Delivering complex projects: competitive dialogue or competitive procedure with negotiation?

The Public Contracts Regulations 2015 (PCR) (which implemented the 2014 Public Procurement Directive) created a new procedure known as competitive procedure with negotiation (CPN). For those bidding on complex infrastructure projects or other government contracts, the implications of CPN may not be immediately apparent. For a contracting authority, CPN provides an additional procurement option giving more flexibility (than a restricted procedure), more control over bidders (than an open procedure). A contracting authority developing an innovative product, services or works may consider that an innovation partnership is more suitable.

The grounds for using CPN are the same as those for competitive dialogue. They are set out in Regulation 26(4) of PCR. While there is a rarely used ground that enables the use of competitive dialogue/CPN where a contracting authority is in receipt of ‘irregular or unacceptable tenders’ in response to an open or restricted procedure, the usual grounds considered by a contracting authority are those in Regulation 26(4) (a) of PCR. These allow, ‘with regard to works, supplies or services’, the use of CPN or competitive dialogue where one or more of the following criteria applies:

i. the needs of the contracting authority cannot be met without adaptation of readily available solutions;
ii. they include design or innovative solutions;

iii. the contract cannot be awarded without prior negotiation because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of risk attaching to them;

iv. the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference.

Contracting authorities seeking to use competitive dialogue or CPN will need to establish an auditable case as part of their procurement strategy, which will usually be a key component of any project business case. This will require a detailed analysis of project risk, requirements for innovative designs or solutions, the need for complex finance solutions and technical requirements to see if, objectively, one or more of the criteria are met. For infrastructure projects with inherent design, delivery or technical risk or complexity, this will usually be achievable.

But why, given the common gateway noted above, would a contracting authority bother with CPN? There are similarities between the two procedures. Both require dialogue (in the case of competitive dialogue) and negotiation (in the case of competitive dialogue) with a minimum of three bidders. Both enable dialogue (or negotiation) in successive stages. Both require a written report justifying the use of competitive dialogue or CPN in accordance with Regulation 84 of PCR.

In The Law of Public and Utilities Procurement: Regulation in the EU and the UK, Professor Arrowsmith notes that CPN ‘may be chosen for situations in which the contracting authority does not necessarily intend to negotiate, having a preference for awarding the contract by a single-phase tendering procedure, but, however, wishes to reserve the right to negotiate should this prove appropriate or necessary in the light of tenders received.’

The driver for a contracting authority using CPN (rather than competitive dialogue) is likely to lie in the following areas.

**Setting minimum requirements**

Under CPN, the contracting authority is required to define the ‘minimum requirements’ to be met by all tenderers. The procurement documents are required to identify the subject matter of the procurement by providing a description of the contracting authority’s needs and the characteristics of the supplies, works or services to be provided.

The contracting authority may negotiate the initial and all subsequent tenders submitted by bidders (other than the final tender) in order to ‘improve their content’ (Regulation 29(13) of PCR). The minimum requirements may not be subject to negotiation and arguably this strengthens the contracting authority’s position in negotiations with bidders.

Alternatively, competitive dialogue is designed to ‘identify and define the means best suited’ to satisfying the contracting authority’s needs. The contracting authority may discuss all aspects of the procurement with the bidders thus giving greater flexibility to dialogue (negotiate) and less risk of breaching procurement law by compromising a minimum requirement.
**Accepting initial tenders**

Under CPN, as noted above, the contracting authority can accept initial tenders (and opt not to enter into further negotiations with bidders) provided it has retained this discretion in the published contract notice. Negotiations can take place in successive stages, reducing the number of bidders by applying the published award criteria. Under competitive dialogue, the contracting authority must continue the dialogue until it can identify the solution/solutions that are capable of meeting its needs. Dialogue may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the stated award criteria.

**Can you clarify final tenders or negotiate tenders at a preferred bidder stage?**

CPN does not give the ability to clarify final tenders but the contracting authority shall ‘verify the final tenders are in conformity with the minimum requirements’ (Regulation 29(21)(b) of PCR). Competitive dialogue allows final tenders to be ‘clarified, specified and optimised at the request of the contracting authority’ (Regulation 30 (17) of PCR).

Under competitive dialogue, the contracting authority can confirm financial commitments or other terms contained in the tender by finalising the terms of the contract. This may, for example, allow the running of a funding competition. These negotiations must not have the effect of ‘materially modifying essential aspects’ of the tender (including the needs and requirements set out in the contract notice) and must not risk distorting competition or causing discrimination.

A bidder under CPN needs to determine what is available for negotiation (ie identify the elements that are not minimum requirements). The bidder needs to grasp quickly the proposed process as there may be fewer opportunities to negotiate than under competitive dialogue. There will also be less flexibility at preferred bidder stage. These points need to be considered carefully by the bidder as part of its bid strategy.