

COMPETITIVE DIALOGUE ¹

**SECTION 2.1.2.2 OF THE COMMISSION COMMUNICATION
"PUBLIC PROCUREMENT IN THE EUROPEAN UNION"
[COM (98) 143]**

UNICE DISCUSSION PAPER

SUMMARY

UNICE proposes a set of principles to extend the opportunity for dialogue in all public purchasing by Public Authorities subject to directives 93/37, 93/36 and 92/50 ("Authorities"):

- 1 Public tendering should respect modern purchasing practise by a wider application of dialogue between purchasers and tenderers.
- 2 The rules must guarantee the preservation of the transparency of the tendering process.
- 3 Regulated Dialogue used as part of a competitive procedure meets this requirement.
- 4 Competitive Dialogue should not be used for the sole purpose of price reduction.

¹ In previous versions of this paper Competitive Dialogue was called Competitive Negotiation.

UNICE has considered the application of dialogue in public tendering in the light of modern purchasing practice. It has concluded that the procedure - "Competitive Dialogue" - addressed in this paper should be introduced for general application by Authorities for any complex tender.

There is understandable concern that dialogue between the purchaser and any of the tenderers during a tender process may lead to non-competitive arrangements. Patently such fears are grounded in reality.

Nonetheless, it is unrealistic in complex tenders to expect to conduct the process without dialogue. The purchaser cannot be fully aware of the tenderers' capabilities and thus cannot anticipate what form a tenderer's response may take. Performance-related specifications mean that purchaser and tenderer have to explore each others' expectations and proposals to ensure proper understanding. Such dialogue may well affect commercial as well as technical aspects of the tender and any contract resulting therefrom.

Competitive Dialogue should only be applied in procurements which are complex - for technical, commercial or financial reasons. Any attempt to define "complex" with sufficient precision for inclusion in the body of the Directives was felt to be beyond practical possibility. The recitals to the Directives should, however, make clear that the procedure really is intended for complex procurements. If a purchaser were to abuse the competitive dialogue procedure, the courts would have to decide on each individual case.

Competitive Dialogue is quite separate from pre-tender discussions, which are not peculiar to any of the award procedures.

UNICE's proposal starts from the premise that all public tendering should be transparent; with very few exceptions all information relating to the tender should be freely available to all tenderers. In a tender in which there is no dialogue the documentation is the same for everyone, thereby respecting the premise. Regulations governing Competitive Dialogue must preserve that position whilst respecting each tenderer's confidential information.

In order to achieve such a result, the purchaser must ensure that all relevant tenderers² are made aware of any material changes to the technical requirement, the commercial terms or the award criteria which arise from Competitive Dialogue with any other tenderer. In so doing, it will nonetheless need to keep each tenderer's information, especially pricing, confidential. Relevant tenderers will have to be afforded the opportunity to respond to any material changes and, in any case, to make a "best and final" submission once all dialogue is complete.

²The term "relevant tenderers" is used throughout this document; an explanation of the way in which it is used may be helpful. The letters in brackets (a), (b), (c) refer to the penultimate bullet on page 3.

A normal Competitive Dialogue procedure will start with a call for competition resulting in, perhaps a dozen or more applicants. The notice constituting the call for competition may, however, have caused other potential applicants to conclude that the tender was not suited to their skills. Bridge builders, for example, might not respond to a call for a tunnel. After the responses to the call for competition have been received a selection process will be used to reduce the number of tenderers with whom real dialogue will be held to a practical short-list, probably three or four.

Minor changes to the requirement will only need to be communicated to the short-list [case (a)].

If the change is more major, the basis on which some applicants were eliminated from the short list will be seen to be invalid; the purchaser would need to revisit the list of eliminated applicants to establish whether any of them ought to be invited to participate [case (b)].

If the change is still more significant – the purchaser is now willing, say, to consider proposals for a bridge instead of only a tunnel – a new call for competition ought to be started to which tunnel builders would probably respond [case (c)].

"Relevant tenderers" thus depends upon the nature of the change in the requirement.

The purchaser will obviously need to contemplate whether relevant tenderers should include only those on the short-list, those who have been eliminated in an earlier round, or all potential tenderers. In the latter case the tender might possibly have to be abandoned and a new call for competition instituted.

UNICE therefore proposes the inclusion of the following provisions in the Works, Supplies and Services directives, with appropriate modifications whenever the existing text is in conflict with the new proposals :

- A procedure, Competitive Dialogue, should be provided;
- the recitals to the Directives should contain a paragraph making it clear that Competitive Dialogue is intended only for complex procurements;
- Competitive Dialogue will always involve a prior call for competition;
- a preliminary selection based on criteria developed from those in Chapter 2 of the Works, Supplies and Services directives may need to be carried out to reduce the number of tenderers to a short-list of a practical size; such short-list shall not, unless fewer tenderers express interest, be less than three;
- the Contracting Authority must keep all relevant tenderers aware at all times of any development in the specification or the terms of tender or contract which might reasonably be considered to have a material effect on tenderers' submissions;
- nothing in the above shall affect the Contracting Authority's obligation of confidentiality to each tenderer but such obligation shall not relieve the Contracting Authority from making effective information available to all other relevant tenderers;
- when all dialogue is finished, the Contracting Authority shall call once – and once only - for “best and final” offers from all the short-listed tenderers, after which there shall be no more dialogue or negotiation other than such clarification as may be permitted in the Open and the Restricted Procedures;
- "relevant tenderer" means, depending upon the nature and materiality of the change,
 - a) the other short-listed tenderers;
 - b) those who were eliminated in the selection phase; or
 - c) all possible tenderers, including those who may have declined to tender;
- Competitive Dialogue will not apply for the sole reason of price reduction (no 'Dutch auctions').

Such provisions may, in some circumstances, present difficult decisions to a purchaser. But the overriding need for transparency in circumstances where suspicions of obscurity may all too easily arise, coupled with the equally imperative need for the opportunity to use Competitive Dialogue, mean that purchasers will have to acquire the skills needed to handle such conflicts.

At the same time suppliers, perhaps especially SMEs lacking the muscle of large companies, will need to acquire complementary skills.

In some circumstances a purchaser may prefer to award preliminary study contracts in order to clarify the basis of the tender, thereby ensuring that it has the right to disclose the information which arises therefrom, and reducing the risk of conflict. Such a procedure also encourages competition by reducing the advantage of tenderers able to fund expensive project studies from their own resources. Certainly use of Competitive Dialogue should not encourage purchasers to be lax in preparing tenders, nor should they seek to pass project definitions which are properly theirs to suppliers.

UNICE expects that, once purchasers become aware of the weight of their obligations in conducting Competitive Dialogue and of their vulnerability to remedial process should they fail to meet such obligations, they will not use the procedure for inappropriate tenders.

An explanatory document published simultaneously with the introduction of the revised Directives, emphasising that Competitive Dialogue is a difficult process and far from being an easy option, would help to raise purchasers' awareness of difficulties which may be encountered in using it, and the undesirability of its inappropriate use.

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