

15 February 2001

**COMPETITIVE DIALOGUE**  
**REVISED DRAFT COM (2000) 275 FINAL/2, COUNCIL 5083/01**  
**DATED 12 JANUARY 2001**  
**UNICE POSITION**

UNICE again confirms its support for the intention to permit competitive dialogue between contracting authority and candidates in particularly complex contracts provided that UNICE's basic positions on such procedural provisions\* were recognised.

In the revised wording of Article 30 in Document COM (2000) 275 final/2, UNICE's positions have to some extent been taken into consideration. But, as it stands, Article 30 still conveys the impression that the proposed procedure can serve as "fishing expedition" which could be used by contracting authorities aiming at avoiding their obligation to define their own needs clearly *prior* to a procurement procedure. Thus, UNICE sets out the following basic elements which will have to be incorporated if competitive dialogue is to work in practice and not be misused for purposes beyond objectively complex contracts:

- ?? The contracting authority, whilst it cannot identify the solution to its needs, has to define the *needs* themselves *very clearly*.
- ?? The award criteria must be set out clearly at the outset.
- ?? The mixing of ideas/solutions of participants of the dialogue procedure must be expressly excluded.
- ?? The disclosure of participants' solutions and other confidential information, already prohibited to other participants, must also be prohibited to any third parties at any time during and after the procedures.
- ?? Each participant in the dialogue will submit its (best and final) offer on the basis of its own proposals.
- ?? Compensation for costs incurred in participating in the dialogue should be mandatory.

**Should the possibility of combining, or of seeking bids based on, solutions from different participants not be clearly excluded, UNICE will definitively be unable to continue to support the Competitive dialogue procedure.**

In order to meet UNICE's essential points for the procedure of competitive dialogue set out above, the following amendments of Article 30 would be needed:

*Article. 30*  
*Competitive Dialogue*

1. ...
2. The **contracting** authorities shall publish a contract notice **clearly** setting out their needs and requirements, which they shall define in a descriptive document

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\* See previous UNICE Comment on the revised Public Purchasing Directives, dated 14 November 2000 page 3-9, especially page 5.

in terms of objectives to be achieved and, if appropriate, in terms of performance or functional requirements. **At the same time the contracting authority shall set out the selection and award criteria.**

3. Contracting authorities shall open, with the candidates selected in accordance with Articles 43 a to 52, consultation. the sole aim of which shall be to identify ~~and define~~ the means best likely to satisfy the needs of the contracting authority. ~~so that it can draw up the contract document. The contracting authority shall continue such consultation until it can identify solutions, if need be after comparing them, capable of meeting its needs.~~ **If, in exceptional cases, the contracting authority becomes aware during the course of the procedure that aspects of the definition of its requirements need amendment, it shall forthwith advise, subject always to sub-clause 4 hereof, all the participants accordingly.**
  4. Contracting authorities **shall** not reveal to the other participants **or to any other third party** solutions proposed or other confidential information communicated by a participant without the latter's agreement.
  - 4.5. Having declared that the consultation is concluded, **and** having so informed the participants ~~and having drawn up the contract document~~, contracting authorities shall ask all candidates who have proposed solutions during the consultation to submit a tender on the basis **of their own** proposals. Contracting authorities shall assess the tenders on the basis of the award criteria laid down and shall choose the most advantageous tender in economic terms. Where the conditions laid down in Article 29 are met, tenders may be negotiated in accordance with that Article.
  - 5.6. Contracting authorities **shall** specify prizes and payments to the participants **in respect of their work in participating in the consultation and preparing proposals.** Such prizes and payments shall be taken into account in estimating the thresholds in accordance with Article 8.
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