

Walking and talking - the competitive dialogue process

When planning a major regeneration project, a public sector landowner may use the "competitive dialogue" procedure to assist in the selection of its private sector development partner. The new procedure, which was introduced into the UK in 2006, enables the public authority to use a competitive front loaded negotiation process when selecting a developer.

Interested developers are required to compete against each other to provide the public authority with an ideal development proposal, which the developer must design to best meet the stated needs and requirements of the public authority. The procedure is becoming commonplace, largely replacing the negotiated procedure for complex development agreements.

Voted "number 1" for Public Procurement in Chambers & Partners 2008, Eversheds knows that deciding on a procurement strategy is not about sticking a pin in a page or doing what has been done before. Successful competitive dialogue procurements for development schemes need to be sensible and robust, and within the complex matrix of the procurement Regulations, Directives and case law.

We have unrivalled experience of working with the public sector and are currently acting on more than 5% of all competitive dialogues currently advertised in the UK. Eversheds' Developer and Regeneration Team head, Stephen Sorrell, recently led a team advising London Borough of Lambeth in its use of the competitive dialogue procedure to select a preferred development partner for its "Future Clapham" development scheme of three strategic mixed use sites in London SW4. In addition, we are advising London Borough of Hammersmith and Fulham on its town hall redevelopment project, and London Borough of Croydon on its innovative CCURV urban regeneration PPP, the first of its kind to be procured by a local authority. The transactions for Lambeth and Hammersmith & Fulham are due to sign soon and have been completed in tight timescales, going from OJEU advertisement to final tenders in less 12 months.

Arguably, land is the most important commodity in today's industry, and it is far from abundant. Coupled with an increasing lack of EU funds towards regeneration, and a considerable increase in new build targets, it is unsurprising that cooperation between the public and private sectors is essential for success.

The process

Ultimately competitive dialogue requires contracting authorities to put a lot more effort in at the front end of the procurement. The advert is of particular importance. Careful planning and assimilation of key facts and points that you are willing to dialogue on is essential to enable bidders to decide whether they are the right person to tender. Those who publish notices first and think about project contents later will not find competitive dialogue an easy process to manage.

Key stages

- The contract notice
- Short listing
- Evaluation criteria
- Closing the dialogue
- The final tender

Short listing can take place at the PQQ stage using the usual technical and financial criteria but there can also be a further slimming down of participants either before the Invitation to Dialogue is issued or afterwards.

There is no magical solution to the drafting of Evaluation Criteria, but they have to be detailed in the Invitation to Participate in Competitive Dialogue (ITPD) and will be used for the dialogue process, any further slim down that takes place through the dialogue,

and the final tender. As such, they need to be given serious thought early on in the process and should remain unchanged throughout.

Under the regulations, dialogue cannot be closed until you have a solution or solutions capable of meeting your needs. This can cause difficulties where timetables are set far in advance with a close of dialogue date set. It is important to remain flexible and keep lines of communication open with bidders so as not to give rise to incomplete bids, potential challenges for bidders or at worst case, result in bidders not participating in the final tender stage.

The final tender should be very much a topping and tailing exercise at the end of the process. The essence of the deal and associated documentation must be resolved within the dialogue itself.

Making it work

Confidentiality

- Each dialogue process with each bidder needs to be treated as a separate negotiation. It is important to be absolutely clear in the ITPD how you will address issues of confidentiality.

Unified Approach

- Competitive dialogue needs to adopt a unified and corporate approach to its dealings with bidders. In local authority led mixed use regeneration schemes for example, the council's regeneration, planning, highways and housing teams all need to work together to adopt a holistic approach and align their interests at the very outset

Leadership

- The person leading the project within the public sector organisation must have the ability to motivate the internal team, ensure deadlines are met and have a key influence and understanding of each of the core areas of dialogue, including planning, commercial and legal terms, design and financial issues.

Innovation

- From the public sector perspective, the beauty of competitive dialogue is that it is genuinely able to seek innovative solutions to the regeneration of pivotal sites

Legal Issues

- The complex nature of regeneration schemes inevitably mean the legal framework requires considerable thought and negotiation. Once selected, the commercial terms cannot be negotiated and therefore there is no opportunity for the parties to revisit issues where this would occur under more traditional routes of procurement / negotiation