



Government  
Commercial  
Function

# COMPETITIVE DIALOGUE AND COMPETITIVE PROCEDURE WITH NEGOTIATION

## GUIDANCE NOTE

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# 1. Context

## 1.1 Overview

1.1.1 This note provides high-level guidance for departments on the Competitive Dialogue (CD) and Competitive Procedure with Negotiation (CPN) procurement procedures building on the requirement set out in the [Sourcing Playbook](#) under chapter 6. It is a collection of best practice to be used by commercial practitioners in applying these procedures, including avoiding common pitfalls and running procurement processes which are planned and structured to maximise value for money and minimise risk

1.1.2 CD and CPN are complex procedures and this guide should not be considered as a replacement for departments to ensure suitably qualified and experienced practitioners run robust procurements. As set out in the Sourcing Playbook, there are a number of activities which should be undertaken by departments before commencing the procurement phase, including a delivery model assessment. As with any procurement procedure the activities undertaken to set the commercial strategy should be outlined, together with the conclusions and recommendations, within internal business case documents.

## 1.2 Contact

1.2.1 For complex projects you should consult the Cabinet Office. The Sourcing Programme ([sourcing.programme@cabinetoffice.gov.uk](mailto:sourcing.programme@cabinetoffice.gov.uk)) provides support to complex outsourcing projects in collaboration with the Complex Transactions Team ([complextransactions@cabinetoffice.gov.uk](mailto:complextransactions@cabinetoffice.gov.uk)).

## 2. What are Competitive Dialogue and Competitive Procedure with Negotiation

### 2.1 Process

- 2.1.1 CD and CPN are two specific legislative procurement routes which allow departments to hold dialogue and/or negotiations with bidders on various aspects of the procurement.
- 2.1.2 **As outlined in the Sourcing Playbook, CD and CPN are the recommended routes for complex outsourcing projects (please see para 4.7).** For these projects there is a high probability that departments and those bidding for the service will need to dialogue and/or negotiate due to the significant risk both for departments and for suppliers and their supply chains.
- 2.1.3 When used correctly, both procedures offer significant and clear benefits, in particular, enabling risk and assumptions to be thoroughly tested, solutions to evolve and the foundations established for ensuring a successful contractual outcome and ongoing relationship for all parties and stakeholders. Throughout this guidance:
- **Dialogue refers to the discussion between the department and bidder to discuss any aspect of the procurement**, e.g. the service requirements or proposed solution.
  - **Negotiation is the discussion between the department and bidder with a view to improving the content of tenders** e.g. performance issues.
- 2.1.4 In this guidance note, dialogue is used to refer to discussions under CD whereas negotiations is used to refer to negotiations under CPN. The concept of dialogue is however sufficiently wide to allow for negotiations to take place under CD. Similarly, discussions which go wider than negotiations can take place under CPN (for example, clarification of performance metrics which would apply under a contract) provided they comply with the general principles of transparency, equal treatment and non-discrimination.

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“As outlined in the Sourcing Playbook, CD and CPN are the recommended routes for complex outsourcing projects.”

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## 3. When to use Competitive Dialogue or Competitive Procedure with Negotiation

### 3.1 Choosing the procurement procedure

3.1.1 Choosing the right procurement procedure is a critical decision to support the delivery of the best commercial outcomes, including improved quality and value for money. Using the wrong procurement procedure risks entering into a contract that is not sustainable for one or all contracting parties, at worst risking the delivery of essential services to the citizen.

3.1.2 Cabinet Office policy on the choice of procurement procedure can be found [here](#). In this respect, the Public Contracts Regulations 2015 (the “Regs”) lay down the circumstances in which CD or CPN may be used, namely:

- Where needs cannot be met without adaptation of readily available solutions;
- Where the works, services or supplies include design or innovative solutions;
- Where the contract cannot be awarded without prior negotiation because of the nature of the requirement, the complexity of its legal and financial make-up or because of its risks;
- Where the technical specifications cannot be established with sufficient precision with reference to particular standards; or
- In the case of where only unacceptable<sup>1</sup>/irregular tenders<sup>2</sup> have been submitted in an open or restricted procedure.

3.1.3 In practice, alongside the definition of a complex outsourcing project as set out in Sourcing Playbook, one or more of the following indicators may suggest the need to use CD or CPN:

- No solution available off-the-shelf;
- Readily available solutions will need adapting to meet requirements;
- The solution involves a refreshed or innovative approach to reflect changing conditions and/or methods of delivery;
- The legal, contractual and/or financial framework is complex;
- There are multiple departmental stakeholders;
- The delivery of the specified outcomes is reliant on outside factors;
- The delivery is dependent on the deployment of more than one technical or service or solution, resulting in interoperability risk;

<sup>1</sup> In particular, a tender submitted by a bidder who does not have the required qualifications or where the price exceeds the budget as set out in the procurement documents.

<sup>2</sup> In particular, a tender which does not comply with the procurement documents, was received late or which has been found by the department to be abnormally low or where there is evidence of collusion or corruption.

- Solutions (financial or non-financial) need stress testing to ensure long term viability;
- Milestones and KPIs are complex or have numerous dependencies on all parties;
- Correct risk allocation is critical to both value for money and long term viability;
- A high level of employee transfer is involved;
- Business continuity risk is high;
- Data inaccuracy has a high impact on costs;
- High level of due diligence is required;
- High degree of unpredictability e.g. in policy design or service demand volumes.
- Assumptions and solutions need testing;
- There is an opportunity to drive cost out without impacting quality.

**The project business case should always justify the chosen procurement procedure.**

Senior Responsible Owners (SROs) should seek assurance from their programme and commercial teams that the recommended procurement procedure provides scope for any necessary dialogue or negotiation, where appropriate.

## 4. Why use Competitive Dialogue or Competitive Procedure with Negotiation

### 4.1 Benefits of CD and CPN

4.1.1 When used correctly, both CD and CPN offer significant benefits to departments and bidders. These benefits come from the ability for departments and bidders to hold discussions during the procurement process. With either procedure, a dialogue/negotiation strategy will need to be developed and deployed by the department to seek optimal value for money. It should be expected that the bidder will also deploy a strategy to ensure its commercial position is maximised, whilst recognising it is subject to competitive tension.

4.1.2 For departments, the two procedures offer the opportunity to maximise value for money and minimise risk by:

- testing the deliverability of solutions;
- exploring opportunities for innovation throughout the life of the contract;
- ensuring bidders understand and are aligned with ministerial and departmental policy and strategic goals;
- exploring opportunities for the right balance between cost and quality;
- Building and testing the client/supplier relationships which will be fundamental to success (including problem resolution).

4.1.3 For bidders, the two procedures offer the opportunity to:

- build and test the relationship with the department;
- have an informed and frank discussion on any areas of concern;
- understand the risk to any up-front investment they are required to make, as well as their longer-term financial exposure;
- Demonstrate to their governance boards that the contract is deliverable and offers them a return on their investment.

4.1.4 CD and CPN are similar procurement procedures, but there are some important differences. The features of each procedure for each part of the process are set out in Appendix I. The comparative advantages of both procedures are set out in Table 1. As discussed earlier, both procedures allow for negotiation.

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**Table 1: Characteristics and advantages of CD and CPN**

Characteristics and advantages of CD	Characteristics and advantages of CPN
<ul style="list-style-type: none"> <li>• <b>Allows discussion between the department and bidder on any aspect of the procurement</b>, e.g. the service requirements or proposed solution.</li> <li>• <b>Allows the department to require that final tenders are clarified, specified and optimised</b>, provided that this does not involve changes to the essential aspects of the tender or the procurement (including the requirements) where that is likely to distort competition or result in discrimination. The key distinction with CPN is that specific reference is made to clarification, specification and optimisation of final tenders.</li> <li>• <b>Allows for negotiations on the winning tender to confirm financial commitments or other terms</b>, provided that this does not materially modify essential aspects of the tender or the procurement, or risk distorting competition or causing discrimination. In practice, in the case of complex outsourcing the translation of the winning tender (including all cost elements) into the final contract will likely require further ‘light touch’ negotiation. Likewise, wider matters such as third party funding, supply chain and social value arrangements may need to be confirmed before contracts are signed. Finally, if there are external changes (e.g. planning permission), the successful bidder’s commitments can be confirmed in light of these as long as these do not change essential aspects of the tender or the procurement, or risk distorting competition or causing discrimination.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Allows the department to award contracts on the basis of the initial tenders without any negotiation</b>, where this was indicated in the contract notice. If the department, therefore, thinks that it may not need to negotiate with bidders, but wishes to reserve the right to do so, CPN may be appropriate.</li> <li>• <b>Allows for greater flexibility on time limits for receipt of requests to participate and receipt of initial tenders</b>, i.e. reduced time limits can be applied in circumstances of extreme urgency. In practice, this gives greater flexibility to reduce time periods, but this will need to be properly justified.</li> </ul>

## 4.2 Choosing CD or CPN?

- 4.2.1 In the case of complex outsourcing, it is worth noting that almost all attributes of CPN are available under CD. CD provides marginally greater flexibility than CPN by expressly allowing for all aspects of the procurement to be discussed, as well as limited discussions of final tenders and negotiation on the winning tender to confirm financial commitments or other terms. These aspects may make it a more attractive procedure to use.
- 4.2.2 Whilst CPN offers the ability to accept initial tenders or shortening timetable, it is hard to envisage these two aspects applying to a complex outsourcing procurement. Whilst CD is likely to be more appropriate to complex outsourcing, Departments must always assess which procedure will be most suitable in providing the structure to ensure a successful commercial outcome.
- 4.2.3 Bidders should be provided with clarity about what is expected of them throughout the process and have confidence that the procurement process will proceed to completion in all but exceptional circumstances.

**If conducted properly the cost and time commitment of both CD and CPN can be a positive investment into delivering a complex outsourcing project successfully.**

The cost of applying either CD or CPN is likely to be significant for both the department and bidders. Costs should be monitored and reported as part of the Programme and Project Management activity (see below).

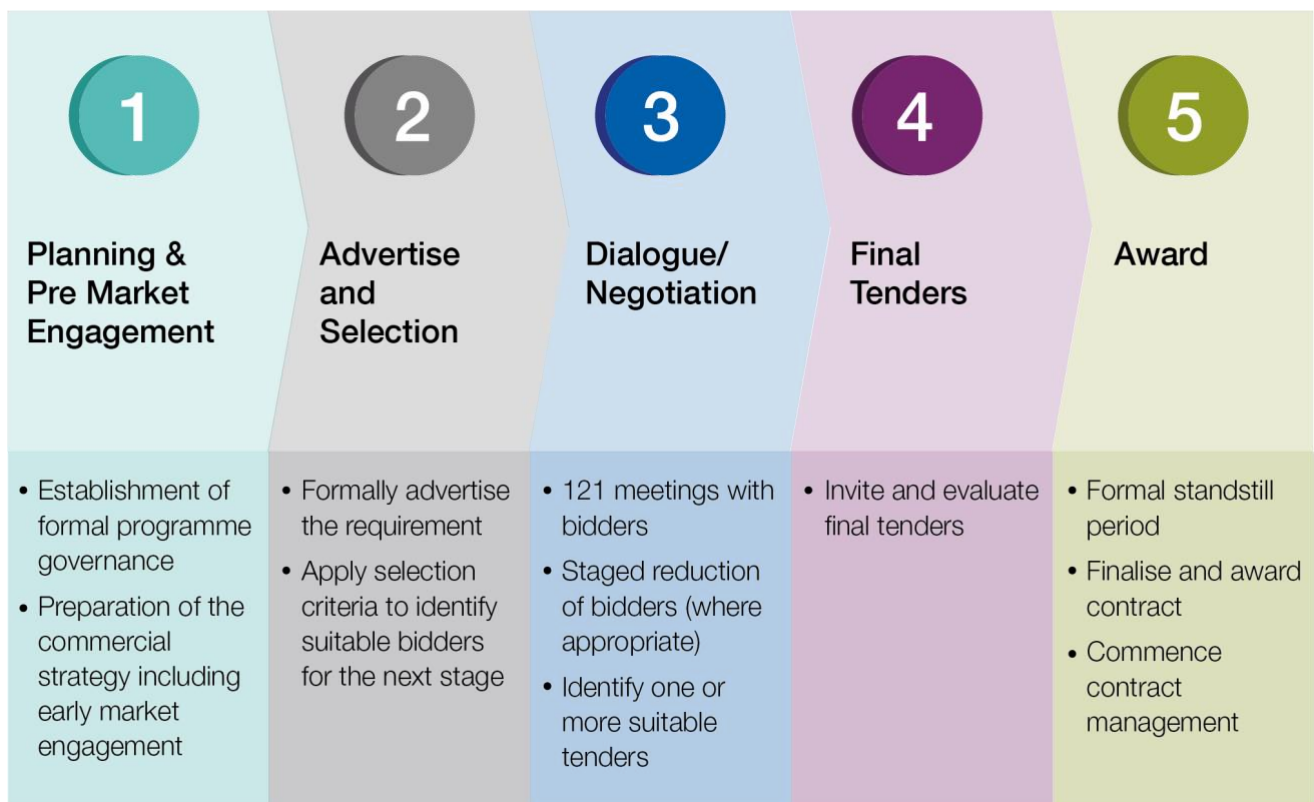
## 5. Key Stages in Competitive Dialogue or Competitive Procedure with Negotiation

### 5.1 Five key stages

5.1.1 There are five similar key stages for the CD and CPN procurement processes, as set out in Figure 1. Appendix I outlines the similarities and specific differences between each procedure at each stage of the process.

5.1.2 At the end of each stage the department should conduct a review, prior to proceeding to the next stage, to ensure the procurement is on track and the assumptions and commitments set out within the project Business Case remain valid and realistic to deliver the objectives of the project/programme.

**Figure 1: Overview of the five key stages for Competitive Dialogue and Competitive Procedure with Negotiation**



## 6. Stage 1: Planning and Pre-market Engagement

### 6.1 Planning

- 6.1.1 The complexity of CD and CPN procedures requires the department to plan in advance and consider in detail how the entire process will be run. Time invested early on in the process can reduce the overall time and cost. This stage is identical for CD and CPN.
- 6.1.2 Planning should begin well ahead of advertising and will be informed by the anticipated number of bidders which are likely to proceed to the dialogue/negotiation stage. The number of bidders will have an impact on the resources, timetable and location.
- 6.1.3 Whilst the points below will be relevant to any procurement procedure, the greater the complexity of the procurement the more important they are to get right.

### 6.2 Engaging early with the market

- 6.2.1 A good dialogue/negotiation requires sufficient market interest in the procurement. There are a number of factors which might impact suppliers' decisions on whether to express their interest to participate in the competition. It is important to engage early with the market and listen to the wider perspective in order to structure the process and the requirements in a way that they will incentivise sufficient numbers of suppliers to participate in the process.

#### **Departments should use pre-market engagement to:**

- warm up the market;
- confirm a market exists to provide the services;
- take initial soundings on the scope, risks and estimated costs of the proposed service;
- test the propose contractual model; and
- confirm the procurement strategy is optimal from both a department and market perspective, and will deliver the intended outcomes.

- 6.2.2 Early engagement with the market must be conducted in a way that does not distort competition or result in discrimination or unequal treatment of suppliers. For example, ensuring that all bidders receive the same information and that the timetable allows all bidders adequate time to engage with the procurement and understand requirements.

## 6.3 Putting in place the right resources

- 6.3.1 Strong Programme and Project Management is essential to success and a project SRO with responsibility for overseeing the procedure should be appointed before planning is started.
- 6.3.2 Senior Responsible Industry Executives (SRIE) should be identified by each shortlisted bidder. This will create a senior channel of communication to support issue resolution. Guidance on the role of the SRIE can be found at Appendix II.
- 6.3.3 The Programme Management Office (PMO) should identify a core team to lead the process and have a clear resource plan in place prior to commencement of dialogue/negotiation, covering all key roles including:
- Chairperson/s for dialogue/negotiation meetings;
  - Subject Matter Experts;
  - Policy, commercial, financial and legal input;
  - Note taker/s; and
  - Administrative support.
- 6.3.4 Appropriately experienced and trained resources are essential to success. One way of ensuring this is completing a proportional skills assessment prior to the commencement of the procurement process. The PMO should also confirm that there are no actual or potential conflicts of interest within the client team and any issues should be resolved prior to the process commencing.
- 6.3.5 Consider the need for external support such as technical specialists, commercial, and legal expertise.

## 6.4 Choosing the right location

- 6.4.1 Experience shows that there are many benefits of co-location of the project team for the duration of the procurement process. This is especially important with multi-functional teams supported by various matter experts which would otherwise be placed at different locations. This temporary arrangement would most likely result in improved communication and close engagement between the relevant stakeholders.
- 6.4.2 Experience also shows that securing off-site accommodation for negotiations or dialogue sessions can be beneficial and support time management. The PMO should always secure well in advance all necessary meeting rooms and supporting accommodation. Consider:
- The co-location of all key resources;
  - The possible need for a physical data room and security requirements;
  - The number of dialogue/negotiation rooms required; and
  - The need for breakout rooms for all parties.

## 6.5 Creating a timetable

- 6.5.1 Both procedures are time consuming, however when used correctly the benefits outweigh the upfront investment of time. As a guide, a successful CPN or CD can take approximately 9 months, although this will depend on market structure, complexity of the procurement and in some instances will take longer. There is no set time frame, other than the minimum time periods for requests to participate/receipt of initial tenders and the required standstill period prior to award, and the actual time required will be driven by the nature and complexity of the requirement and service solutions. Contracting authorities should use pre market engagement to construct the timetable and it should be subject to at least a weekly review by the PMO.
- 6.5.2 The timetable should cover all stages of the procurement process, including the time needed for approval and when the service is expected to commence. A clear, realistic and transparent timetable will enable good time and cost management, clarity to all parties, as well as providing bidders with confidence in the procurement process.
- 6.5.3 Dialogue/negotiation sessions should be planned so as to ensure equal treatment for all bidders i.e. equal time should be available to all, agenda topics should be consistent, and the experience and quality of dialogue/negotiation teams should be consistent. Consideration should be given to whether more than one dialogue/negotiation session can be run in parallel e.g. one team discussing technical issues and another team discussing commercial issues. This approach can shorten timescales but increase resource requirements. An example timetable for the dialogue/negotiation stage (Stage 3 of the process set out in Figure 1) can be found at Appendix III.
- 6.5.4 Once approved, the end-to-end procurement timetable should be communicated to all bidders to ensure transparency. With CD, an indicative timeframe must be provided at the start of the process but this is recommended for both procedures. Any changes to the timetable should be communicated to all bidders at the earliest opportunity.

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“As a guide, a successful CPN or CD can take approximately 9 months, although this will depend on market structure, complexity of the procurement and in some instances will take longer.”

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## 6.6 Appropriately delegated decision-making

- 6.6.1 It is likely that unforeseen issues may arise during the negotiation/dialogue stage and the programme should have a pre-agreed escalation process, where a decision exceeds delegated authority. To support quick decision making, the PMO should implement dashboard reporting so that all key stakeholders are kept up to date with progress.

**Clear governance is essential to have clarity in decision making and approval. Departments should ensure their negotiating/dialogue team has the appropriate delegated authority to prevent a time consuming back-and-forth.**

Risk, issue and cost tolerances should be pre-agreed with the SRO and Programme Board and the approval of the strategy should include the delegation of authority so that the right people have the authority to make decisions, knowing the 'envelope' they are working within, and so that a consistent approach is taken with all bidders.

## 6.7 Keeping records, sharing data and managing clarifications

- 6.7.1 The PMO should develop robust record keeping processes. Good note keeping will help in:
- ensuring the sessions with bidders are structured around the agenda points agreed;
  - ensuring a record of the dialogue/negotiations, including key points of feedback provided by department, commitments offered by bidders and any actions agreed;
  - demonstrating consistency of information provided to all bidders and therefore integrity of the procurement process;
  - ensuring a strong record of progress, including outstanding actions;
  - ensuring consideration of how bidders' commercially sensitive information /intellectual property is being handled (please refer to the relevant section on this point within this guidance); and
  - Providing a robust audit trail of the various stages of the procurement process which will feed into the Procurement Report.
- 6.7.2 In most instances a Virtual Data Room (VDR) will need to be implemented to ensure the structured sharing of data on such matters as staff transfer, financial data, usage volumes and current performance. The level of security afforded to data should be considered, VDRs are available via Crown Commercial Services.
- 6.7.3 The department should expect a high level of clarifications to be raised either verbally or in writing. To ensure equal treatment it will be necessary for a clear process for managing clarifications to be set out in the procurement pack, i.e. responses are shared with all bidders unless the bidder indicates (and the department is satisfied that) a particular query is commercially sensitive.

6.7.4 It is likely that the same individuals involved in negotiation/dialogue sessions will be involved in responding to clarifications and, therefore, time will need setting aside to ensure clarifications are dealt with promptly. All responses should be subject to a clear quality assurance and approval process prior to release.

## 6.8 Protecting bidders' intellectual property and/or commercially sensitive information

6.8.1 Appropriate handling and protection of commercially sensitive information and Intellectual Property (IP) is one of the key concerns of bidders. Departments should consider appropriate handling and protection as part of the early market engagement phase. Mechanisms should be developed during the planning stage and then clearly communicated to all bidders as part of the procurement documentation.

6.8.2 This will include consulting the market, as well as any incumbent provider, in order to gain an understanding of subjects most likely to be commercially sensitive or which involve IP. Departments should then decide on the mechanisms to adopt to protect commercially sensitive information and IP. For example:

- ensuring commercially sensitive information is appropriately marked when provided to the department;
- ensuring any third parties assisting in the procurement are also bound by appropriate non-disclosure clauses to protect such commercially sensitive information.
- the rules to be followed for answering solution specific or other commercially sensitive clarification questions (responses to such questions should not normally be shared with all bidders);
- challenging whether incumbent information is sensitive or whether it should rightly be shared with all bidders;
- briefing internal teams on the treatment of sensitive data;
- the terms and conditions to be included in the contract which will protect a successful bidder's commercially sensitive information and IP.



## 7. Stage 2: Advertise and Selection

### 7.1 Requirements

7.1.1 This stage is very similar for CD and CPN. For departments, formal advertisement of the procurement is via a Contract Notice issued in the Official Journal of the European Union (OJEU) and on Contracts Finder.

7.1.2 The Contract Notice advertising the competition must include all of the information required for notices generally. In relation to CD and CPN in particular, it must also include some additional information e.g. an indicative timeframe (CD), whether the department envisages a staged process (reducing the number of bidders during the dialogue/negotiation stage), the award criteria and whether the department reserves the right to award the contract on the basis of the initial tenders without negotiations (CPN). Some of these elements are within the department's discretion but, if they are to be relied upon, must be clearly stated at the start of the formal procurement process.

7.1.3 Shortlisting of qualified bidders to be invited to Stage 3 will be carried out by evaluating responses to the [Standard Selection Questionnaire](#), i.e. by applying the exclusion grounds and selection criteria. The department must use objective and non-discriminatory criteria or rules if it wishes to limit the number of qualified bidders invited to participate. A minimum of three bidders meeting the selection criteria must be invited to participate in the next stage. When deciding whether to limit the number of qualified bidders, and what might be an appropriate number, the following factors should be taken into account:

- how competitive is the market;
- scope of requirements/solutions to be explored during the negotiation/dialogue stage;
- greater number of bidders will most likely increase competitiveness of the process;
- dialogue/negotiation with a greater number of bidders will increase cost of the process;
- suppliers will be assessing their chances of being successful in the competition and a large number of shortlisted bidders invited to participate might discourage some suppliers to participate in the process or impact the level of their engagement.

7.1.4 A successful selection process is critical to ensuring an appropriate number of bidders with the right financial standing, technical experience and capability proceed to stage 3. Departments should always review the outcome of the selection stage to ensure the procurement is still likely to produce a successful outcome. For example, there may be concerns where less than three bidders meet the selection criteria or competition is lacking.

## 8. Stage 3: Dialogue/Negotiation

### 8.1 Deploying a robust dialogue/negotiation strategy

- 8.1.1 A good strategy will clearly set out the objectives and parameters of the dialogue/negotiation broken down by topic e.g. each KPI. The approach to strategy should be internally approved through the relevant governance process before it is deployed. It should be regularly reviewed to ensure it remains current and takes into account lessons and stances taken by bidders during dialogue/negotiation.
- 8.1.2 In most circumstances it is not necessary to discuss all aspects of the requirement, solution and commercial issues. Departments should make it clear in the procurement pack which areas are intended to be subject to dialogue/negotiation and any boundaries or constraints around those areas. As a guide, departments should start from a narrow point of definition and expand as it sees fit, rather than leaving open a wide range of items, loosely defined. Areas to dialogue/negotiate will be informed by the output of the pre-market engagement stage.
- 8.1.3 Departments should carefully consider requests from bidders to table other items for dialogue/negotiation, allowing dialogue/negotiation only where there is clear benefit in doing so e.g. to remove assumptions or reduce risk.

### 8.2 Objectives

- 8.2.1 The objectives of dialogue/negotiation will vary depending on the nature of the procurement and may include:
- **Testing deliverability:** The dialogue/negotiation phase should be used to thoroughly test deliverability of the proposed offer. Technical and financial experts should probe all aspects of the proposed solution; consideration should be given to conducting site visits and/or demonstrations. Testing deliverability needs to be balanced, to consider cost aspects and the stage of the process. Is it appropriate to request more information from a small number of shortlisted bidders with greater chances of being successful in the process or from a single preferred bidder? Late stage testing of deliverability shall be supported by reasonable evidence. All assumptions should be challenged and dependencies clarified.
  - **Exploring the opportunity to innovate:** Where innovation is required, a mechanism should be agreed which clearly sets out how innovation will be managed, funded, approved, benefits will be allocated and, who will own any new intellectual property. Departments must be clear at the beginning of the project the degree of required flexibility under the contract. This must be set out in the notice.
  - **Removing assumptions:** Bidders should be asked to state any and all assumptions they are making in their tender. The dialogue/negotiation phase should have the objective of removing assumptions. Where assumptions

cannot be removed there should be clarity of who owns the consequence of assumptions being wrong.

- **Ensuring appropriate allocation of risk.** The following topic areas may be suitable for dialogue:
  - **Within the pricing mechanism:** recognising that volume risk may not be transferable, and indeed may not be manageable by either party, it is reasonable to leave open for dialogue topics such as price components; volume bands and thresholds; cap and collar levels; which indices are used for indexation.
  - **Within the performance management regime:** target and threshold levels (though for KPIs, the department should have sufficient understanding to set key target performance levels); simplification of definition; exclusions; length of bedding in period (if offered) where some / all KPIs may not apply.
  - **Within contract terms:** with appropriate use of the Model Services Contract (which have been regularly reviewed and updated with input from industry), departments can set out the vast majority of contract terms as non-negotiable during the procurement process, as leaving open all contract terms for negotiation inevitably extends the procurement process. Departments should, however, be prepared to negotiate other terms where there is a need to do so in order to achieve a successful outcome. That said, some areas of the Model Services Contract require tailoring/negotiation to reflect priorities and the capability and appetite of particular markets - this should be completed with the aid of legal advice and informed by pre market engagement with suppliers. In relation to allocation of risk, the department may wish to leave open the ability to explore appropriate levels of cap on certain liabilities, and insurance coverage. The Model Services Contract, and its associated guidance, can be found [here](#).
- **Driving greater value for money:** Departments should look for opportunities to negotiate improved value for money. For example, there may be opportunities to reduce cost and/or increase benefits. Departments should always ensure that any cost reductions do not increase short or long term deliverability risk.
- **Testing relationships:** With complexity comes issues which will require parties to work closely together, at times under great pressure and public scrutiny, in order to resolve. Consideration should be given as to whether it is appropriate to test bidders' proposals on building and maintaining good relationships and their processes for identifying and escalating difficult issues.
- **Managing Change:** Complex outsourcing contracts are often lengthy and change needs to be catered for and managed. For example, IT will most likely advance or become obsolete. Service and performance requirements, service volumes, or service solutions may change. Both parties need to confirm how any change will be managed (including approvals, testing and costs), and accommodated within the contract.

## 8.3 Initial dialogue/negotiation

- 8.3.1 Initial dialogue/negotiation sessions, either with all qualified bidders invited to participate, either together or on a 1:1 basis, aim to ensure a common understanding of the remaining stages and associated timetable. Dialogue/negotiations can start as soon as the department has opened the dialogue with bidders (CD) or received initial tenders (CPN). With CPN, initial discussions on the procurement process, timetable, etc. can take place prior to receipt of initial tenders but the department should position these as briefing/clarification sessions rather than negotiations. It is essential that departments understand and only negotiate within the scope of their delegated authority on financial and non-financial aspects of their procurement e.g. risk transfer, liabilities, financial security (guarantees).
- 8.3.2 An agenda should be circulated in advance to ensure everyone is clear on the purpose of the initial dialogue/negotiation and have sufficient time to establish their team. The first round of meetings with bidders should be used to:
- Ensure bidders have a clear understanding of the procurement process and how tenders will be evaluated;
  - Enable bidders to present the key elements of their initial tenders (CPN) or outline proposals (CD), in PowerPoint or a similar format, so that the fundamentals of their offer are clear to the department; and
  - Allow bidders to raise key questions about the requirement or the procurement process.
- 8.3.3 The objective of the first round of meetings should be to ensure bidders:
- Have confidence in and clarity of the procurement process, including timetable and resource need;
  - Understand the requirements;
  - Understand the customer, its business and operational context, including any relevant people issues;
  - Have met key decision makers and key team members.

## 8.4 Ongoing dialogue/negotiation

- 8.4.1 The number of dialogue/negotiation sessions will be dependent upon the number and complexity of topics requiring dialogue/negotiation and progress made towards meeting the objectives. Dialogue/negotiation should not be used to conduct a line by line review of drafting (comments can be provided via correspondence using an eProcurement Portal and Virtual Data Room) but, instead, used to focus on the key technical, operational or commercial issues. Agendas should be circulated in advance to ensure everyone is clear on the purpose of each session and bidders have time to prepare.
- 8.4.2 Dialogue/negotiation should begin at a high level and progress to the level of detail required to be confident in all key elements. With CD, any aspect of the procurement can be discussed but the dialogue must aim to identify and define best ways of satisfying the department's needs. With CPN, the initial and

subsequent tenders must be negotiated and negotiations should aim to improve the content of tenders. Therefore, dialogue on a CD may start with discussions on the department's requirements and move onto the bidders' proposals, whereas negotiations on a CPN should focus on the bidders' tenders, but these could be preceded by general briefing/clarification of the department's requirements.

- 8.4.3 The department's Should Cost Model is used to ensure suppliers provide transparency throughout the dialogue/negotiation of all key cost drivers over the lifespan of any resulting contract. Note that the Should Cost Model will not normally be shared with bidders but used to inform the department's negotiation position and the robustness and deliverability of bids. See the additional Should Cost Model Guidance Note for further guidance.
- 8.4.4 Drafting of bidders' proposals should be progressive, starting with outline proposals and gradually building based on dialogue/negotiation to more detailed proposals.<sup>3</sup> The drafting of much of a bidder's tender should be aligned with the structure of the draft contract, enabling relevant parts of the winning tender to be easily imported into contract schedules.
- 8.4.5 Departments should use the dialogue/negotiation process to point out to bidders at the earliest opportunity any elements of their proposals which fall short of their requirements (although minimum requirements cannot be negotiated under CPN), encouraging bidders to refine their proposals appropriately.
- 8.4.6 End of the day meetings should be used to take stock of progress, address any emerging risks and issues, and confirm plans for the next dialogue/negotiation.

**Departments should not use dialogue/negotiation discussions as a means of telling bidders how they will score in the evaluation process.**

If the department is conducting the process in stages, with de-selection at some or all stages, formal proposals should be invited at the end of each stage (proposals for CD and tenders for CPN) and evaluated against the award criteria.

**8.5 Closing dialogue/negotiation**

- 8.5.1 The dialogue stage should only be closed when the department is satisfied that it will receive one or more tenders which are capable of meeting its needs (CD) and, although this is not required for CPN, it is a good principle to apply to decide when to close negotiations. In this respect all bidders should be kept informed of their progress and any fundamental concerns with their proposals.
- 8.5.2 Departments should write to all bidders to formally close the dialogue/negotiation stage and invite final tenders. Bidders should recognise that closure of this phase does not necessarily mean that their proposal meets the department's requirements.

<sup>3</sup> Unless under CDN the process is set out to provide for accepting initial tenders. It is, however, hard to envisage this would be suitable for a complex outsourcing requirement.

## 9. Stage 4: Final Tenders

### 9.1 Clarification & Evaluation

- 9.1.1 This stage is similar for CD and CPN. Following the closure of the dialogue/negotiation stage, bidders should be provided with sufficient time to finalise, gain approval to and submit their final tenders.
- 9.1.2 Following the receipt of final tenders limited clarification should be required if dialogue/negotiation has been successful in meeting its objectives. The CD process allows departments to require that final tenders are clarified, specified and optimised, provided that this does not involve changes to the essential aspects of the tender or the procurement where that is likely to distort competition or result in discrimination. In practice, some clarification of final tenders is also allowed with CPN as long as the general principles of equal treatment, non-discrimination and transparency are complied with.
- 9.1.3 Tenders should be evaluated in accordance with the published evaluation criteria (see the Bid Evaluation Guidance Note).

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“Following the closure of the dialogue/negotiation stage, Bidders should be provided with sufficient time to finalise, gain approval to and submit their final tenders.”

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## 10. Stage 5: Award

### 10.1 Communicating

- 10.1.1 The award decision should be communicated by the means of standstill letters, drafted in accordance with the Regulations.
- 10.1.2 During the mandatory standstill period, the draft contract should be finalised ready for signature upon expiry of the standstill period.
- 10.1.3 Under CD, once the winning tender has been identified, the department may negotiate with the successful bidder to confirm financial commitments or other terms, provided that this does not materially modify essential aspects of the tender or the procurement or risk distorting the competition or causing discrimination. It should, however, be remembered that negotiation is best conducted prior to receipt of final tenders i.e. whilst there is competitive tension.

### **Award will be subject to final approvals and final contract drafting in order to reflect the winning tender**

This should be an administrative task (usually carried out primarily by lawyers) as all aspects of the contract should be settled by this point.

# 11. Avoiding Common Pitfalls

## 11.1 Pitfalls

11.1.1 Experience tells us there are a number of common pitfalls which should be avoided when running a successful dialogue/negotiation process:

- **Insufficient or poor early market engagement:** A CD or CPN procedure should not be undertaken without first taking the time to consult the market on whether the business case objectives are achievable and, if so, how and at what cost. This stage itself may take a number of months but is key to ensuring both the department and the market have confidence in the process before spend becomes committed.
- **Limited competition:** Lack of or limited competitive tension during the procurement process impacts departments' buying power and the opportunity to maximise value for money. Early market engagement should be used to test the level of market interest and expected level of competition between bidders.
- **Poor risk identification and allocation:** For effective risk identification and management it is important for the program to monitor risks using risk management tools, working with the technical, commercial and legal specialists from the outset and throughout the procurement process.
- **Scope creep:** It is possible that despite a well-planned process, the department will inevitably be faced with unforeseen changes and issues. It is crucial to try to anticipate these as much as possible and, if they do arise unexpectedly, to seek advice from commercial and legal teams to assess the implications.
- **Poor cost control:** As discussed earlier, the cost of running a CD or CPN procedure is high for departments and bidders. Departments should maintain a tight control of cost and alert the SRO to any increases beyond agreed tolerance. If necessary, the procurement should be paused in order to reassess the viability of the business case.
- **Poor use/management of external expert resources:** It is important to make early plans for the procurement, deployment and management of expert resources required. The cost of engaging external experts can be high and should be reflected in the business case. As with all programme resources, external experts should be managed to ensure deliverables and accountability are clear and costs remain carefully controlled.
- **Lack of data and bidder due diligence:** Unless they have access to the necessary data (via a Virtual Data Room) and are able to undertake the necessary level of due diligence bidders will need to base their solutions on untested assumptions. This leads to tenders having inherent risk and raises their costs (and your price) or, where there is an incumbent provider, a risk that other bidders do not have access to the same level of information. Departments should take time to ensure all bidders have access to the



necessary levels of data and the time to see and understand any existing service provision, including current levels of performance. Departments should be concerned and question if bidders do not feel it necessary to conduct any due diligence.

- **Lack of continuity of Key Personnel:** Having continuity of personnel is essential in order to maintain momentum and progress, as well as gain the bidder's confidence in the process. Likewise, departments should expect bidders to put forward a team that will see the process through including, if successful, having a role in contract mobilisation.
- **Compromised integrity of the procurement process:** Process boundaries within the CD and CPN are less prescribed when compared with the Open or Restricted procedures. Their use requires expertise and a good awareness of what is and is not permitted. For example, it is necessary to consider whether any action may be construed as distorting competition or having a discriminatory effect. It is important for the programme to work with commercial and legal specialists from the outset and throughout the process to ensure the integrity of the procurement process is maintained.

## 12. Appendix I: Detailed Comparison of Competitive Dialogue and Competitive Dialogue with Negotiation

Procurement Stage	Competitive Procedure with Negotiation (CPN) PCRs, Regulation 29	Competitive Dialogue (CD) PCRs, Regulation 30
<b>Stage 1: Formal Pre-market Engagement</b>	Pre-market engagement is permitted. A Prior Information Notice (PIN) is a good method for alerting the market of the start of formal pre-market engagement.	Pre-market engagement is permitted. A Prior Information Notice (PIN) is a good method for alerting the market of the start of formal pre-market engagement.
<b>Stage 2: Formal commencement of the procurement, including selection of bidders using the standard Supplier Selection Questionnaire</b>	Call for competition by Contract Notice (CN) (for central or sub-central authorities) or PIN (for sub-central authorities only).	Call for competition by Contract Notice (CN) (central and sub-central authorities).
	<p>In the procurement documents, contracting authorities must:</p> <ul style="list-style-type: none"> <li>Identify the subject-matter of the procurement including by providing a description of needs and the characteristics of the suppliers/works/services</li> <li>Indicate the minimum requirements that must be met by all tenders</li> <li>Specify the award criteria</li> </ul> <p>Information must be specifically precise to enable operators to identify the nature and scope of the procurement so they can decide whether to apply.</p>	<p>Contracting authorities must:</p> <ul style="list-style-type: none"> <li>Set out the needs and requirements in the CN</li> <li>Define these needs and requirements in the CN or in the descriptive document or in both</li> <li>Provide an indicative timeframe (in the same documents as defining the needs and requirements)</li> <li>Specify the award criteria</li> </ul>
	<p>Requests to participate must be received within 30 days from the date of the CN or the date of invitation to confirm interest where a PIN is used as a means of calling for competition.</p> <p>In a state of urgency, this time limit can be reduced to not less than 15 days.</p>	Requests to participate must be received within 30 days from the date of the CN.
	<p><b>Selection Stage Evaluation: Only those who are invited to participate following assessment of selection information may participate.</b></p> <p>Contracting authorities can reduce the number of qualified suppliers invited to participate. A minimum of three suppliers, where they exist and meet the selection criteria, must be invited to participate.</p> <p>Contracting authorities may also limit the number of tenders/solutions to be discussed having provided the mechanism to do so.</p>	

Procurement Stage	Competitive Procedure with Negotiation (CPN) PCRs, Regulation 29	Competitive Dialogue (CD) PCRs, Regulation 30
<b>Stage 3: Dialogue / Negotiation</b>	<p>There is no express requirement to provide an indicative timeframe.</p> <p>30 days for receipt of initial tenders from date invitation was sent out, or 25 days if electronic tenders are accepted.</p> <p>This time limit can be reduced to 10 days if a PIN was published other than as a means of calling for competition and if certain requirements are met.</p> <p>Sub-central authorities can agree a time limit for receipt of initial tenders with all selected candidates (but where there is no agreement the time limit must be at least 10 days).</p> <p>In a state of urgency, the time limit for receipt of initial tenders can be reduced to not less than 10 days from the date of the CN.</p>	<p>Indicative timeframe must be provided in the same documents as the needs and requirements are defined (i.e. the CN or descriptive document or both).</p>
	<p>Negotiations are on the basis of initial and subsequent tenders.</p> <p>Contracting authorities may award contracts on the basis of the initial tenders without negotiations where this was indicated in the CN or the invitation to confirm interest.</p>	<p>No initial tenders. Dialogue stage used to discuss and negotiate bidders' proposed solutions best suited to satisfying the department's needs</p>
	<p>Contracting authorities must negotiate with bidders on the initial and all subsequent tenders submitted to them but not the final tender, unless they have indicated that they may award without negotiation.</p>	<p>Contracting authorities must open a dialogue with selected bidders. .</p>
	<p>Negotiations are with a view to improving the content of tenders.</p>	<p>Dialogue must have the aim of identifying and defining the means best suited to satisfying the department's needs. All aspects of the procurement can be discussed. The dialogue must be continued until the department can identify the solution(s) capable of meeting its needs.</p>
	<p>Minimum requirements and award criteria must not be subject to negotiations.</p>	<p>No specific requirements on having a dialogue on minimum requirements or award criteria.</p>
	<p>During negotiation/dialogue, contracting authorities must ensure equal treatment and not provide information in a discriminatory manner which may give some bidders an advantage.</p>	

Procurement Stage	Competitive Procedure with Negotiation (CPN) PCRs, Regulation 29	Competitive Dialogue (CD) PCRs, Regulation 30
	<p>Contracting authorities must inform bidders of any bidders of any changes to the technical specification or other procurement documents (other than minimum requirements which mustn't change).</p> <p>Following changes, contracting authorities must allow sufficient time for bidders to modify and resubmit amended tenders as appropriate.</p>	<p>No specific requirement to inform bidders of changes but the general principle of transparency would require notification of changes to bidders.</p>
	<p>Bidders' confidential information must not be revealed to other bidders without specific agreement. Agreement must be with reference to the intended communication of specific information, not a general waiver.</p>	
	<p>The negotiation/dialogue may take place in successive stages to reduce the number of solutions (CD)/bidders (CPN) by applying the specified award criteria. Contracting authorities must indicate whether they will use successive stages.</p>	
<b>Stage 4: Final tenders</b>	<p>No negotiations allowed on final tenders.</p>	<p>Final tenders may be clarified, specified and optimised as long as that doesn't involve changes to the essential aspects of the tender or the procurement including the needs and requirements set out in the CN where those aspects are likely to distort competition or have a discriminatory effect.</p>
	<p>No explicit restriction on discussions on the successful tender (other than no negotiations of final tenders). Clarifications which comply with the general principles of equal treatment, non-discrimination and transparency are permitted.</p>	<p>Negotiations can take place on the successful tender to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract as long as they don't materially modify essential aspects of the tender or the procurement and does not risk distorting competition or causing discrimination.</p>
<b>Stage 5: Award</b>	<p>Award on the basis of most economically advantageous tender (which may include using best price-quality ratio or lowest price). <i>Departments should, however, note that it is Government Policy to award contracts based on value for money and not lowest price.</i></p>	<p>Award on the basis of most economically advantageous tender using best price-quality ratio.</p>
<b>Notes</b>	<p>No explicit provision on payments to bidders during the procedure.</p>	<p>Contracting authorities may specify prizes or payments to participants of the dialogue. (Note that offering prizes or payments is not common practice and should be discussed with and approved in advance by the Cabinet Office.)</p>

## 13. Appendix II: Role of the Senior Responsible Industry Executive

The Senior Responsible Owner (SRO) role helps projects to focus on their core objectives and the business benefits to be delivered. Projects also benefit from an industry equivalent to the SRO providing similar governance within the supplier's project team and this is the role of the Senior Responsible Industry Executive (SRIE).

### **Purpose of the roles**

The SRO is responsible for ensuring that a project or programme meets its objectives, delivers the projected benefits, maintains its business focus and is well managed with clear authority, context and control of risk. The SRIE's role is to work in partnership with the SRO to ensure successful delivery.

The SRO and SRIE are expected to keep their respective teams focused on the achievement of the desired business outcomes and to be open with each other as to issues, problems, constraints and politics within their respective organisations.

One of the key factors in the success of any complex programme is likely to be the relationship between the SRO and the SRIE. However, it is important to ensure that this will not compromise the integrity of the procurement process and that departments and their SROs are always observing and are compliant with public procurement rules. Programmes where there is a direct, candid relationship between SRO and SRIE, where issues are tackled early and openly in an atmosphere of personal trust, are much more likely to achieve their business objectives.

### **SRIE Responsibilities**

The SRIE should have the following responsibilities:

- **Understand the customer's goals and align the supplier's resources accordingly:** Understand customer's business goals, their scale and strategic importance to the customer, through engagement with SRO and ensure that supplier resources are committed accordingly.
- **Customer/Supplier Relationship and Culture:** Establishing and maintaining a relationship with the customer that best suits the nature of the programme to be delivered and the culture of the customer and supplier organisations.
- **Participate in suppliers' responses to tender requirements:** Participate in supplier governance process to understand fully the delivery risk and whether the proposed tender is deliverable at the tendered cost
- **Project or programme organisation:** The SRIE should understand the post award governance structure and ensure a fit with the supplier's governance structure. The SRO and SRIE should agree where SRIE fits in with any joint post award governance structure if appropriate.

- **Monitoring and control of progress:** The SRIE will monitor the overall progress of the programme with the SRO. The SRIE and SRO should both be judged on the success of the service delivery.
- **Problem referral:** Referring serious problems to the SRO and senior management within the supplier organisation as necessary, in a timely manner.

An SRIE needs to:

- Provide leadership and vision about what needs to be achieved
- Take responsibility – including putting things right when they go wrong, and ensuring recognition is given when they go right
- Have a good understanding of the business issues associated with the programme from both a customer and supplier perspective
- Be a senior figure in the business with the authority to mobilise resources and resolve issues within the supplier organisation
- Be active, not a figurehead
- Have sufficient industry and business experience to undertake the role
- Understand the culture and governance of the customer
- Understand the business goals of the SRO
- Not simply represent the supplier's business interests, but take the wider, programme view

## 14. Appendix III: Example Timetable

Below is an example timetable for three suppliers for stage 3 of the dialogue/negotiation process as set out in Figure 1. This one example and there are many other potential approaches which may be appropriate for a specific procurement. The timetable should always reflect the characteristics and objectives of the commercial strategy.

Milestone	Week	Day				
		Monday	Tuesday	Wednesday	Thursday	Friday
<b>Opening Position</b>	1		AM: Familiarisation session with all suppliers (2-hours) PM: Preparation	All-day: Cover all workstreams with supplier 1	All-day: Cover all workstreams with supplier 2	All-day: Cover all workstreams with supplier 3
	2	All-day: Consolidation & Planning day (no suppliers)	All-day: Cover all workstreams with supplier 2, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 3, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 1, split into three 2-hour sessions	All-day: Consolidation & Planning day (no suppliers)
<b>First Interim Response</b>	3	All-day: Consolidation & Planning day (no suppliers)	All-day: Cover all workstreams with supplier 3, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 1, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 2, split into three 2-hour sessions	All-day: Consolidation & Planning day (no suppliers)
	4	All-day: Consolidation & Planning day (no suppliers)	All-day: Cover all workstreams with supplier 1, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 2, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 3, split into three 2-hour sessions	All-day: Consolidation & Planning day (no suppliers)
<b>Second Interim Response</b>	5	All-day: Consolidation & Planning day (no suppliers)	All-day: Cover all workstreams with supplier 2, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 3, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 1, split into three 2-hour sessions	All-day: Consolidation & Planning day (no suppliers)
	6	All-day: Consolidation & Planning day (no suppliers)	All-day: Cover all workstreams with supplier 3, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 1, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 2, split into three 2-hour sessions	All-day: Consolidation & Planning day (no suppliers)
	7	All-day: Consolidation & Planning day (no suppliers)	All-day: Cover all workstreams with supplier 1, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 2, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 3, split into three 2-hour sessions	All-day: Consolidation & Planning day (no suppliers)
	8	All-day: Consolidation & Planning day (no suppliers)	All-day: Cover all workstreams with supplier 2, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 3, split into three 2-hour sessions	All-day: Cover all workstreams with supplier 1, split into three 2-hour sessions	All-day: Consolidation & Planning day (no suppliers)

Each day with suppliers should also include a short internal 'start of day' meeting and a 'close of day' meeting without suppliers. Each week has approximately 18 hours of face time with suppliers.

Milestones can be a useful way to add additional structure the process:

- **Opening Position.** This is an opportunity to set out ways of working, ensure that all parties understand the process and confirm the scope of requirements.
- **First Interim Response.** This is an opportunity for each supplier to present an initial proposed solution in response to dialogue. Providing a presentation template can help to support consistency across different suppliers.
- **Second Interim Response.** This is an opportunity for each supplier to present an updated proposed solution in response to dialogue, refining their first interim response.

In this example, each work stream is treated as equally important. Time should be allocated to work streams according to their priority and respond to ongoing dialogue e.g. if more time is needed to discuss work stream 2 then this may become a focus in the later weeks of discussion.





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