



HM TREASURY

# HM Treasury Review of Competitive Dialogue

November 2010





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# Executive summary

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This review has considered the impact of the Competitive Dialogue process on public sector procurements in the UK. Following a series of questionnaires and roundtable discussions with public and private sector participants in procurements which have used Competitive Dialogue, we have the following recommendations to improve the procurement process, achieve better value for money and shorten delivery times:

1. Inconsistent training courses on the Competitive Dialogue procedure has contributed to the lack of upskilling in procurement professionals. This review recommends a series of training courses for complex procurement be developed for officials across the public sector. (p.8)
2. Competitive Dialogue should not be seen as the 'default' procedure for all complex procurements. Step by step guides to the Open, Restricted and Negotiated procedures are currently in development and should give authorities the confidence to use alternative procedures where these are appropriate. (p.11)
3. All future projects wishing to use Competitive Dialogue over the Open and Restricted procedures should include their justification document in their published procurement documentation, following sign off by the Senior Responsible Owner and the organisation's Head of Procurement. (p.11)
4. Pre-procurement is the most important stage of a Competitive Dialogue procurement, it is also often the most neglected and poorly executed. Forthcoming guidance from the Efficiency and Reform Group will help address this key area of concern. (p.14)
5. To inform new bidders, and to combat some of the more common impressions about what can be expected during a Competitive Dialogue procurement, a short 'Suppliers' Guide to the Competitive Dialogue Process' should be developed. (p.14)
6. As part of their pursuit of the best value for money solution, contracting authorities should be cognisant of the private sector's 'auditioning' process. They should use Bidders' Days OJEU Prior Information Notices and Contract Notices to showcase their preparation and demonstrate to all bidders their capacity, capability and commitment to delivering an efficient and timely procurement process. (p.14)
7. Procurement timetables should be developed allowing for a realistic schedule of meetings which incorporates time to address internal approval processes and allows sufficient time to revise documents based on outputs from Dialogue meetings. This will provide a procurement with a strong foundation capable of supporting both public and private sector requirements and expectations. (p.15)
8. Projects should establish their own procedures for closing Dialogue *before* entering procurement. Taking the time to establish the level of detail and assurance required in advance of entering Dialogue will avoid costly overruns and impromptu requests for further information. (p.16)

9. Considering the benefits of targeted dialogue, it is strongly recommended that Authorities should consider which issues need to be dialogued and they should not seek to dialogue every aspect of the contract. (p.16)
10. In 2007 the Committee of Public Accounts (PAC) observed that with the introduction of the new procurement regulations, it would be expected that the incidence of late changes made changes to PFI projects after they had selected a single, preferred bidder would decline. This review has carefully considered current practice under Competitive Dialogue compared to that under the Negotiated procedure and understands Competitive Dialogue has successfully addressed the issue of protracted post-preferred bidder discussions. (p.16)
11. HM Treasury has engaged with the Procurement Lawyers Association and legal advisers from the PPP Forum with a view to encouraging the legal sector to debate those areas of Competitive Dialogue delivery most heavily influenced by legal advice. Covering issues from the original decision to pursue Dialogue over alternative procurement routes, to behaviours during Dialogue, approaches to evaluation and the interpretation of 'clarify, specify and fine tune', both organisations are keen to develop a series of papers on the subject, to be produced collaboratively by a working group of experienced practitioners. The review welcomes this work as a positive step towards achieving a consensus view on these crucial aspects of Competitive Dialogue delivery.(p.17)
12. On each future Competitive Dialogue procurement, the Authority should produce a detailed guide to the evaluation approach to be taken, setting out the value of each piece of information requested and linking each response to the evaluation criteria will reduce bid costs for the private sector, reduce the administrative burden for the public sector and facilitate the swifter and more accurate evaluation of bids. (p.18)
13. Public sector teams engaged in Competitive Dialogue procurements should engage in a shadow charging exercise to provide a more accurate picture of the cost of undertaking complex procurements. Such exercises will help focus the attention of the Senior Responsible Owner and Head of Procurement on costs and have a subsequent positive effect on timescales and behaviours. Data gathered should be shared between authorities to inform future resource planning. (p.20)
14. Authorities should bear bid costs in mind when determining the level of detail genuinely required for bid submission purposes at each stage of dialogue and what is absolutely necessary for evaluation purposes and to deliver the required planning permissions. (p.20)
15. This review recognises that the current Gateway processes were established in advance of the introduction of Competitive Dialogue and recommends a refresh of the Gateway stages to more accurately reflect (where required) the implications of using Competitive Dialogue as the procurement route. (p.21)

HM Treasury has a historical commitment to the Public Accounts Committee to review the impact of the Competitive Dialogue procurement process. Colleagues in the Cabinet Office's Efficiency and Reform Group are currently undertaking a Lean Procurement Review to uncover the causes of delay in the procurement process and to suggest actions to rectify them. It is hoped that the findings of this 18 months study will complement and contribute to this valuable piece of work and this report has been submitted as evidence to the ERG Review for their consideration.



# 1

## Introduction

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**1.1** Since its introduction into UK law in January 2006, Competitive Dialogue has been used by the public sector to deliver a broad scope of projects ranging from large scale infrastructure programmes (including a variety of Public Private Partnerships (PPPs)) to IT systems.<sup>1</sup> With over 1,200 procurements having been undertaken using Competitive Dialogue, HM Treasury felt there was now sufficient experience of the procedure to allow a meaningful review to take place.

**1.2** This review has been motivated by Government's policy commitment to achieve value for money for the public sector by improving the delivery of projects and minimising procurement costs and we recognise the importance of efficient and effective procurements in achieving this aim. Badly delivered procurements deliver badly executed projects which are more likely to be subject to escalating costs and delays, increasing the cost to the public purse and reducing the value for money achieved.

**1.3** HM Treasury has a historical commitment to the Committee of Public Accounts (PAC) to review the impact of the Competitive Dialogue procurement process. Colleagues in the Cabinet Office's Efficiency and Reform Group are currently undertaking a Lean Procurement Review to uncover the causes of delay in the procurement process and to suggest actions to rectify them. It is hoped that the findings of this 18 months study will complement and contribute to this valuable piece of work and this report has been submitted as evidence to the ERG Review for their consideration.

### Objective of the review

**1.4** The object of this review is to examine the way in which the Competitive Dialogue procedure has been undertaken in practice and the impact this has had on complex procurement in the UK, drawing on the experience of contracting authorities and market participants.

**1.5** The intention of this review is not to replace or rewrite the 2008 HM Treasury and OGC guidance<sup>2</sup>, but instead consider how Competitive Dialogue is being used, illuminate areas of concern, and make recommendations for ongoing and future procurements.

**1.6** Working with advisers PricewaterhouseCoopers LLP, HM Treasury initially engaged in desk based research to establish the size of the UK Competitive Dialogue market, identify the types of complex procurements being undertaken and better understand the skills and capacity of contracting authorities delivering the process.

**1.7** Two surveys, one project specific and one general, were commissioned to provide an evidence base for the review. The project specific survey targeted individuals from the public sector team on each individual Competitive Dialogue procurement identified by the initial desk based research. The second, web based, survey provided an opportunity for a response from all individuals that have an interest in the Competitive Dialogue procedure.

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<sup>1</sup> [http://www.ogc.gov.uk/documents/guide\\_competitive\\_dialogue.pdf](http://www.ogc.gov.uk/documents/guide_competitive_dialogue.pdf)

<sup>2</sup> [http://www.hm-treasury.gov.uk/d/competitive\\_dialogue\\_procedure.pdf](http://www.hm-treasury.gov.uk/d/competitive_dialogue_procedure.pdf)

**1.8** A series of roundtable discussions were then held with groups of key stakeholders, including central government commercial directors, PPP programme managers, academics, infrastructure bidders, IT bidders, legal advisors, financiers and central government/local authority representatives. These discussions covered the issues raised by the two surveys, and allowed groups with significant, first hand, Competitive Dialogue experience to share their views.

**1.9** We were keen to explore whether issues raised were specific to Competitive Dialogue or were more general procurement issues and whether they relate to the specific nature of the procedure or to the capacity and capability of an authority.

## High-level conclusions

**1.10** The overarching conclusion we draw from our research and consultation is that where the Competitive Dialogue procedure is used appropriately **both the public and private sectors believe the Competitive Dialogue procedure has been a positive addition to the procurement spectrum.** There is a general consensus that the procedure: i) maintains competition; ii) imposes discipline on all parties (particularly in closing off the key project documentation whilst still in competition); iii) establishes excellent working relationships between the public and private sectors; iv) delivers improved solutions with a better 'deal' for the public sector; and avoids the scope and price creep often found with negotiated procedure procurements. Competitive Dialogue has also been useful in focussing effort by reducing the number of variant bids.

**1.11** However public and private sector participants agree that **Competitive Dialogue is only a positive addition to the procurement spectrum when it is conducted appropriately. Where that is not the case it can be burdensome and expensive.** There was specific criticism focusing on: i) the frequency with which Competitive Dialogue is used (especially where the project is not complex and the Restricted procedure could be used); ii) the lack of preparation, insufficient skills and capacity on the part of contracting authorities; and iii) the negative impact these issues have on bid costs and procurement times.

# 2

## Delivering Competitive Dialogue in the UK

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**2.1** When considering the impact of Competitive Dialogue it is important to look beyond the mechanics of implementation and consider those external factors that will influence delivery. The outcome of a procurement will be influenced as much by the capacity and capability of those party to the process as by the nature of the contract to be delivered.

### Participants in Competitive Dialogue Procurements

#### Public Sector Participants

**2.2** There are hundreds of contracting authorities engaged in public sector procurements in the UK. Combined with the rarity of genuinely complex projects there is currently a limited number of procurement professionals with experience of Competitive Dialogue and little consistency in approach to delivering the process.

#### Local Government

**2.3** Local Authorities currently account for almost half of all Competitive Dialogue OJEU notices published in the United Kingdom. Our research has shown that there are few Local Authorities with repeat experience of Competitive Dialogue procurements and those that do have little evidence of knowledge sharing between delivery teams.

**2.4** One Local Authority demonstrating best practice in this area is Leeds City Council. With a central strategic delivery unit Leeds are supporting and sharing best practice between sectors and hold regular 'lessons learned' sessions to ensure continuous improvement in the way Competitive Dialogue is undertaken.

#### Central Government

**2.5** Central government contracting authorities tend to have more capacity to accommodate the increased resources required to deliver a Competitive Dialogue procurement and tend to have experience in developing a standardised approach to procurements via programmes rather than individual projects.

**2.6** Central government contracting authorities are also demonstrating a less tentative approach to the more contentious elements of Competitive Dialogue. Specifically they have considered a range of procurement alternatives rather than assume a blanket use of Competitive Dialogue.

**2.7** Several Departments have produced sector specific guidance on the use of Competitive Dialogue but there was little evidence of cross sectoral discussion during the preparation of this guidance. This has led to a missed opportunity to drive a more consistent approach to the procedure.

#### Public Sector Skills Gap

**2.8** Public Sector attendees at our roundtable events conceded a general lack of Competitive Dialogue knowledge and skills within their procurement teams, although they consider this to be improving. In particular they recognised that the very small resource pool of public sector

procurement specialists means that a greater reliance is being placed on the private sector to provide support.

**2.9** While recognising the added value that private sector advisory services can bring to procurements, HM Treasury is keen to reduce this reliance and improve public sector skills and capacity. **Inconsistent training courses on the Competitive Dialogue procedure has contributed to the lack of upskilling in procurement professionals. This review recommends a series of training courses be developed for officials across the public sector.**

**2.10** Public sector procurement professionals would benefit from a practical 'how to' of Competitive Dialogue. The course should showcase best practice, feature learning points from recent and ongoing procurements and provide an opportunity to quiz experienced practitioners.

**2.11** Senior Responsible Owners (SROs) and non-procurement specialists would benefit from a less technical approach, focusing on those key issues, such as planning, strategy, costs, timescales and market engagement, which will reap benefits if considered as policy is developed.

**2.12** HM Treasury will work with the ERG to determine the most appropriate provider for these courses and will work with the chosen provider to reflect the results of this review within the course content.

**2.13** In addition to formal training, authorities would benefit from networking groups to share opinions and best practice.

## **Private Sector Partners**

**2.14** Private sector partners in Competitive Dialogue range from bidders and funders to legal, technical and financial advisors who may act for either the public or private sector parties to the procurement.

### **Bidders**

**2.15** The bidding community is most concerned about inappropriate use of the Competitive Dialogue procedure, rising bid costs,<sup>1</sup> extended procurement timetables and reduced scope for innovation, particularly where the process drives convergence between design solutions.

**2.16** The skills and capacity required to manage Competitive Dialogue procurements can generally be found only in larger suppliers and/or those working in a market with a programme of delivery which brings opportunities to engage in repeat procurements.

**2.17** Small and medium sized enterprises may lack the skills and knowledge to use Competitive Dialogue effectively and may lack the depth of resources (including financial) to undertake such procurements. Many perceive the use of Competitive Dialogue as a barrier to entry into supplying the public sector. Contracting authorities should be particularly mindful of Government measures announced on 1 November 2010 to help the five million small firms in the UK grow and boost enterprise across Britain.<sup>2</sup>

### **Financiers**

**2.18** Representatives from the International Project Finance Association (IPFA) have reported that banks are being asked to get involved earlier in Dialogue meetings. Some financiers expressed concerns over the level of detail being requested from Bidders during the process, the impact on procurement timelines and the level of preparedness/resource on the public sector side. In

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<sup>1</sup> Particularly design costs as multiple bidders are designing projects to the level of detail (i.e. 1:50 drawings) that previously would have been left to the preferred bidder.

<sup>2</sup> [http://www.ogc.gov.uk/documents/SME\\_PPN.pdf](http://www.ogc.gov.uk/documents/SME_PPN.pdf)

addition, some financiers felt the early involvement sought by the public sector was quite generic (e.g. asking for descriptions of the credit process and planned closing timetable) rather than being more usefully targeted to project specific issues.

**2.19** The interface between Competitive Dialogue, due diligence and preferred bidder debt funding competition is complex. At a very early stage, authorities and their advisers should consider the financing strategy as part of the procurement strategy and develop the documentation/process accordingly.

### **Advisory Firms**

**2.20** Consultants are routinely employed by both the public and private sector parties involved in Competitive Dialogue procurements to provide expert legal, technical and financial advice. Such support is advisable where internal skills are not available to avoid any disadvantage to the public sector. Use of advisers who understand the requirements of financiers is particularly important when funding competitions are used in conjunction with Competitive Dialogue.

**2.21** Echoing the principles of Managing Public Money and recent Government policy on employing consultants, HM Treasury is keen for contracting authorities to ensure they control spend on such advice and encourage knowledge transfer to avoid future reliance where possible.

### **Appropriate resourcing of Competitive Dialogue projects**

**2.22** As part of a mandatory Gateway 2 Review, central government contracting authorities are expected to prepare a delivery strategy which “confirm(s) that internal organisational resources and capabilities will be available as required for future phases of the project.” Reviewers will also seek “assurance that the organisation has adequate expertise and capacity to undertake internal delivery of the requirement.”<sup>3</sup> Wider public sector authorities are also encouraged to engage in the Gateway process to examine the progress and likelihood of successful delivery of their programmes or projects.

**2.23** Despite this assurance programme, a frequent complaint about the Competitive Dialogue process concerns the significant amount of support and skills, internal and external, required on the part of the contracting authority to manage and deliver the procurement.

**2.24** 59% of contracting authorities have reported a need for increased internal resource, with a similar number requiring increased external support. This ranges from additional administration support to manage logistics to additional legal and financial support in the Dialogue meetings and early evaluations.

**2.25** When considering the level of resource in place during a procurement, two thirds of contracting authorities felt they were sufficiently resourced. However a significant number of respondents (three quarters) to the general survey said that the public sector were either under, or considerably under resourced, indicating the private sector do not believe there is sufficient public sector capacity and capability being devoted to Competitive Dialogue procurements.

**2.26** In addition to staffing the core procurement team it is important to recognise the importance of a strong leadership team. Competitive Dialogue projects must be led by a well briefed Senior Responsible Owner who is fully aware of the intricacies of the process and the demands it will make on their time. A project director with the technical, financial, legal, and commercial awareness to act as an intelligent client and lead the process is also vital to running a successful Competitive Dialogue procurement.

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<sup>3</sup> [http://www.ogc.gov.uk/documents/BOOK\\_2\\_APRIL.pdf](http://www.ogc.gov.uk/documents/BOOK_2_APRIL.pdf)

**2.27** When considering whether to bid for particularly complex contracts, private sector bid teams are frequently expected to produce bid cost estimates and resource plans as part of the investment decision on whether to bid for the contract or not. Having the public sector mirror this behaviour and publish these plans as part of the procurement documentation would have a benefit.

**2.28** The public sector is currently moving towards greater transparency in relation to procurement and the nature of its contracting engagements with the private sector, and as a consequence procurement documentation will now be routinely published.<sup>4</sup>

**2.29** Publishing a detailed and robust procurement and resource plan in advance of procurement would not only give comfort to prospective bidders and help address private sector concerns on the capacity and preparedness of the procurement, it would also allow an audit of the actual time and cost taken during procurement once a project reaches close. Holding projects accountable in this way will focus attention on the true cost of procurement and help build a more realistic and achievable timetable.

## **Size and type of contracts let under Competitive Dialogue**

**2.30** The ERG defines a complex procurement as “one where the specification is difficult to define or is complex or innovative, the procurement is high risk, the competition is restricted to a limited market, the contract will be based on unusual commercial models (e.g. PFI or a PPP variant) or where the procurement involves spend in a number of categories.”<sup>5</sup>

**2.31** Our research found 44% of those projects which responded to the survey were for contracts of 5 years or less, rising to 67% for 10 years or less. In terms of cost, 52% of projects had a capital value of £5m or less, 41% with a services value of £5m or less.

**2.32** While we would not suggest there is always a direct relationship between project value or duration and complexity, given the length of time and internal resources it takes to prepare for and deliver a Competitive Dialogue procurement, these numbers raised some concerns.

**2.33** It was clear from our research that a wide range of obviously complex projects have taken advantage of the flexibility that Competitive Dialogue offers to secure policy outcomes. These include large scale IT projects, hospital and prison PFI projects and urban regeneration partnerships.

**2.34** However, we were concerned to note others which were not so obviously complex, for example purchasing annual insurance policies, occupational clothing, and detergents, printing a local government newsletter and obtaining cleaning services for a single school.

## **Competitive Dialogue should not be the default procurement route**

**2.35** Our review has indicated that contracting authorities are increasingly viewing Competitive Dialogue as the default process for all but the most straightforward procurements.

**2.36** Risk aversion is one reason for the upsurge in Competitive Dialogue. HM Treasury is concerned this overuse may be an unintended consequence of the tone of the 2008 Guidance. The intention was to discourage inappropriate use of the Negotiated procedure, it may, however, have been interpreted as an implied ban on everything but Competitive Dialogue.

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<sup>4</sup> [http://www.ogc.gov.uk/documents/PPN\\_1710\\_Transparency\\_in\\_procurement\\_and\\_contracting.pdf](http://www.ogc.gov.uk/documents/PPN_1710_Transparency_in_procurement_and_contracting.pdf)

<sup>5</sup> [http://www.ogc.gov.uk/procurement\\_documents\\_complex\\_procurement.asp](http://www.ogc.gov.uk/procurement_documents_complex_procurement.asp)

**2.37** While previously comfortable with utilising the full range of procurement procedures, contracting authorities have now expressed nervousness about straying from Competitive Dialogue and are often confused as to what is permissible under the Open, Restricted and Negotiated procedures.

**2.38** Authorities would benefit from consistent central guidance on how to engage in these procedures, similar to that produced for Competitive Dialogue. The Efficiency and Reform Group's procurement "Superhighway" should address this.

**2.39** This will be in the form of a decision tree for procurers wishing to select the most appropriate route for their procurement. The decision tree will, through a few simple questions covering the value, complexity and nature of the goods, works or service being procured, direct the user to the most appropriate route for their requirement.

**2.40** Competitive Dialogue should not be seen as the 'default' procedure for all complex procurements. HM Treasury welcomes the step by step guides to the Open, Restricted and Negotiated procedures which are currently in development. These should give authorities the confidence to return to alternative procedures for less complex procurements.

## **Justifying the use of Competitive Dialogue**

**2.41** The 2008 Guidance made reference to a requirement to justify the use of Competitive Dialogue "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."<sup>6</sup>

**2.42** The review has shown the preparation of a 'justification' can be more than just an administrative burden if approached in the right way. Preparing a justification for Competitive Dialogue can focus the mind of the procurement team on the project requirements ensuring it considers which can be settled into firm specifications, which may not need to be subject to Dialogue and which will require discussion with the market.

**2.43** The opportunity to challenge 'known unknowns' in advance of procurement, through market testing, may provide the opportunity to refine specifications to the point where the Restricted procedure may become an option or the Dialogue phase may be limited to a small number of outstanding complex issues.

**2.44** To avoid unnecessary use of Competitive Dialogue, Senior Responsible Owners should robustly test the complexity of their project and seek assurance it may not be delivered via other, less complex, procedures.

**2.45** HM Treasury recommends that all future projects wishing to use Competitive Dialogue over the Open and Restricted procedures should include their justification document in their published procurement documentation, following sign off by the Senior Responsible Owner and the organisation's Head of Procurement.

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<sup>6</sup> OGC/HMT, Guidance on Competitive Dialogue, 2008. Page 14.





# 3

## Competitive Dialogue in Practice

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**3.1** HM Treasury's review of Competitive Dialogue covered behaviours at each stage of the process, from pre-procurement through to the evaluation and debriefing of bidders.

### Pre Procurement Preparation

**3.2** It is widely recognised that projects, regardless of their procurement route, are frequently placed under pressure to enter into a formal procurement process too early, often with negative consequences. The ERG notes in 'A Formula for Success' "The competitive phase in the procurement process is often started too early, principally in an effort to make, or to be seen to make, progress. But this is a false economy. Using the competitive process to resolve issues, which could have been dealt with before the start, is likely to be more difficult and more costly."<sup>1</sup>

**3.3** Feedback received from our surveys and the roundtable sessions was very clear with regards to this stage of the process – pre-procurement is the most challenging and most influential stage of a Competitive Dialogue procurement. The findings also indicate it is often the most neglected and poorly executed part of the process.

**3.4** The review has indicated that increased, and more focused, early engagement with suppliers would significantly improve the ability of contracting authorities to deliver an efficient and effective process and improve both value for money and the quality of outcomes delivered by the project.

**3.5** The roundtable events produced a strong consensus view from both public and private sector contributors that early engagement with suppliers is essential. Public sector procurement specialists agreed they remain overly cautious over pre-procurement market testing.

**3.6** One of the private sector's main complaints about Competitive Dialogue is the tendency for the public sector to use the Dialogue phase as an opportunity to take advantage of 'free consultancy' from the market – allowing suppliers to come forward with suggestions during Dialogue and then using this information to tailor, and often redefine, their requirements and outcomes. Doing this at the Dialogue stage is too late.

**3.7** While there was evidence of pre-procurement 'soft market testing' to attract bidders to a project in advance of issuing an OJEU notice there was little evidence of engaging with suppliers to help identify achievable outcomes or to define the scope. Bidders have made it clear they are happy to engage in soft market testing processes as long as these are proportional and structured in an appropriate manner.

**3.8** There was also limited evidence of using market intelligence to contribute to the decision to use Competitive Dialogue. In certain cases, early market testing to ascertain whether proposed approaches would be acceptable to bidders and to confirm whether output requirements are appropriate could reduce the need for Competitive Dialogue and support a Restricted procedure approach.

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<sup>1</sup> Office of Government Commerce, A Formula for Success, 2009. Page 5

**3.9** The Efficiency and Reform Group is currently preparing new guidance on the Pre-Competition phase of major or complex procurements. This will encourage contracting authorities to engage with the potential supply base before starting the formal competition process. It explains there are many benefits from engaging early, such as: improving the contracting authority's understanding of their potential outcome; enabling them to tailor their requirement more effectively; and informing the procurement strategy and business case.

## Pre Qualification and Down-selecting Solutions

### Establishing and maintaining competition

**3.10** HM Treasury was keen to explore the reality behind the perception that Competitive Dialogue is stifling competition by excluding all but the largest and most experienced private sector providers.

**3.11** Roundtable discussions with bidders and advisers to both the public and private sectors suggested that the perception of high bid costs, lengthy time-frames and convoluted processes, does seem to be discouraging some bidders, particularly small to medium sized companies.

**3.12** While not specific to Competitive Dialogue, contracting authorities should refer to the ERG guidance on Small and Medium sized Enterprises when preparing for procurement to try and combat unintentional barriers to entry and to ensure fair competition.<sup>2</sup>

**3.13** To inform new entrants, and to address some of the more common impressions about what can be expected during a Competitive Dialogue procurement, a short 'Suppliers' Guide to the Competitive Dialogue Process' should be developed. Such a publication could outline how bidders can get the best out of a Competitive Dialogue procurement as well as the information and behaviours they are entitled to expect from the contracting authority.

**3.14** Larger, more experienced companies are also pausing for thought before bidding on Competitive Dialogue procurement, regardless of how substantial the end contract may be. Bidders are increasingly likely to undertake extensive due diligence on the contracting authority to understand the resources being devoted to the process, the experience and expertise of the procurement team and depth of preparation undertaken by the contracting authority and may forgo the opportunity where inexperience and/or lack of preparation is evident. This increases the responsibility on the contracting authority to prepare properly for bids so as to ensure high levels of competition.

**3.15** As part of their pursuit of the best value for money solution, contracting authorities should be cognisant of the private sector's 'auditioning' process. They should use Bidders' Days OJEU Prior Information Notices and Contract Notices to showcase their preparation and demonstrate to all bidders their capacity, capability and commitment to delivering an efficient, time conscious procurement process.

**3.16** And while there may be some contention over establishing competition, once the procurement process is underway both sides are in agreement that the process is capable of maintaining sufficient competition. Over 90% of public sector respondents felt their procurements maintained competitive tension throughout the process. When the private sector respondents were asked the comparable question, the percentage remained above 90%.

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<sup>2</sup> OGC, Small Supplier, Big Opportunity, 2010. [http://www.ogc.gov.uk/documents/Contract\\_Flagging.pdf](http://www.ogc.gov.uk/documents/Contract_Flagging.pdf)

## Down-selecting solutions

**3.17** One of the key skills required to deliver an efficient Competitive Dialogue is maintaining the optimum number of bidders required to achieve true competition while keeping bid timetables on schedule and bid costs low.

**3.18** Experienced public sector procurement professionals who attended the roundtables expressed a strong consensus view that one of the most significant lessons they would take into their next Competitive Dialogue was the importance of down-selecting early.

**3.19** Our legal adviser attendees noted that contracting authorities, Local Authorities in particular, are reluctant to move from 3 to 2 bidders and so tend to keep 3 bidders in dialogue for longer than is necessary. Almost 15% of respondents to our survey had taken at least 6 bidders through to final bid submission, a worryingly high percentage.

**3.20** Carrying through too many bidders to the final stages of the process is likely to have a negative impact on bid timescales and bid costs both for the public and private sector. However, one of the main advantages to Competitive Dialogue is closing off detailed, but key, issues whilst still in competition. This should not be lost through premature down-selection and so a balance needs to be struck between the two.

**3.21** Sectors with established programmes of delivery, such as waste, housing and education, tend to have standardised a de-selection process that suits their particular market.

**3.22** HM Treasury does not believe that one single de-selection method is appropriate for all Competitive Dialogue procurements as the benefits of Competitive Dialogue can mainly only be realised through a tailored procurement process appropriate to the particular circumstances of a given project.

## Focus during Dialogue

**3.23** A significant benefit of the Dialogue process is that it can be tailored to suit individual projects. During this review, HM Treasury has encountered many cleverly constructed and innovative delivery methods; however we are also aware of suboptimal approaches.

**3.24** Examples of bad practice include excessive requests for submissions from bidders, public sector teams ill prepared for bidder meetings, the public sector holding meetings for meetings sake, incomplete documentation issued to bidders and unexplained delays to timetables.

**3.25** The most common abuse of the Dialogue section of the procedure is by those contracting authorities that have not completed enough pre-procurement preparation. Such authorities see Dialogue as an opportunity for 'free consultation' with the market and a chance to develop their specifications rather than the true aim of Dialogue which is to clarify and refine solutions.

**3.26** Strict adherence to a sensible timetable was the most common proposed recommendation tabled by both public and private sector during our roundtable events.

**3.27** Procurement timetables should be developed allowing for a realistic schedule of meetings which incorporates time to address internal approval processes and allows sufficient time to revise documents based on outputs from Dialogue meetings. This will provide a procurement with a strong foundation capable of supporting both public and private sector requirements and expectations.

**3.28** It was clear from our discussions that having the confidence to close Dialogue is as valuable as any traditional negotiating skill. While contracting authorities are wary of the options available to them post close of Dialogue, prolonging discussions and asking for increasingly detailed information is rarely beneficial and often costly to all parties.

**3.29** HM Treasury recommends projects should establish their own procedures for closing Dialogue before entering procurement. Taking the time to establish the level of detail and assurance required in advance of entering Dialogue will avoid costly overruns and impromptu requests for further information.

### **Targeted Dialogue**

**3.30** Authorities who have engaged in sufficient pre-procurement preparation will enter Dialogue with many aspects of their project defined, and therefore with no need for discussion. Where contracts are standardised, for example, projects may wish to safeguard this from discussion.

**3.31** Dialogue which majors on the 'known unknowns' (Section 2.43) will reduce the burden on the public and private sectors and increase the likelihood of timetables being achieved.

**3.32** There is clearly a question over authorities having sufficient confidence to proceed with targeted dialogue. However, considering the benefits of such behaviour, it is recommended that contracting authorities should strongly consider their options around not dialoguing every aspect of the contract.

### **Post dialogue - specifying, clarifying and fine tuning bids**

**3.33** In 2007 the Public Accounts Committee (PAC) observed that prior to the introduction of the Competitive Dialogue procedure, one third of public sector teams made changes to PFI projects after they had selected a single, preferred bidder.<sup>1</sup> The PAC noted that with the introduction of the new procurement regulations, it would be expected that the incidence of late changes would decline, but recommended that HM Treasury review whether or not the new regulations have been effective.

**3.34** To respond to this recommendation HM Treasury has carefully considered current practice under Competitive Dialogue compared to that under the Negotiated procedure and understands Competitive Dialogue has successfully addressed the issue of protracted post-preferred bidder discussions. Based on evidence received during the review, the period from Preferred Bidder stage to Financial Close for PFI projects is shorter under Competitive Dialogue and the practice of making late changes to contracts appears to be much reduced.

**3.35** In addition to reducing the scope for significant changes to be made to contracts following the completion of the competitive stage of the process, the introduction of the Competitive Dialogue procedure has brought valuable discipline to the post-preferred bidder period, introducing a clear and structured process, with a contracted deadline for closing projects.

**3.36** However the process governing post-Dialogue discussions has introduced some new challenges and is provoking diverse opinions for authorities and bidders alike.

**3.37** When asked to what extent did the limited room for manoeuvre following the close of dialogue cause practical difficulties, 49% of project specific responses reported no difficulties at all. This stands in contrast to 86% of general survey respondents reporting at least minor difficulties, including 15% experiencing considerable difficulties.

**3.38** Disproportionate amounts of bid costs are being incurred by bidders prior to the closure of dialogue on procurements where an overly prudent approach is taken to the interpretation of clarify, specify and fine tune. There are clear inconsistencies in advice across the legal sector on what is permissible under the terms of the Regulations.

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<sup>1</sup> House of Commons, Committee of Public Accounts, "HM Treasury: Tendering and benchmarking in PFI", 2007. Page 5.

### **Box 3.A: Seeking legal consensus on Competitive Dialogue**

Contracting authorities are heavily influenced by their legal advisers on a wide range of issues surrounding Competitive Dialogue, from the original decision to pursue Dialogue over alternative procurement routes, to behaviours during Dialogue, approaches to evaluation and the interpretation of 'clarify, specify and fine tune'.

HM Treasury has engaged with the Procurement Lawyers Association and legal advisers from the PPP Forum with a view to encouraging the legal sector to debate these issues more widely. Both organisations are keen to develop a series of papers on the subject, to be produced collaboratively by a working group of experienced practitioners. The review welcomes this work as a positive step towards achieving a consensus view on these crucial aspects of Competitive Dialogue delivery.

**3.39** The shorter timeframe post Preferred Bidder has also created the opportunity for an unintended adverse consequence. Contractors previously used the period leading up to contractual close for resource mobilisation. In some cases the shorter time span is proving insufficient to get adequate sub-contracting arrangements in place, and care must be taken to avoid delays on early deliverables.

## **Evaluation of Bids and Debriefing of Bidders**

**3.40** Many of the issues raised during the review surrounding evaluation and debriefing apply to public procurement more generally rather than being Competitive Dialogue specific. These issues include consistency and transparency, convergence in scoring, the implications of the Freedom of Information Act 2000, and the publication of evaluation criteria.

**3.41** HM Treasury has had discussions with the ERG on the issues of evaluation and debriefing, alerting them to the views expressed during the roundtables. The ERG has published guidance on preparing an evaluation strategy, regardless of procurement route and is currently working on revised guidance specifically applicable to complex procurements.

**3.42** Recent guidance on the application of the Remedies Directive recommends authorities provide a thorough debriefing session to unsuccessful bidders and these principles of disclosure should be applied throughout the Competitive Dialogue process.<sup>2</sup>

**3.43** While also widely applicable to all procurement routes, the issue of the quantity of information requested by contracting authorities is particularly pertinent to Competitive Dialogue procurements. Roundtable attendees were of the opinion that in the majority of cases too much information is being requested by contracting authorities and that it was not always clear why information was requested.

**3.44** Contracting authorities should only ask for information directly relevant to the evaluation process, bear in mind the cost and time required to complete detailed submissions and remember that these costs and timescales increase with the number of bidders involved in the procurement.

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<sup>2</sup> [http://www.ogc.gov.uk/documents/\\_Toc188779542](http://www.ogc.gov.uk/documents/_Toc188779542)

**3.45** A recent Competitive Dialogue procurement carried out by the Department for Works and Pensions (DWP) was explicit on the value of each piece of information requested from the Bidders, linking each response to the relevant section of the evaluation criteria, including clear instructions on the mandatory responses and providing opportunity for bidders to clearly highlight where their proposal offered greater value for money or enhanced service provision.

**3.46** It is clear this type of thorough approach is not widespread amongst contracting authorities. Bidders frequently complained of being asked for nugatory information and reported instances where pertinent information submitted as part of the bid had been missed by evaluators and subsequently not scored. Not only did the DWP approach demonstrate clearly to bidders how prepared the authority was, it also reassured bidders that they were not engaging in costly bid submission preparations for no purpose.

**3.47** On each future Competitive Dialogue procurement, the authority should produce a detailed guide to the evaluation approach to be taken, setting out the value of each piece of information requested and linking each response to the evaluation criteria will reduce bid costs for the private sector, reduce the administrative burden for the public sector and facilitate the swifter and more accurate evaluation of bids.

**3.48** The ERG is developing new guidance for tender evaluation of complex procurements. It is being developed with government and industry experts so maximising its utility in areas that are not so straightforward, addressing the pitfalls in tender evaluation that departments may not be aware of or have the experience to deal with adequately. The guidance will enable a more informed preparation to be made for this critical stage of complex procurement.

# 4

## Key areas of concern

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**4.1** Several key areas of concern emerged during our roundtable discussions, raised in equal measure by both public and private sector contributors. While not all are directly attributable to the introduction and use of Competitive Dialogue, HM Treasury has recognised the importance of addressing these topics.

**4.2** Areas of most concern are:

- The capacity for Competitive Dialogue to secure improved outcomes;
- The increasing cost of Dialogue;
- Cancelled or delayed procurements; and
- Cherry picking and bid convergence.

### The capacity for Competitive Dialogue to secure improved outcomes

**4.3** Our discussions and survey responses suggest the introduction of Competitive Dialogue has improved procurement outcomes by enabling the public and private sectors to develop and deliver more appropriate, bespoke, value for money outcomes. 78% of respondents to our general survey agree bidders have an increased or significantly increased ability to deliver improved solutions when compared to the Negotiated Procedure.

**4.4** However it is important for contracting authorities to be aware of what key stakeholders will consider acceptable. Early stakeholder engagement will allow contracting authorities to set boundaries within which solutions can be developed. Input from planning authorities and the general public, where such views are appropriate, can give vital upfront indications particularly on unacceptable solutions. This will save time and resources for both the public and private sectors, including avoiding nugatory development costs to the bidders.

**4.5** Responsibility for stakeholder engagement does not however rest solely with the public sector; the private sector must maintain dialogue within their bid consortium when developing new ideas. In particular, bidders need to ensure their proposals are financeable.

**4.6** The traditional approach to leaving substantive due diligence to the Preferred Bidder phase is somewhat inconsistent with Competitive Dialogue and can be particularly challenging for innovative solutions. As such, bidders must engage appropriately with their financiers so as not to delay the procurement process and the public sector evaluation criteria should reflect this accordingly.

### The increasing cost of Dialogue

**4.7** It is generally accepted that compared to alternative procurement routes, Competitive Dialogue procurements are more costly to both the public and private sectors. 86% of general survey respondents believe that compared to the Negotiated Procedure, Competitive Dialogue has increased, or significantly increased bid costs, with 55% of contracting authorities of the same opinion.



**4.8** The primary reason for increased public sector costs is the increase in administration, evaluation and support costs which increase when a large number of bidders are taken into dialogue and/or where bidders are not appropriately down-selected. With the majority of these costs rarely quantified but instead absorbed as public sector overheads, the true cost of procurement (regardless of process used) can often be overlooked.

**4.9** Private sector practices mean they more fully understand the extent of their bid costs. Accountability within bid companies compels bid team leaders to quantify their expected spend and seek Board or Finance Director approval for such spend before entering into, and during, a procurement.

**4.10** Public sector teams engaged in Competitive Dialogue procurements should engage in a shadow charging exercise to provide a more accurate picture of the cost of undertaking complex procurements. Such exercises will help focus the attention of the Senior Responsible Owner and Head of Procurement on costs and have a subsequent positive effect on timescales and behaviours. Data gathered should be shared between authorities to inform future resource planning.

**4.11** Private sector representatives at the roundtables believed costs have risen from 2-3% of the contract size (under the Negotiated Procedure) to 5-6% (under Competitive Dialogue) for the losing bidder(s). Costs for winning bidders are broadly comparable under the two procedures.

**4.12** With all Bidders involved in Dialogue expected to spend sums previously only encountered once 'Preferred Bidder' status had been secured, the bid community believes Competitive Dialogue is more subjective with an increased bid cost risk burden than alternative procedures.

**4.13** To reduce costs, authorities must be clear about their objectives, avoid taking too many bidders into dialogue and down-select intelligently to prevent holding them in dialogue too long. Authorities may also wish to achieve cost savings by running a tight process with a specific number of timed dialogue meetings and identifying and engaging in dialogue only on the specific aspects of the project solution and contract.

#### **Box 4.A: Reimbursing bid costs**

The 2008 Guidance recognised the increased cost of Competitive Dialogue but confirmed Government policy on not paying costs other than in exceptional circumstances.

Internationally, some contracting authorities have used incentives such as paying a percentage of bid development costs to improve public sector behaviours during procurement and maintain the competitive tension of a procurement.

While policy on reimbursing bid costs will remain as it currently stands, HM Treasury recognises the value of considering the cost benefit of alternative approaches and will work with the ERG, and industry groups, to consider the issue further.

**4.14** One further area of spend which is of particular concern is the cost associated with the evaluation of design.

**4.15** While design solutions are undoubtedly a major part of many Competitive Dialogue procurements, authorities often look for too much detail during dialogue, for example seeking 1:50 plans when 1:200 or 1:100 would suffice for costing. **Contracting authorities should bear cost in mind when determining the level of detail genuinely required for evaluation purposes at each stage of dialogue and absolutely necessary to deliver the required planning permissions.**



**4.16** That is not to say, however, that the private sector is entirely blameless in this matter. A significant number of experienced bidders have admitted going ‘above and beyond’ the requested design requirements to impress stakeholders and attempt to influence the selection process.

## Cancelled or delayed procurements

**4.17** Survey results showed almost 10% of respondents were engaged in Competitive Dialogue procurements which have been cancelled or are on hold. Explanations for these cancellations and delays mainly focused on changes in strategic policy or changes to requirements on the part of the contracting authority.

**4.18** Just as the decision to enter into a procurement process should not be taken lightly, neither should the decision to cancel or delay a procurement exercise, whether or not dialogue has been completed.

**4.19** Within a Competitive Dialogue procurement, once pre-qualification is completed and a substantial level of bid detail has been worked up by each bidder, contracting authorities should recognise they are in discussion with the equivalent of multiple Preferred Bidders, all of whom are likely incurring substantial costs.

**4.20** Attendees at the roundtables expressed strong support for linking Competitive Dialogue more formally into the OGC Gateway process and including experienced Competitive Dialogue procurement professionals as Gateway reviewers. It may also be beneficial for projects involving a complex procurement process to consider undergoing an ERG Starting Gate review.<sup>1</sup>

**4.21** This review recognises that the current Gateway processes were established in advance of the introduction of Competitive Dialogue and recommends a refresh of the Gateway stages to more accurately reflect (where required) the implications of using Competitive Dialogue as the procurement route.

**4.22** These independent scrutiny processes should go a long way to ensuring projects are sufficiently prepared to remain on schedule, have ongoing senior stakeholder buy in and remain in line with policy.

## Cherry picking and bid convergence

**4.23** The prospect of contracting authorities engaging in ‘cherry picking’, or sharing bidders’ solutions, was an area of substantial concern in the early days of Competitive Dialogue.

**4.24** Contracting authorities clearly recognise this issue; 55% of public sector respondents to our survey consider bidders to have a considerable or very considerable perception that cherry picking is an active issue.

**4.25** On the whole, evidence suggests contracting authorities are respecting the concerns of the private sector and are giving due care to the security of data, ensuring all those involved in the bid process (particularly stakeholders) are aware of their responsibility to maintain confidentiality.

**4.26** These efforts must continue. When this issue was raised at the roundtable events, it was generally accepted that while cherry picking and convergence continue to be areas of genuine concern, neither practice is rife. However, as expected, bidders stated they often do not introduce their most innovative ideas until relatively late in the dialogue process.

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<sup>1</sup> [http://www.ogc.gov.uk/programmes\\_\\_\\_projects\\_starting\\_gate.asp](http://www.ogc.gov.uk/programmes___projects_starting_gate.asp)

### HM Treasury contacts

This document can be found in full on our website at:  
[hm-treasury.gov.uk](http://hm-treasury.gov.uk)

If you require this information in another language, format or have general enquiries about HM Treasury and its work, contact:

Correspondence Team  
HM Treasury  
1 Horse Guards Road  
London  
SW1A 2HQ

Tel: 020 7270 4558

Fax: 020 7270 4861

E-mail: [public.enquiries@hm-treasury.gov.uk](mailto:public.enquiries@hm-treasury.gov.uk)

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