a one-to-one confidential basis with individual bidders.

#### **Duration & Timing of Meetings**

5.3.5 Dialogue sessions on a given topic should be held with all bidders in sequence and over a relatively short period of time (i.e. if there are five or fewer bidders and a day is required to dialogue the issue with each bidder then these should be conducted in the same week). The order in which bidders are invited for separate dialogue topics should be varied so that

all bidders are dealt with equally. At least some of the same Contracting Authority team should be present at all of the discussions for a given dialogue topic, to be able to compare effectively the outcomes of the different meetings.

- 5.3.6 However, where there are a large number of bidders (for example as has been the case with some complex framework agreements), this may not be possible. In this case the Contracting Authority will need to put procedures in place that ensure that bidders are dealt with on an equal basis and that the outcomes of the dialogues with different bidders can be effectively fed back and consolidated. Of course this scenario does raise the question of whether it is really efficient or practical to embark upon a Competitive Dialogue process with a large number of bidders, which the Contracting Authority needs to consider very carefully at the outset.

### **Personnel**

- 5.3.7 It is preferable to have a core team involved in all of the dialogue sessions across the various dialogue topics. This enables the Contracting Authority to develop a consistent view of each individual bidder across the different topics, and raise any inconsistencies with the bidder in question.
- 5.3.8 The core team is likely to need to be supplemented by specialists in the specific topics that are being dialogued. However, the demand for supplementary attendants should be kept to a reasonable level to ensure effectiveness and to restrain costs.
- 5.3.9 Undertaking a series of dialogue sessions can be time consuming and resource intensive, particularly for the Contracting Authority but also the bidders. It can be personally taxing for the individuals involved in the dialogue sessions. The Contracting Authority must therefore balance the need to work to a concise time period with the need to ensure enough time for all parties to undertake the necessary preparation, dialogue and debriefing work, without exhausting key personnel.

### **Organising the Team**

- 5.3.10 If the team that undertakes the detailed dialogue sessions is drawn from the main procurement team, they will not be able to advance the overall procurement process at the same time. This can lead to difficulties in meeting procurement timetables as work is effectively put on hold while the detailed dialogues happen.
- 5.3.11 The Contracting Authority should therefore consider whether it is appropriate to set up a separate team to prepare for, and undertake, the detailed dialogue sessions with bidders. In practice this approach will probably only be appropriate for the largest, most complex procurements. However, the creation of a separate team will itself require careful planning and management, to control consequential governance and communications issues, ensuring both teams are fully abreast of each other's progress. The dialogue team could then debrief the main procurement team on the outputs from the dialogue meetings.
- 5.3.12 The main procurement team would then develop the contractual structure and associated documentation to reflect the outcomes of the dialogue sessions in parallel to the ongoing dialogues on other topics. This approach allows the Contracting Authority to refine its overall requirement, seek clarifications and approvals to proposed changes if necessary, and to incorporate any changes into the next request for a submission from bidders. It will also leave it free to undertake other functions that need to be performed, particularly

preparing the documentation for the next request for submission and the evaluation of bidder submissions.

- 5.3.13 By not having responsibility for conducting the detailed dialogue sessions, the main procurement team can undertake an independent review and challenge process with the dialogue team, ensuring that a fair and objective approach is being taken and that the dialogue team is following the process and procedures set out by the Contracting Authority.
- 5.3.14 Where possible, the Contracting Authority should encourage bidders to develop a similar approach to resourcing and managing the dialogue stages, allowing them to develop their solutions in parallel to the detailed dialogue sessions effectively and to respond to requests for submissions within acceptable timescales.

### **Preparing to Close the Dialogue**

- 5.3.15 The limited room for manoeuvre after closure of the dialogue phase requires the Contracting Authority to have agreed substantially all aspects of the project (technical, commercial, financial and contractual) and bidders' proposed solutions, during the dialogue phase.
- 5.3.16 Under the Negotiated procedure, clarifying detailed elements of the bidders' solutions is often delayed until after the appointment of a preferred bidder. Under Competitive Dialogue this work (and the associated costs) now needs to be undertaken by all bidders who progress to the final phase of the dialogue stage and submit final tenders. This is necessary to satisfy the requirement that final bids "contain all of the elements required and necessary for the performance of the project"<sup>28</sup>. All parties need to be aware of this from an early stage and the Contracting Authority should do all that it can to minimise the cost burden on bidders and third parties.
- 5.3.17 The Contracting Authority needs to ensure, before the end of the dialogue phase, that bidders are proposing enough acceptable solutions. These may be based on a single requirement, which it has developed and refined during the dialogue process, and which bidders are willing to bid on, or it might be willing to receive solutions with different technical and commercial approaches.
- 5.3.18 It may not be possible or practical (for technical or administrative reasons) for bidders to produce completely developed and approved solutions, but any further refinement that may be required after the receipt of final bids should be within the parameters and boundaries set out in those bids. Therefore the Contracting Authority will need to satisfy itself that any further development of the solutions will fall within the stated scope of the solutions proposed and will be acceptable to it.
- 5.3.19 It is important that all parties gain sufficient approvals to proposed solutions before the closure of the dialogue. They should be confident that the final bids, which are based on the final solutions, will be acceptable to their organisations.

### **Preparing to Manage Post-Dialogue Issues**

- 5.3.20 The Contracting Authority may wish to agree with bidders, before the closure of the dialogue, a process for handling unforeseen issues so they can be addressed should they arise. This may help to reduce the potential risk of legal challenge, provided that the extent

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<sup>28</sup> Regulation 18(25)(b)

of change does not go beyond the scope of clarification and fine-tuning as described in the Regulations. It is advisable to get bidders to agree to these processes as part of the conditions for bidding. The Contracting Authority cannot however use this approach in a way that allows for amendments to bids or negotiation with bidders after the end of the dialogue stage.

**Box 5.6: PFI: Derogations and Due Diligence**

Derogations from the standard wording and guidance set out in *Standardisation of PFI Contracts (SoPC) Version 4* (March 2007) usually involve changes in risk allocation and/or price, so it will be necessary to agree all substantive derogations in principle before the end of the dialogue stage.

It will not be possible to confirm the whole financing package for PFIs before then (e.g. swaps can only be priced at the time of financial close). However, bidders will need to secure a high level of approval from their sources of finance and ensure that there is a strong commitment to funding the proposed solution on the agreed contractual basis. This will in most cases necessitate considerable due diligence before the end of the dialogue stage<sup>1</sup>.

**Closure of Dialogue**

5.3.21 After the Contracting Authority has written to bidders declaring the conclusion of the dialogue phase, it is not possible to reopen it and the room for any further discussion is very limited. The Regulations state<sup>29</sup>: "...the contracting authority may request a participant to clarify, specify or fine-tune a tender...but such clarification, specification, fine-tuning or additional information shall 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." Therefore the Contracting Authority must be confident that the likely form of final solutions which bidders have indicated during the dialogue phase that they will provide, are likely to be acceptable.

5.3.22 Similarly bidders must be confident that they sufficiently understand the requirements of, and any constraints on, the Contracting Authority, so that their final bid will be compliant and acceptable to it. If any of the parties fail to understand these requirements and constraints, then there is a high chance that final bids will be non-compliant and rejected.

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<sup>29</sup> Regulation 18(26) - The Public Contracts Regulations 2006

## **Phase 3: Post Dialogue**

### **5.4 Stages 5 & 6: Submission of final tenders to appointment of preferred bidder**

#### **Final Tenders**

- 5.4.1 Once the Contracting Authority has declared that the dialogue has ended it asks bidders to submit their final tenders. The Invitation to Submit a Final Tender (ITSFT) should set out the requirements for the bid and should emphasise that bids needs to be acceptable to the Contracting Authority. These tenders will contain “all the elements required and necessary for the performance of the project”<sup>30</sup>. The final bid must be final and not subject to change or negotiation. The Contracting Authority may allow bidders to submit variant tenders in addition to their standard offering if it considers this to be advantageous. This option must have been set out in the Contract Notice<sup>31</sup>.
- 5.4.2 A bidder can use the period after the closure of dialogue but before the submission of final tenders to clarify points of information with the Contracting Authority to ensure that its final bid will be compliant. However, bidders cannot use this period to negotiate or seek to amend the Contracting Authority’s requirements or contract terms.
- 5.4.3 These final tenders will usually be based on the solutions that were presented during the dialogue stage ensuring that bids satisfy the needs and the requirements of the Contracting Authority. Any bidder who submits a final tender on a different basis risks making an unacceptable or non-compliant bid.

#### **Competition**

- 5.4.4 There must be genuine competition at this stage, which normally requires at least two bids from credible bidders. If it is unlikely that there will be two acceptable bids forthcoming the Contracting Authority will need to consider whether or not it should invite bids at all. The text box below summarises existing best practice on market failure and single bidder situations. The Treasury guidance on single bidder tenders gives further advice on this situation in the PFI context.

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<sup>30</sup> Regulation 18(25) - The Public Contracts Regulations 2006

<sup>31</sup> Regulation 10 - The Public Contracts Regulations 2006

**Box 5.7: Market Failure and Single Bidder situations**

Market failure or lack of competition occurs where there is only a single (or no) bidder for a project or perhaps where there are two or more bidders but only one is considered to be credible. In the absence of competitive tension a bidder is not appropriately incentivised to offer its best price, terms and conditions. Consequently value for money will be difficult to achieve unless other steps can be taken to secure it. However, a procurement should not automatically be stopped as a result of market failure. The Contracting Authority should carry out a thorough review before deciding on the way forward. If it concludes that it is not possible to take appropriate additional action to secure value for money the procurement should be halted at that point.

In considering whether the procurement should continue, the reason for the market failure should be examined closely. If the failure is due to systemic problems in the market, an alternative procurement route would not resolve it. In this case the Contracting Authority would probably want to consider if it could protect its position while allowing the procurement to continue. Alternatively, the failure of the competition could be due to:

- concerns in the bidding community about the Contracting Authority's commitment to the project, or the skills or experience of its procurement team; or
- bidders finding that they are short-listed for too many projects, and deciding to withdraw from one or more projects.

It would be difficult, and inappropriate, to provide a set of definitive rules to follow in the event of market failure. Each case should be considered on its merits. It is, however, possible to identify some general principles that should be adopted:

- if the market failure occurs early on in the procurement process, the procurement should be halted unless there are systemic market failures that would equally affect any alternative;
- where failure occurs when the process is mature (such as during the later dialogue stages or after bids have been received) the Contracting Authority should consider the strength and quality of the remaining, or only credible, bid/bidder and consider the extent to which the competition up to that stage has been able to drive out and demonstrate value for money; and
- if a Contracting Authority considers it appropriate to continue with a single bidder, it should ensure there is transparent competition in the bidder's supply chain. Benchmarking is not an adequate alternative to market testing. If the bidder will not agree to market testing its subcontracts, the procurement is unlikely to deliver value for money and should be halted.

5.4.5 In considering the right number of bidders to retain in the later stages of the process, and hence whether and to what extent to downselect, the Contracting Authority needs to strike a balance between maintaining competition and the resulting costs to it, and bidders, of running a competition with too many participants. The appropriate number of bidders depends on the specific circumstances of the project and the quality of the bidders and should be judged on a case by case basis by the Contracting Authority. However, the characteristics of different types of markets may affect what it likely to be the appropriate number of bidders to achieve competition. In a very mature market, where the Contracting

Authority has sufficient previous evidence and experience on which to base judgements, a smaller number of bidders might be judged to be provide sufficient competition whereas in a developing market more bidders might be required to provide the Contracting Authority with sufficient comfort that competition will be maintained.

#### **Clarify, Specify, Fine-Tune (Final Tenders)**

- 5.4.6 Contracting Authorities may ask bidders to “... clarify, specify or fine-tune a tender..., but such clarification, specification fine-tuning or additional information shall 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.”<sup>32</sup>.
- 5.4.7 The legal meaning and interpretation of these terms in the Directive are ultimately matters for the courts to determine. This guidance cannot further define these terms, as that could be potentially misleading, though some broad examples from the experience of projects are included below.
- 5.4.8 However, it is apparent from statements made by the European Commission (including its Explanatory Note<sup>33</sup>) that these phrases are intended to be interpreted narrowly. The Explanatory Note compares the scope under this stage of the Competitive Dialogue procedure to that available under the Open or Restricted procedures where “all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out”.
- 5.4.9 So there is no scope for the Contracting Authority to seek to change any of the final bids due to them being unacceptable, or to respond to late changes in its requirements. Bidders cannot reopen discussions with the Contracting Authority at this stage and non-compliant bids will not be acceptable.
- 5.4.10 It is important for the Contracting Authority to ensure that all parties are aware of these restrictions and the practical implications that arise from them. Following any necessary clarification, specification or fine-tuning, or request for additional information, the Contracting Authority must evaluate the final bids received on the basis of the award criteria set out for the procurement process to identify the most economically advantageous tender.

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<sup>32</sup> Regulation 18(26) - The Public Contracts Regulations 2006

<sup>33</sup> Explanatory Note – Competitive Dialogue – Classic Directive [http://ec.europa.eu/internal\\_market/publicprocurement/explan-notes\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/explan-notes_en.htm)

**Box 5.8 Examples of issues that may be appropriate to resolve after close of dialogue [note: these examples may be relevant after final tenders have been received and at the preferred bidder stage]**

It is not possible to state a set of common contract issues that can appropriately be resolved after the closure of the dialogue and the submission of final tenders, covering all complex procurements and their individual circumstances. However, it is clear that it is not appropriate to leave issues unresolved beyond the closure of dialogue because neither the Contracting Authority nor the bidders have addressed the issue, or considered it necessary to do so, without good cause.

In judging whether issues are suitable to resolve after close of dialogue, Contracting Authorities may need to consider whether it is practically possible or cost effective to resolve the issue, either wholly, partly or at all, before closure of the dialogue.

Where the main elements of an issue have been addressed in the final tender but providing further detail (to the level required for contractual close) would be unduly burdensome, it may be valid for the detail to be developed only once a preferred bidder has been appointed. However, any later specification or fine-tuning of final tenders would have to be within the boundaries set out in the relevant bidder's final tender.

Although each case needs to be dealt with in the context of the specific procurement, examples where issues or details might best be dealt with after submission of final tender include:

- Detailed information on subcontractors: the Contracting Authority may require information on subcontracting arrangements. However, it may not be necessary, or realistic to require full details of the subcontracts before the close of dialogue. Such details may be more appropriate at a later stage eg following the appointment of a preferred bidder;
- Complete design detail: requesting the design to the level of detail required for contractual close may not be necessary at final tender stage. However, any subsequent design details must be within the scope of the original design that was submitted at final tender stage (in both technical and pricing terms). For example, the Building Schools for the Future guidance explains that Royal Institute of British Architects Stage D design should be sufficient for the purpose of selecting a preferred bidder, which can then progress to RIBA Stage E for contract close;
- Detailed planning applications: this is especially relevant where the relevant planning authority is not prepared to provide detailed planning approvals before appointment of a preferred bidder; and
- The lender's financial swap rates (the lender's financing rate is usually at a floating interest which is translated into a fixed rate through a swap at the time of contract signature at the market rate then ruling).

## 5.5 Stage 7: Preferred Bidder to Contract Close

### Clarify and Confirm Commitments (Preferred Bidder)

- 5.5.1 Having identified the most economically advantageous tender the Contracting Authority can request the preferred bidder “to clarify aspects of that tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination<sup>34</sup>”.
- 5.5.2 As with the case of “clarification, specification or fine-tuning” it is not possible at this stage to attempt to further define the meaning of “clarify aspects of the tender or confirm commitments” without legal precedents arising from court rulings. However, it seems clear that this represents a further narrowing of the scope for any discussion between the Contracting Authority and the preferred bidder.
- 5.5.3 While, for the reasons outlined above, there will be little for the Contracting Authority and the preferred bidder to discuss during this period, the preferred bidder is likely to need to undertake further work in some areas. The bidder may need to undertake detailed design work, complete approvals or permit processes (e.g. from planning authorities) as well as confirm arrangements with third parties (e.g. signing contractual arrangements with sub-contractors or funders).
- 5.5.4 It is common practice to issue a letter to the preferred bidder, confirming the intention to proceed with that bidder, subject to the bidder’s acceptance, and identifying any outstanding issues. Therefore, although the number of outstanding issues included in a preferred bidder letter under Competitive Dialogue is likely to be significantly fewer than under the Negotiated procedure, there may still be a period of elapsed time between the appointment of a preferred bidder and contract signature. However, it is likely that in general this period will be shorter than under the Negotiated procedure, which in some cases has taken years to conclude.

### Mandatory Standstill Period

- 5.5.5 The Regulations require the Contracting Authority to undertake a 10-day standstill period between contract award and contract conclusion. This encourages transparency in the award process and enables potential challenges to be addressed before contract signature<sup>35</sup>. This is also often referred to as the Alcatel standstill requirement, referring to an ECJ case<sup>36</sup>.
- 5.5.6 This requirement is not specific to procurements under the Competitive Dialogue procedure and separate general guidance is provided by OGC on this area<sup>37</sup>. Under Competitive Dialogue, the 10 day stand still period should happen when all matters that are material to the decision to award the contract to the winning tenderer have been resolved i.e. there will be no further changes that will modify the terms under which the contract will be concluded.

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<sup>34</sup> Regulation 18(28) - The Public Contracts Regulations 2006

<sup>35</sup> Regulation 32(3) - The Public Contracts Regulations 2006

<sup>36</sup> Case C81/98 Alcatel Austria and Others -v- Bundesministerium für Wissenschaft und Verkehr

<sup>37</sup> OGC guidance note on the 10 day mandatory standstill period

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### **Managing Change (Preferred Bidder)**

- 5.5.7 The Contracting Authority does not have the flexibility under Competitive Dialogue, which it previously had under the Negotiated procedure, to negotiate changes to final bids - “contracting authorities should identify and define the means best suited to satisfying their needs” during the dialogue period when there is effective competitive pressure on bidders.
- 5.5.8 The challenge for the Contracting Authority under the Competitive Dialogue procedure is to balance the legal requirements with the need to achieve contract signature while operating in a world where change can occur between the closure of the dialogue phase and contract signature (the post dialogue phase).
- 5.5.9 Changes can occur during this period for a number of reasons, which may be within or outside the control of the Contracting Authority. It is inappropriate for a Contracting Authority to undertake any changes to bids received after the closure of dialogue, if these changes could have been anticipated and dealt with during the dialogue stage. Any change of requirement or circumstance that was reasonably predictable, or directly under the Contracting Authority’s control, is unlikely to be a satisfactory reason, from a legal perspective, to change bids during the post dialogue phase.
- 5.5.10 As well as responding to exogenous changes that occur during this period, there may also be a need further to develop areas or elements of the preferred bid beyond that achieved at final bid stage, for example development of the detailed technical design of the preferred solution. Provided they are refinements of the final bid then these are likely to be acceptable. However, any clarification or confirming commitments with the preferred bidder must not have the effect of modifying substantial aspects of the tender or the call for tender and must not risk distorting competition or causing discrimination.
- 5.5.11 There is some uncertainty over how to determine which, if any, of the specific issues that might arise in the post dialogue phase, are acceptable reasons for any change to bids. Practitioners should always apply the principles contained in the Treaty of Rome as a guide to interpreting the new provisions. Further clarity may also emerge from future legal cases. Box 5.8 above also provides some examples of issues that could be dealt with at this late stage.
- 5.5.12 Contracting Authorities are therefore currently operating in a period of uncertainty. As highlighted earlier, where there are known or likely reasons for change occurring during the post dialogue phase, it may be appropriate to develop transparent mechanisms to allow these changes to be handled in a pre-agreed manner. If all bidders accept the specified approach as a condition of submission of their final bids, then the Contracting Authority might mitigate some of the potential risk of a legal challenge on the grounds of lack of transparency. However, any activity that attempts to go beyond the scope of clarification and confirming commitments would be likely to be construed as distorting competition or having a discriminatory effect and so risk legal challenge.
- 5.5.13 The position is more difficult to assess where changes occur during the post dialogue period, which the Contracting Authority could not reasonably have predicted or anticipated. As this is not an uncommon situation in a complex procurement, the Contracting Authority may be faced with some potentially difficult decisions over how to proceed and how to manage risks. It will not want to risk legal challenge, but the consequences of cancelling the procurement process could also have serious implications for all parties.
- 5.5.14 To manage such circumstances, the Contracting Authority could define some broad categories of potential change and outline how they might be dealt with if they should occur. For example, the Contracting Authority and bidders may have discussions with

planning authorities but are unlikely to be able to secure detailed planning permission for all of the proposed solutions during the dialogue stage. It is therefore quite possible that planning authorities may require changes to the actual solution of the preferred bidder following their appointment, which could result in changes in the price and other terms of the preferred bid.

- 5.5.15 Provided that the Contracting Authority and the preferred bidder could not have better managed things to avoid this situation, it would not be in anyone's interests for the procurement to fail because of such an event. So, for practical reasons, the Contracting Authority may decide to allow some consequential change, provided the change results directly from such an event and is limited to that which is needed to respond to the event.
- 5.5.16 There will be other types of events, which the Contracting Authority and the bidders have no control over, including general changes in market prices or market availability. In any event, any clarification or confirmation of commitments must not lead to substantial changes, or risk distorting competition or causing discrimination.
- 5.5.17 Box 5.9 provides a more detailed example of post-preferred bidder debt funding competitions.

**Box 5.9: PFI: Post-Preferred Bidder Debt Funding Competitions (“PBDFC”)**

The Treasury has issued draft outline guidance on the running of privately led, but publicly overseen, debt funding competitions after the selection of a preferred bidder for PFI contracts. As the preferred bidder runs these competitions they are not themselves subject to the Competitive Dialogue (or any other public procurement) procedure. However, as set out above, the preferred bidder will not be able to re-open negotiations with the Contracting Authority to deal with substantive issues that funders might raise. So the Contracting Authority and bidders need to be comfortable that such issues have been dealt with before selection of preferred bidder so that the PBDFC is run on a bankable solution.

Where the Contracting Authority does not require bidders to deliver firm financing at the time of submitting final bids (because it has assessed that deliverability of finance is not likely to be an issue), the PBDFC will set a market price for the finance element of the preferred bid. So provided the PBDFC is run appropriately, it should not result in any discrimination or distortion of competition.

Where there are doubts as to the deliverability of finance for the project (due to its novel, large or complex nature, which means that there may not be an identifiable financing market) it may be appropriate to require bidders to provide assurance that their bid can be financed. The draft guidance covers the circumstances in which a PBDFC should be held or not.

**Contract Award**

- 5.5.18 After all the necessary approvals and requirements for finalisation of the contract, and the completion of the standstill period, the Contracting Authority and the preferred bidder will sign the contract documentation.

5.5.19 Contract signature is, of course, far from being the end of the matter, though from this point on there are no Competitive Dialogue specific issues. The Contracting Authority should, however, make sure that the necessary planning and resources are in place for transition from any existing ownership or delivery of services to the new contractor/provider; and have effective contract management in place to ensure that the contractor fulfils its contractual obligations.

## 6. Summary

- 6.1 The Competitive Dialogue procedure should now replace the Negotiated procedure as the main procedure for complex public procurements where open and restricted procedures are deemed unsuitable.
- 6.2 Although this new procedure is based on established procurement principles – including transparency, openness, and non-discrimination – it does impose a significant resource burden and discipline on the Contracting Authority running the process, and can mean that bid costs are higher for both the Contracting Authority and unsuccessful bidders than previously.
- 6.3 Generally, Competitive Dialogue requires:
- Staying within scope; working within the parameters published at the outset, and during the course of the procurement process until the end;
  - Extensive planning; the Contracting Authority must plan in advance and in detail how the entire process will be run. Time invested early on in the process can reduce the overall time and costs;
  - Competitive tension to be in place during all substantive negotiations;
  - Substantial resources; additional costs and resources may be required for the Contracting Authority to negotiate with more than one bidder, and for unsuccessful bidders who have to develop their bids further before knowing if they will be successful;
  - Careful consideration of the legal boundaries; although there is not yet any specific legal interpretation of what is or is not permitted, there is only very limited room for manoeuvre after the dialogue is over and final bids have been requested;
  - Solutions to be well developed before close of dialogue; the Contracting Authority and bidders must be very clear before dialogue is closed about whether a bid is likely to be acceptable or not.
- 6.4 A well-managed procurement using the Competitive Dialogue procedure can bring benefits, which will vary depending on the specifics of individual projects. However, more generally these benefits include:
- Helping to drive better value for money for the Contracting Authority by maintaining competitive tension during the negotiations; and
  - Providing bidders with greater clarity about what is being expected of them throughout the process, and confidence that the procurement will proceed to completion.
- 6.5 Conversely, there may be problems if Competitive Dialogue is used inappropriately or poorly managed. The procedure could add substantially to costs for Contracting Authorities and bidders without any compensating improvement in outcomes.
- 6.6 This guidance is aimed at providing practical guidance to help practitioners conduct Competitive Dialogue procurements well. However, it is generic and cannot hope to cover all possible scenarios for every conceivable complex procurement. There is some sector-specific guidance available, which is listed in Appendix B. However, ultimately each Contracting Authority will need to use its own judgement and expertise and consider the

particular requirements and contexts of its specific procurement, to determine how best to apply the guidance in each case.

**Appendix A****GLOSSARY**

<b>Terminology</b>	<b>Meaning</b>	<b>Detail</b>
4ps	Public Private Partnership Programme	Project and programme advisors to local government
BAFO	Best and Final Offer	
Candidates	A tenderer or interested party	
Classical (or Classic) Directive	Directive (2004/18/EC) - on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts	
Commission (the)	The European Commission	
Contracting Authority	The term used in the EU Directives for the public sector procuring entity	Article 1 (9) of the Classical Directive
Contract Notice	The contractual advertisement placed in the Official Journal of the EU	
Descriptive Document	A document that describes the Contracting Authority's requirements	
ECJ	European Court of Justice	
Economic Operator	The term used in the EU Directives to mean supplier or potential supplier	
ISDS	Invitation to Submit Detailed Solutions	
ISOP	Invitation to Submit Outline Proposals	
ISOS	Invitation to Submit Outline Solutions	
ITN	Invitation to Negotiate	
ITPD	Invitation to Participate in Dialogue	
ITSFT	Invitation to Submit Final Tender	
MEAT	Most Economically Advantageous Tender	Article 53 of the Classical Directive
OGC	Office of Government Commerce	
OJEU	Official Journal of the European Union	
PBDFC	Preferred Bidder Debt Funding Competitions	
PFI	Private Finance Initiative	
PIN	Project Information Notice	
PPP	Public Private Partnership	
PIM	Project Information Memorandum	
PFU	Private Finance Unit	
Regulations (the)	The Public Contracts Regulations 2006	

## **Appendix B**

### **Other Competitive Dialogue Guidance and Relevant Documents**

#### **European Commission**

DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

[http://ec.europa.eu/internal\\_market/publicprocurement/legislation\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm)

#### **Explanatory note – Competitive Dialogue – Classic Directive**

[http://europa.eu.int/comm/internal\\_market/publicprocurement/docs/explan-notes/classic-dir-dialogue\\_en.pdf](http://europa.eu.int/comm/internal_market/publicprocurement/docs/explan-notes/classic-dir-dialogue_en.pdf)

#### **UK Regulations**

[http://www.opsi.gov.uk/si/si2006/uksi\\_20060005\\_en.pdf](http://www.opsi.gov.uk/si/si2006/uksi_20060005_en.pdf)

#### **Office of Government Commerce**

OGC guidance and resources on Competitive Dialogue

[http://www.ogc.gov.uk/procurement\\_policy\\_and\\_application\\_of\\_eu\\_rules\\_specific\\_application\\_issues.asp](http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_specific_application_issues.asp)

#### **Building Schools for the Future**

BSF Guidance Note on Classification of the Contract and Choice of Procedure under the EU Procurement Rules for the BSF Programme

[http://www.p4s.org.uk/documents/BSF\\_Guidance\\_Documents/GuidanceNoteonClassificationofContract&ChoiceofProcedureFebruary2006.doc](http://www.p4s.org.uk/documents/BSF_Guidance_Documents/GuidanceNoteonClassificationofContract&ChoiceofProcedureFebruary2006.doc)

BSF Guidance Note on How to Conduct a Competitive Dialogue Procedure

[http://www.p4s.org.uk/documents/BSF\\_Guidance\\_Documents/GuidanceNoteonHowtoConductaCompetitiveDialogueProcedureJanuary2006.doc](http://www.p4s.org.uk/documents/BSF_Guidance_Documents/GuidanceNoteonHowtoConductaCompetitiveDialogueProcedureJanuary2006.doc)

**4Ps** A map of the PFI process using Competitive Dialogue

<http://www.4ps.gov.uk/PageContent.aspx?id=2&tp=&s=0&title=&Stage=4&searchbtn=Go&x=37&y=8>

4Ps guide to Competitive Dialogue

<http://www.4ps.gov.uk/>

#### **Draft Department of Health guidance**

Presentation materials presented at the Department of Health PFU's conference on Competitive Dialogue on 5 October 2006. The scope of these are somewhat wider than just Competitive Dialogue related issues, with the PFU taking the opportunity to "consult" on some other areas including the Business Case process, inclusion (or not) of equipment in PFIs, interim services etc. but includes:

[http://www.dh.gov.uk/Consultations/ClosedConsultations/ClosedConsultationsArticle/fs/en?CONTENT\\_ID=4140468&chk=dZGjlj](http://www.dh.gov.uk/Consultations/ClosedConsultations/ClosedConsultationsArticle/fs/en?CONTENT_ID=4140468&chk=dZGjlj)

#### **Draft HMT guidance**

PREFERRED BIDDER DEBT FUNDING COMPETITIONS - Draft outline guidance for feedback, which includes guidance on how funding competitions will interact with Competitive Dialogue

[http://www.hm-treasury.gov.uk/media/2/A/ppp\\_pdbfcguide100806.pdf](http://www.hm-treasury.gov.uk/media/2/A/ppp_pdbfcguide100806.pdf)