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"Applying the European Public Procurement Rules to Major Projects"

Significance of the New Rules for Major Project Procurement
by
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A Introduction

1 Although the title given to me by White Paper is quite broad, I am intending in this talk to focus on the Competitive Dialogue Procedure.

2 I do not intend going through the Procedure in a line by line fashion. Instead, what I am going to do is to start by summarising the Procedure and then pick up on practice points and potential concerns which I see arising from the Procedure, using some factual scenarios to illustrate the point.

3 Given that pretty much every private practitioner who has written about the Competitive Dialogue Procedure, both since the Directive was adopted on 31 March 2004, and before then, has expressed negative views on the subject, it is hardly original for me to do so! But I would join those voices in expressing concern as to the usefulness of the Competitive Dialogue Procedure. I think that there are many pitfalls for unwary Contracting Authorities and numerous real-life situations in which I can see contractors either refusing to participate at all, or participating in a reluctant and minimalist way, or litigating issues which may determine the outcome of the competition.

4 I am sorry that it appears necessary to come to such a negative conclusion: the clash between the need for flexibility in awarding PFI/PPP contracts on the one hand, and the rigidity of the procurement directives (and particularly the narrowness of the grounds for use of the Competitive Negotiated Procedure) on the other hand has been an unsatisfactory situation since PFI/PPP came on the scene. We have been dealing with these issues since at least 1990 (when I was part of the team advising the private sector on the Manchester Metrolink Tram System) if not before. *The Pimlico Schools* case was, in that respect, simply an accident waiting to happen. I suspect that many PFI's/PPP's conducted under the

Negotiated Procedure have been, indeed still are, doing so contrary to the views of the Commission and, probably, the terms of the "Old" Directives.

5 The position put forward in the New Directive is certainly nearer to the Commission's view, that all negotiation has to be viewed with suspicion, than it is to the position of practitioners and their clients in the UK who probably perceive that mounting cost and complexity are much greater enemies to reaching the "right" solution than any interest which Contracting Authorities may have in favouring their "pet" providers. I am sure that I am not alone in having seen countless situations in which the rigidity of the "Old" Directives has created problems for projects, when I struggle to think of even a single example where a Contracting Authority has sought to bend the rules in order to award the contract to its favourite supplier.

6 With this background in mind it is a great pity, and an opportunity wasted, for the Commission to fail to recognise the real benefits for a single market and for consumers which could have been generated by reducing costs for both bidders and Contracting Authorities, shortening the duration of award procedures and improving legal certainty. We will never know the comparative costs of each route, but I would suggest that the cost of this lost opportunity is far greater than the cost of, or value of any damage which may be done by, inappropriate, non-transparent or discriminatory award procedures under a broader form of Negotiated Procedure.

B Outline of the Competitive Dialogue

1 If I have not already turned you completely off the new procedure, let's look at the basic building blocks of it.

2 I have set out in the handout, and on the slide, a flow chart showing the various stages of the procedure but I will take a minute or two to describe them in outline now.

3 Most of the detail is contained in Article 29 of the "New" Directive, but (as ever) there is some helpful material in the Recitals and we also need to look at elements of Articles 30, 31 and 44, and at the definitions.

4 Article 29 states that in the case of "Particularly Complex Contracts", member states may provide that, where the open or restricted procedures "will not allow" the award of the

contract, a Competitive Dialogue may be used. Note, therefore that the Competitive Dialogue Procedure may not be available at all in some member states.

5 If Competitive Dialogue is used, then the "most economically advantageous tender" basis of evaluation must be utilised.

6 The first elements of the process are similar to those of the restricted or Negotiated Procedure, in that a contract notice is published and respondent candidates are down-selected in accordance with the same rules as apply to the negotiated or restricted procedures. One slight difference at this stage is that the Contracting Authority may issue a "Descriptive Document" along with the Contract Notice setting out its requirements.

7 Once down-selection has occurred, the process diverges from the restricted or Negotiated Procedure. The dialogue is commenced with down-selected bidders and Article 29 tells us that the aim of it is to "identify and define the means best suited to satisfying" the Contracting Authority's need. It is expressly stated that the Contracting Authority may discuss all aspects of the contract with down-selected bidders during the dialogue.

8 There is a needless repetition of the requirement of equality (set out as one of the basic principles in Article 2).

9 There is then a statement that solutions proposed or other confidential information communicated by a candidate participating in the dialogue may not be revealed to others without the agreement of the candidate concerned. This is an expansion on the provisions of Article 6 regarding confidentiality which simply states that information designated by participants as confidential may not be revealed. We will come back to this very important and potentially troublesome provision later.

10 Contracting Authorities can specify that the dialogue may take place in a series of successive stages, in order to reduce the number of solutions to be discussed during the dialogue stage. This is to be done by applying the final award criteria. This can only be done, however, if the Contract Notice or Descriptive Document indicates that this iterative process may be used.

11 It is then stated that the Contracting Authority must continue the dialogue until "it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs".

12 The Contracting Authority then invites final tenders from bidders on the basis of the solution or solutions presented and specified during the dialogue. Tenders may be "clarified, specified and fine-tuned" but this must not involve changes to the "basic features" of the tender or call for tender where this is likely to distort competition or have a discriminatory effect.

13 Tenders are then assessed in the usual way based on the award criteria (remember that MEAT must be used) and the winning tender is determined.

14 After this, the winning tenderer can be asked to clarify (note, not "specify" or "fine-tune") aspects of its tender or confirm commitments contained in the tender, provided that this doesn't have the effect of modifying "substantial aspects of the tender" and does not risk distorting competition or causing discrimination. Presumably the reference to confirming commitments here is to do with matters such as funding commitments and parent company guarantees and I will not consider it further.

15 Finally, it is stated in Article 29 that Contracting Authorities may specify prices or payments to the participants in the dialogue. Despite having confused some writers on the subject, it is clear from earlier drafts that this is in contemplation of bidders being paid for participating in the dialogue. I think it unlikely that Contracting Authorities will choose to do this in the UK.

C Some Potential Problems with Competitive Dialogue

1 Well, so much for the bare details, let's look at some of the individual elements mentioned above in a little more detail. In doing so, I will pick out both the concerns which they raise and the practical points which arise, particularly for Contracting Authorities, in operating them.

2 "Particularly Complex Contracts": are defined in Article 1. Two types of "Particularly Complex Contract" are contemplated: those where the technical means of satisfying the Contracting Authority's needs or objectives cannot be defined, and those where the Contracting Authority is unable to specify the "legal and/or financial make-up" of the project. Both of these limbs of the definition are qualified by the word "objectively". This is emphasised by Recital 31 which

refers to it being "objectively impossible" to define the relevant means, "without this being due to any fault" on the Contracting Authority's part. While some writers have seen a degree of subjectivity in this test, my first concern on behalf of Contracting Authorities is that this is, actually, quite a hard objective test. This is backed up by some of the wording in the Commission's original proposal for the Directive. Clearly the concern was that Contracting Authorities might "simply affirm" (to use the Commission's language) that the situation was a complex one. The Commission clearly sees the burden of proof as being on the Contracting Authority. This is perhaps a faint echo of the suspicion which the Commission has around looser procedures, as mentioned above.

3 The particular concern I see here is for smaller and less sophisticated Contracting Authorities. Admittedly, "Particularly Complex Contracts" are more likely to involve bigger, more sophisticated Contracting Authorities. The smaller Contracting Authorities may, it seems, be faced with the prospect of either using another procedure which may be less suited to its purposes for a variety of reasons, or spending significant amounts of money on external consultants to give advice in areas in which it does not have the necessary competence.

4 Perhaps those acting for contractors will argue that this is quite right and proper: better that the Contracting Authority spends one lot of fees with external consultants than that several bidders be put to all of the costs of submitting detailed bids and participating in the dialogue. We will come back to the issue of excessive costs later.

5 Looking at the wording of these two limbs of the "Particularly Complex" definition, one can envisage that the inability to define technical means may refer, for example, to the various ways of providing a river crossing and dealing with difficult ground conditions for a bridge or tunnel, and indeed the choice between a bridge or tunnel itself.

6 As regards the inability to specify the legal and/or financial make-up, this could encompass issues such as whether an alliancing structure is appropriate, and the different financing options (be it traditional finance or bonding or some other structure).

7 I expect the most of us (certainly me!) will find it easier to work with an example which relates to technical means rather than legal or financial make-up, so let me mention here an example which I will use to illustrate the rest of the points I want to make this morning. Let us assume

that the relevant authorities in a large city wish to connect the two main railway stations with each other, with the centre of the city and perhaps with a bus station or conference centre or football ground.

8 They know that they want a public transport solution, but they are not clear whether the best solution is offered by an underground (less disruptive of above ground traffic flows but very expensive), a tramway (expensive to maintain and perhaps raising the most issues for safety, but with plenty of contractors in Europe able to assist) and a guided busway (in many ways the simplest solution, but one which has not been adopted in any major UK city). Of course, for this to be a Particularly Complex Contract, the authorities must be unable objectively to define the technical means which will satisfy their needs or requirements.

9 Having decided that they can utilise the Competitive Dialogue Procedure, they publish a Contract Notice setting out their needs and requirements, or they can do so in a "Descriptive Document". It is not clear incidentally when the Descriptive Document must be made available to bidders. This is my second practical point for Contracting Authorities. They need to set out their "needs and requirements" (or is it "needs", as used later on and if so what is the difference?) but authorities need to be careful what they wish for. There may well be a temptation to specify a whole host of aims and objectives which the authorities have. When significant sums of central government money are coming in to support a project, it is natural for the Authority to seek to set out a detailed list of objectives which it would like to pursue in addition to the basic requirements for the project. For example, in our transport scenario, the Authority may wish to achieve a regeneration of the stations as part of the project, or may wish to provide for interoperability of bus and train tickets with the tickets on the new system, or may wish to assist in improving a deprived or run-down area of the city, but there may be a trap for the unwary Contracting Authority here, insofar as the Contracting Authority needs to identify the solution or solutions "which are capable of meeting its needs". If the Contracting Authority over-specifies at the outset, there is perhaps the opportunity for a challenge by a bidder who has put in an "all singing and dancing" bid which is very expensive, that the Authority cannot now remove items from its list of needs and requirements simply because other bidders cannot provide them or cannot do so at an acceptable cost.

10 This is our first example of the potential lack of flexibility of the Competitive Dialogue Procedure: whereas it seems to be accepted practice in the industry that, as part of a Competitive Negotiated Procedure, the Contracting Authority will modify its requirements to match the ability of contractors to deliver, and to deliver within the expected budget, it is not at all clear that this is the case with Competitive Dialogue.

11 For contractors, the advice is actively to consider challenging potential solutions which may be put forward by the Contracting Authority if there is a good argument that those solutions do not meet the Contracting Authority's needs. Given the Holleran decision, contractors may have to bite the bullet and decide to take any such action very quickly indeed.

12 The next area of concern I have relates to the requirement of confidentiality around solutions proposed by a candidate. The first reaction of all of us is to say that this is entirely appropriate. If the bidder comes up with a clever means of delivering on the Authority's requirements, it should be allowed to carry that advantage through the process and also put in a winning bid based on it. But how might this affect the dialogue? And indeed how might it affect the ultimate call for tenders?

13 In my public transport scenario, let us assume that only the underground and tram solutions have been considered by the Contracting Authority. A bidder which comes up with the guided busway approach and can show that it will meet the Contracting Authority's needs may have a telling advantage. All well and good.

14 But consider a situation in which the information which a bidder has will actually affect the prospects for a worthwhile competition. Let us assume that the Authority favours the underground solution (we need to ignore for the moment the fact that this is likely to be the most expensive option, and quite possibly unaffordable!). Having given contractors a heavy steer towards the underground option in the Contract Notice or Descriptive Document, most bidders could be expected to develop this approach. However, one of the bidders is a civil engineering contractor which recently built a major conference venue in the centre of the city. As part of doing those works, it had a major seismic survey done and has ascertained that there are serious underground problems which may make an underground solution undeliverable and even unsafe. It puts forward a tram-based solution, advising the Contracting Authority of the contents of its seismic survey (which will, of course, previously

have been unknown to the Contracting Authority) but warns the Contracting Authority that it should not disclose this confidential information to other bidders.

15 Here, the confidential information does not simply help this bidder put forward an advantageous proposal, but effectively means that the bidding approach being taken by all other bidders is likely to prove an expensive cul-de-sac. The Authority is now faced with a dilemma: does it leak this information to the other bidders so that they will consider more feasible options, or does it allow things to proceed knowing that most bidders' tenders will be based on false premises, with the choice of awarding the contract to the knowledgeable contractor or to no-one? This is surely an intolerable situation, made worse by the baffling omission from Article 31 which means that where no suitable tenders have been received in a Competitive Dialogue Procedure, the Negotiated Procedure without prior publication of a Contract Notice cannot be utilised, in contrast with the position under the Restricted Procedure.

16 If the Authority failed to specify at the outset that solutions could be de-selected, it will have a long drawn-out, and with most bidders completely disingenuous, dialogue. In fact, perhaps years downstream, it will issue an invitation to tender to which only one bidder can possibly submit an acceptable response. If that bidder is aware of its advantageous position, it will submit a high price, which the Authority will either have to accept or start the whole process over again. If de-selection of the underground option is possible, will the Contracting Authority even be able to tell the disgruntled losers why it has done so? Would a Court challenge be necessary simply to find out?

17 As a consequence, I think that Contracting Authorities will be tempted to specify in their documentation that they may require bidders to submit to the disclosure of confidential information in circumstances where it may jeopardise the equal or non-discriminatory nature of the competition, or jeopardise the competition itself, but it is far from clear that this is lawful: Article 29(3) is written in absolute terms, subject only to the "agreement" of bidders. It is difficult to see the Court concluding that a provision unilaterally imposed by the Contracting Authority has in any real sense been agreed by the bidders.

18 I have assumed in doing this that the obligation of confidentiality subsists after the dialogue has ended and in to the invitation to tender itself: in other words that the invitation to tender

cannot give the game away in terms of innovative solutions or other vital confidential information. How realistic is this? Can I simultaneously keep back information from each bidder that will enable it to understand the basis on which other bidders might be bidding, whilst still treating all bidders equally and in a non-discriminatory way? Unless I write a completely bland, totally output-based invitation to tender, will the ITT not give the game away?

7 It is perhaps idle to speculate on how this issue could have been addressed in the Directive – how one could balance the need to reward innovation and protect confidential information on the one hand whilst avoiding a form of "innovative dictatorship" on the other. The Contracting Authority could abandon the process if competition-threatening information comes to light and the bidder will not countenance its being revealed, but would it not be preferable to allow the Contracting Authority to stipulate that bidders must accept disclosure in such circumstances?

8 In the absence of such a provision, Contracting Authorities will be tempted to seek to impose disclosure on unwilling bidders and may then face challenge.

9 Contracting Authorities would also be well-advised to include or refer to as much information as possible in their Descriptive Documents, including details of possible alternative ways of meeting the Contracting Authority's objectives, with a view to countering any suggestion by any one contractor that it has a novel and confidential solution. But remember that the Contracting Authority is only utilising the Competitive Dialogue Procedure because it cannot objectively define the technical means capable of satisfying its needs or objectives: be too specific, and one potentially undermines the idea that this is a "Particularly Complex Contract"; too general, and the danger is that bidders allege that particular ideas or potential solutions are confidential.

10 On a more general note, it might be questioned to what extent there will be a quality dialogue if, in fact, the Contracting Authority needs to lock itself away in a room with a bidder to discuss its innovative solution, and then do the same with another bidder and so forth: is the spirit of the procedure not a wide-ranging and free-wheeling dialogue involving all participants with a fairly free exchange of information? I was interested to hear from a representative of the Commission that it views the dialogue as a series of narrow "one-on-one" sessions.

11 Article 29(4) gives the possibility of a Competitive Dialogue consisting of a series of successive iterative stages. A practice point here for Contracting Authorities is that, for the reasons already noted, they should, in my view, always take up this option in the Contract Notice: I cannot see any situation in which a Contracting Authority would wish to be denuded of that opportunity. It is not, of course, obliged to de-select options simply by reserving the right to do so.

12 This is the source of my next area of concern: Are we down-selecting options or bidders? And what are the consequences of each answer? The views of writers on the subject differ: at least one of them sees the opportunity here both to deselect potential solutions and individual bidders. But this is far from clear. First of all, Article 29(4) talks about the iterative process being "in order to reduce the number of solutions to be discussed during the dialogue stage" and Article 29(5) is consistent in also talking about the solution or solutions which are capable of meeting the Contracting Authority's needs. Article 29(6) talks about concluding the dialogue and informing the participants (**Note:** not the remaining participants) who then submit final tenders based on the solution or solutions presented and specified during the dialogue. It is only when we look at Article 44(4) which unhelpfully deals with the situation under both the Negotiated Procedure and Competitive Dialogue Procedure that there is talk of reducing "the number of solutions to be discussed or of tenders to be negotiated" and which talks of the number arrived at being sufficient to make for genuine competition "insofar as there are enough solutions or suitable candidates." One of the writers assumes this is a sign that one can down-select bidders and solutions. I think that a more natural reading of this provision is that when it is talking about candidates, it is referring to the Negotiated Procedure, and that when it is referring to solutions it is talking about the Competitive Dialogue Procedure. This is entirely consistent with the language used in Article 29.

13 As an aside, I have always thought any talk of the number of bidders to be strange, given that bidders can submit a number of individual tenders: in a complex procurement, there might be a mandatory standard bid, and then variants might be allowed and bidders may submit several bids. In reality, when the award criteria are being applied and the decision is made, the decision is as to which bid is to be preferred not which bidder is to be preferred. We have all become used, in the Negotiated Procedure, to a reduction in the number of bidders but it is

far from clear that this is what is envisaged, or even allowed, by the Competitive Dialogue Procedure.

14 To illustrate, consider my public transport scenario again. It may be that many, if not all, of the consortia are led by civil engineering companies who are interested in building the bridges and tunnels and new roadways and stations which will be involved, rather than in supplying the complex technical kit which goes along with trams or underground trains. They are likely to have a consortium involving specialist contractors as consortium members.

15 But a canny contractor in my public transport example may well place an "each way bet" on more than one of the solutions: rather than nail one's colours to the mast of a particular approach, why not have a number of specialist sub-contractors in the consortium and adopt the approach that two or more of the possible solutions are viable and that the contractor can deliver whichever one the Contracting Authority wishes? If I have two contractors who are both offering to deliver an underground or a guided bus way or a tram system, how can I sensibly de-select them during the dialogue process simply because I drop the guided bus way solution? Surely they are still in the running?

16 But, I hear you say, even large contracting companies will not sensibly go to all of the expense of participating in a complex and long-running dialogue, running several different expensive solutions all at the same time.

17 My response is, why should they? I have a concern about "Participants on the Touchline": it seems to me that the Competitive Dialogue is built on a working assumption that all participants will roll their sleeves up and partake fully in the dialogue. But is it not a rational, though selfish, approach to decide that I will stand on the touchline, encouraging others along with expressions of approval, but without taking any of the risks involved in playing the game? If I sit on the sidelines, vaguely agreeing that several of the available solutions are viable, and leave it to others to do all of the work, I will keep my own costs down, I will reveal little, if any, of my confidential information and I stand to gain much from the ideas of others. (If the dialogue is conducted as the Commission envisages, on a one-to-one basis, this risk may be much reduced).

18 There is nothing in Article 29 that allows the Contracting Authority to deselect a bidder. Whilst I think I would have no trouble in advising the Contracting Authority that it could eject a bidder who was simply refusing to take part, it becomes a very difficult subjective process to decide when a bidder is pulling its weight and participating fully and when it is not. I can hear echoes of *Walford -v- Miles* in any suggestion that there is an obligation, whether as a matter of contract or the procurement rules, for a contractor to engage to a specific extent in discussions. Am I simply punishing a bidder for being less garrulous or providing less detail as part of the dialogue? Where is the line drawn?

19 In the Negotiated Procedure, we have all got used to the idea that there is a series of rounds, ITT, BAFO even LAFO, and that a bidder who does not submit any documentation as part of that process can be ejected. We can evaluate bids in successive phases and eject the bidders who put forward the least attractive bids. Given that (as we will see in detail later) tenders may be "clarified, specified and fine tuned" at a later stage, it seems to me that it is hard to argue convincingly that a lack of specificity at the dialogue stage is a reason for ejecting a bidder.

20 This throws up another problem: evaluation at each of these stages is to be done by applying the final award criteria to the solutions being developed. But how can one do this? If the final award criteria include, for instance, price and time for completion, is it permissible to ignore these elements of the final award criteria and reject a solution merely because it is proving problematic on other grounds of evaluation? It does not seem to me that this is permitted – one can only make sense of the concept of applying the final award criteria if they are <u>all</u> applied: and in order to do this, I need details from the bidders on issues such as price and time for delivery. The Commission thinks that I need to wait until I can apply all evaluation criteria: if this is so, will the apparent opportunity to de-select in fact prove illusory?

21 What happens if two bidders are proposing the same solution, for instance, the tram system, but one foresees that it will take a very long time to deliver, whereas the other is very much more optimistic? Do I score this on the basis of the optimistic view or the pessimistic view? The choice I make is likely to decide whether that option proceeds to the final invitation to tender or not.

22 Maybe the pessimistic bidder has confidential information which it has not shared with the Contracting Authority. If this is the case and the Contracting Authority goes "nap" on the tram solutions, then the project may yet again be still-born.

23 Another problem in applying the final award criteria in down selecting bids is that it seems to me that there is nothing to stop a bidder from completely changing its tune between the dialogue phase and the invitation to tender phase: if we were conducting a Negotiated Procedure in the customary way with a series of rounds, we might oblige bidders to commit to a price and take a consistent view on key terms, but why should a bidder not make crazy assertions on price, timescale for delivery and so forth as a tactical means to squash other solutions, finally hitting the Contracting Authority with the full consequences of its proposed solution only at the invitation to tender stage? Contracting Authorities may wish to leave open the possibility of re-playing a particular stage of the process and abandoning the invitation to tender and going back into dialogue, in the event that a bidder does this. Whether such a mechanism would be lawful remains to be seen: arguably, as we have already noted, the dialogue is simply about identifying the solution or solutions capable of meeting the Authority's needs: it would seem to me that only if that conclusion is called into question is there an opportunity to re-visit earlier phases of the process. If a contractor's price goes up by 30% but it is still within the Contracting Authority's budget, the solution is still viable.

24 When does a dialogue have to stop? It has to stop when the Authority can "identify the solution or solutions…… which are capable of meeting its needs". This is problematic in my view. It may be that it will take longer and prove harder for a bidder with an innovative solution to show that that solution is capable of meeting the Authority's needs. How and when can the Authority decide that that solution is simply not viable and dump it? It will be under pressure from the bidders who submit more conventional bids to get on with the process, but I do not see how it can conclude at that stage that the innovative proposal is capable of meeting its needs.

25 Once this stage is reached, the Contracting Authority needs to invite final bids. But will it be ready to do so? If the Contracting Authority in my hypothetical scenario has identified that a tram or guided busway is capable of meeting its needs, it must, on one view cease the dialogue even if there are many important issues still to be resolved: for example, it may be

that a conclusion has not been reached on how difficult property issues will be dealt with, or it may not be clear whether a particular tranche of government funding is available or complex planning or other matters may not have been resolved. There is arguably no room for delay or continuation of the dialogue in such circumstances, yet the bids received may not be capable of meaningful evaluation. Again, I can conceive of pushy bidders seeking to persuade the Authority to end the dialogue and go to the ITT phase perhaps too early. Remember that the Authority cannot simply switch to a Negotiated Procedure without advertisement in the event that it does not receive any suitable tenders. The Commission seems to take a more relaxed view and believes that there is scope for the Contracting Authority to postpone conclusion of the dialogue.

26 Just a word here about the award criteria: first of all, particularly in the context of innovative proposals, it may be hard to write meaningful evaluation criteria which will enable the Contracting Authority to have confidence that it will be choosing the right solution by applying them. Great care is going to be needed here. If, as a result of one bidder's confidential information, I know that other solutions may not be deliverable because of risks unknown to the bidders who put them forward, how do I evaluate this in scoring? Do I assume that, whatever the bid itself says, these factors will have an effect on costs/deliverability/ deliverability to time? Is it fair to reach this conclusion without having had any debate on the subject with the bidder concerned? How transparent is this?

27 Finally, on this question of a solution or solutions which meet the Authority's needs, I see a risk of much difficult litigation here: always assuming that one bidder can ascertain what solution is going to be put forward by another, it seems to me that there is the opportunity to argue that a particular solution does not meet the Authority's needs and therefore should not be considered as a possible option at the ITT stage.

D Will the Competitive Dialogue Procedure be useful in relation to PFI/PPP projects?

1 I have already set out a number of reasons why I doubt that Competitive Dialogue will work for these types of project, including:

- the lack of the much-vaunted flexibility because of the restrictions on post-tender negotiations.

- the possible bottleneck in down-selecting solutions.

- the possibility that dialogue may have to be ended earlier than the Contracting Authority would want to do so.

2 But there are also other reasons why Competitive Dialogue may either be unavailable or may prove too much of a straitjacket, including the following:

- the narrowness and objectivity of the definition of "Particularly Complex Contracts": increasing standardisation of documentation and use of similar forms and well-tested approaches for requirements such as schools and hospitals may mean that they do not qualify at all !

- the well–trodden path of nominating a reserve bidder for the twin purposes of maintaining some pressure on the preferred bidder and providing a fall-back if the preferred bidder runs into problems seems to be expressly ruled out by Recital 31, a view which has been confirmed to me by a Commission representative. This door has not been expressly closed as regards the Negotiated Procedure.

- the fact that Competitive Dialogue seems to contemplate only a one-way development in solutions offered rather than in both the bidders' offerings and the Contracting Authorities' expectations.

3 My view is that the limitations on post-tender and post-PB selection dialogue will prove the biggest hurdle. In the Commission's (state aid) decision on the London Underground PPP, it accepted that:

"in a complex and innovative infrastructure contract of this type, using the Negotiated Procedure…it was reasonable for the UK authorities to conclude that negotiation with single preferred bidders was an unavoidable part of the process of finalising…the contracts".

Strange, then, that this level of latitude is very clearly absent from the Competitive Dialogue Procedure.

4 Further, funders are likely to remain unwilling, for understandable reasons, to become involved until late in the process. Their requirements, in terms of modifications to the shape

of the deal are likely to amount to much more than the mere confirmation of commitments that Article 29 envisages.

5 Coupled with this, as noted in the next section, Contracting Authorities are likely to take the practical view that a challenge (at least from contractors) to the use of the familiar and more flexible Negotiated Procedure is low.

E The Future?

1 Which advert is it which trumpeted "The Future is Now"? This strapline could equally be applied to the Competitive Dialogue Procedure because the first OJEU advertisements referring to it have appeared.

2 I would never previously have considered Dereham a likely hotbed of innovation, but 2 of the 6 OJEU adverts which so far refer to Competitive Dialogue are from Breckland D.C.!

3 Understandably, none of these has been submitted as a "Competitive Dialogue" advertisement – instead 5 of the 6 have been submitted as Negotiated Procedure adverts referring to Competitive Dialogue. The sixth, mysteriously, is a Restricted Procedure notice which refers to Competitive Dialogue: I suspect that Hammersmith & Fulham Council can expect a billet doux from the Commission !

4 The Commission is of the view that Competitive Dialogue is not available until national implementation, not least because the new procedure is only an option which individual member states may or may not choose to take up.

5 But I suspect that this is not of real concern to the authorities: contractors are unlikely to complain about the choice of procedure as such. OGC has encouraged Contracting Authorities to use frameworks, although they are also optional according to Article 32, and are not mentioned in the existing directives (for non-utilities).

6 The Commission is likely to see early use of the Competitive Dialogue Procedure as the lesser of two evils, if the Negotiated Procedure is the alternative.

7 In conclusion, is Competitive Dialogue the way forward? I doubt it, but 5 UK Contacting Authorities already disagree! If Competitive Dialogue is widely used, there is certainly scope for considerable uncertainty and litigation for some time to come.

8 The next step is the issue of guidelines by the Commission which I am informed will be in the next few months.

9 Finally, draft UK implementing regulations are expected about the end of May 2005, with those regulations coming into force on or around the 31 January 2006 deadline for implementation.

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