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Position Paper on Competitive Dialogue

1. Background

1.1. General

The competitive dialogue procedure has been introduced in Directive 2004/18 in order to extend some flexibility to contracting authorities for encouraging innovation in complex projects; on the one hand it preserves competition and on the other it allows the contracting authorities to discuss aspects of the contract with the candidates. In this sense, competitive dialogue is perceived as a dynamic process that allows the project to be defined during the procurement process instead of prior to it as in conventional procedures.

The competitive dialogue procedure may be used for:

- the award of contracts including design and construction, e.g. the award of design-build or PPP contracts, or even
- the award of pure design contracts.

It should be noted that Member States have the discretion whether to introduce competitive dialogue in their legislation or not [Recital, 16].

1.2. Conditions for application

Competitive dialogue may be applied in the case of particularly complex contracts, where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract [Art. 29, par. 1][1]. Particularly complex projects are those where the contracting authorities are not able to define [Art. 1, par. 11 (c)]:

- the technical, performance or functional requirements of a project, or
- the legal and/or financial setup of a project.

The inability of the contracting authorities to define the means of satisfying their needs or of assessing what the market can offer should not however be “due to any fault on their part”, i.e. attributable to deficiencies of the contracting authorities themselves [Recital, 31].

The situation for application of the competitive dialogue procedure may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or Public-Private Partnerships, the financial and legal make-up of which cannot be defined in advance [Recital, 31].

The European Commission has issued an interpretation of the conditions for application [Explanatory Note – Competitive Dialogue – Classic Directive, 2005]; this document has a non-official status and reflects the views of the services only and not the Commission[2]. In this interpretation, the competitive dialogue procedure can, for reasons of efficiency, be applied even for the definition of technical solutions that could have been defined by the contracting authority

[1] The numbers in brackets refer to the Articles of Directive 2004/18.

[2] Ref. letter of Commissioner Charlie McCreevy to FIEC, 6.7.2006

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through a separate contract preceding the design contract itself[3] [section 2.2]; it is questionable whether this interpretation is consistent with the directive as set forth above.

1.3. Applicable procedure

Directive 2004/18 sets forth the main elements of the competitive dialogue procedure; however, the Directive does not regulate the conduct of the dialogue in adequate detail. Thus, although it is specified that, during the dialogue, contracting authorities shall ensure equality of treatment among all candidates, there are no specific provisions that will ensure it.
Of interest to this paper are the provisions in the Directive that:

- contracting authorities may (or may not) specify prices or payments to the participants in the dialogue [Art. 29, par. 8]
- contracting authorities may not reveal to the other participants solutions proposed or other confidential information by any participant without his agreement [Art. 6 and Art. 29, par. 3]
- contracting authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage, by applying the award criteria specified in the contract notice [Art. 29, par. 4], and
- contracting authorities shall conduct the dialogue until one or more solutions are identified and then may invite the candidates to submit their final tenders on the basis of these solutions [Art. 29, par. 6].

In the Explanatory Note it is argued that:

1. Candidates may be invited to submit final proposals for a selected solution – subject to their agreement; it is understood that this may be a solution of one of the candidates or, for that matter, a composite solution developed by the contracting authority from the submitted solutions [section 3.3], and
2. Contracting authorities may stipulate in the tender notice that acceptance of the invitation to participate implies consent for transfer of ideas between candidates [footnote 21].

2. EFCA's concerns

1. EFCA recognises that the technical, legal or financial aspects of a project may be difficult to define at the outset of the project, where the appropriate technical solution is not normally known or if the legal and financial conditions cannot be unilaterally defined by the contracting authority, e.g. for PPP contracts.

   In view of the above, the award of such design or design-build or PPP contracts by means of the conventional procedures of Directive 2004/18, in which their legal & financial conditions are fixed at the outset, may not be the most appropriate.

   Indeed, for most cases, the contracting authority should normally award two consecutive contracts, one for the definition of the requirements and/or the technical solution and one for the design or design-build or PPP itself. In this context, EFCA recognises that competitive dialogue offers some flexibility in the award procedure; however, it should be borne in mind that this flexibility comes at considerable cost to the consulting sector, since several consulting groups will be engaged in the definition of the technical solution.

[3] Thus the definition of the means to cross a river, e.g. a bridge or a tunnel, could - according to the interpretation of the Explanatory Note - be made through the competitive dialogue procedure.

2. EFCA is concerned that the competitive dialogue procedure, which requires the input of significant expertise from the participants of various disciplines for appreciable amounts of time, may be applied without their (adequate) remuneration. If the contracting authority does not adequately remunerate candidates for their participation costs in this process, these will have to be incorporated in their future overhead costs when doing work for other contracting authorities; thus costs would in effect be rolled over to other projects.

   For consulting engineers participating in competitive dialogue procedures, the input of expertise concerns:
   - the development of appropriate solutions
   - the participation in meetings with the contracting authorities, and
   - the successive adjustments of the submitted designs as per the contracting authorities' suggestions.

   Thus, for consulting engineers in particular, the cost of participation in competitive dialogue for a project is a significant part of their overall project cost; incorporating them in the costs of future proposals cannot be done without undue loss of competitiveness.

3. EFCA is concerned that, in the discussion with the candidates of alternative technical solutions, the contracting authorities, in their effort to achieve the best final results, may transfer the best ideas between candidates – or even use them to select or compile the solution on the basis of which final proposals will be invited.

   It should be understood that the dissemination of ideas among candidates will discourage them from adequately investing in the preparation of comprehensive designs; thus, this procedure will in effect stifle innovation instead of enhancing it. Moreover, the (direct or indirect) communication of successful ideas of participants to others may constitute an encroachment of intellectual property and cannot guarantee their equal treatment.

3. EFCA's position

1. EFCA recommends that the competitive dialogue procedure be foreseen for discussion of the legal & financial conditions of PPP projects for which such conditions cannot be unilaterally defined in the invitation to tender. Beyond that, EFCA believes that, due to the sophisticated nature and appreciable cost of the competitive dialogue procedure to both the participating firms and the contracting authorities involved:
   - the competitive dialogue procedure should be considered an exceptional one, and
   - Member States should carefully evaluate whether its deployment for projects other than PPP is appropriate for their country.

2. EFCA strongly recommends that, where competitive dialogue is foreseen in national legislation, provisions are made for:

   (a) The full reimbursement by the contracting authorities of the participants for the cost of their participation in competitive dialogue procedures; thus the costs of candidates' participation would in effect be clearly accounted for in each project[4].

[4] Indeed, the same should be applicable in conventional design-build projects.

(b) The protection of the confidentiality of proposed ideas, with the acknowledgement of intellectual ownership of the fundamental characteristics of the technical, financial or legal solutions proposed by the candidates and explicit restriction of their dissemination by the contracting authorities to others – with the possible exception for ideas that *do not* constitute fundamental characteristics of proposed solutions, subject to specific written authorisation in the context of Art. 29.3 of Directive 2004/18.

Thus, the final proposal submitted by each candidate should not be substantially different from the original one, as well as any proposals submitted during the dialogue; provisions should me made for verification thereof by interested parties by allowing candidates access to all documents of the competitive dialogue process[5] when it is completed[6] and the right to appropriate recourse in cases where violations are determined.

Moreover, provisions in tender documents for waiving confidentiality such as:

- provisions that contracting authority may invite candidates to submit final tenders for solutions submitted by other candidates or for composite solutions developed by the contracting authority, or
- provisions that acceptance of the invitation to participate implies consent for transfer of ideas between candidates

must be ruled out as contrary to the letter and spirit of Directive 2004/18.

3. For contracts including design and build elements, if contracting authorities do not adequately cover the costs of the candidates' participation in competitive dialogue procedures, the costs of consulting engineers should be covered by the contractors[7].

4. In the interest of efficiency of the procedure, EFCA recommends that, where competitive dialogue is used:
   - the staff that both the contracting authorities allocate to this dialogue is qualified, and
   - the dialogue be effectively prepared and structured by the contracting authority, with clear objectives at every stage.

   In cases where the contracting authority is not fully capable of the above requirements, qualified consultants should be engaged to support it.

Compiled for the PP Committee
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[5] including all proposals submitted and all minutes of meetings

[6] with the exception of technical or trade secrets that candidates have designated as confidential as per Art. 6 of Directive 2004/18.

[7] unless the benefits to consultants from successful proposals adequately outweigh their risks in the proposal stage