

The Competitive Dialogue Process: Decision Taking

APSE Solutions has been asked to provide UNISON with a short briefing on decision making under the Competitive Dialogue process. APSE is not a firm of lawyers and does not purport to offer legal advice.

Competitive Dialogue (CD) is one of a small number of procedures allowed under the European rules that govern public procurement. It is used (and can only be used) for particularly complicated contracts or where the Contracting Authority is not able to state clearly in technical terms (specify) exactly what it wants.

CD, as the name suggests, allows for discussion with the bidders to help them and the authority to identify the best way to deliver the authority's broad requirements. This discussion or dialogue, takes place under strictly controlled conditions to avoid any possibility of unfairness creeping in. As with any procurement, there is an overriding obligation to treat bidders equally and fairly and to have transparency in the process.

One way that transparency is achieved is that the criteria to be used to judge the bids and the process to be followed, is set out in the tender documents from the start of the process. Contracting authorities must not depart from, or make changes to these criteria. To avoid any possibility of this happening, the Council will establish its own bid team to undertake the dialogue and ultimately to evaluate the final tenders which, under the procedure, are submitted once dialogue has ended and clarity obtained around exactly what the Council wants from the successful bidder.

In the case of the Barnet DRS contract, confusion has arisen around the role of elected members in the decision making process. This follows an announcement by officers that the Council is now seeking to form a Joint Venture Company with the successful bidder (JV). This was swiftly followed by cabinet

members denying that a decision had been made and pointing out that it would be them, not officers that would make the decision. Officers have since continued to state that they are seeking to create a JV.

In most cases a decision to award a major contract is indeed made by the cabinet of a council and in some cases by the full council. To this extent, the Barnet cabinet are right to point out that the decision over whether or not to enter into a Joint Venture is ultimately one that they will make. However, this should not be taken to imply that they will make the choice between a Joint Venture and a straight contract. This is a choice that can only be made within the Competitive Dialogue arena, from which will emerge both a 'preferred supplier' and by extension, a 'preferred solution'. Any other approach would represent a departure from the original evaluation criteria and process. Councillors will have the option of voting against awarding a contract to the preferred bidder but they will not have an option of awarding it to the other bidder instead or of substituting a straight contract for the Joint Venture or vice versa.

In many ways, this is an extreme example of one of the most significant consequences of moving to a commissioning model of council governance. Commissioners get to choose whether or not to contract with a company but they do not get to choose how that company will carry out the work. Nor do they get to choose an alternative company if for any reason they disagree with the officer recommendation in favour of the preferred bidder. All of these things are determined within the CD process through dialogue between the Council's bid team and the bidders to which others cannot be party if the integrity of the process is to be maintained. The final vote can therefore be characterised as a take it or leave it decision. A decision to 'leave it', in circumstances such as in Barnet where no meaningful in-house alternative has been developed, is highly unlikely and members may feel that in effect they have very

limited input into the process, once they have made the early decision to go to tender.

The ability of elected members to input into how a contract is to be delivered, including whether it should be through a Joint Venture, is effectively confined to the pre-procurement stage. In this case the elected members could, at outline business case stage, have stipulated a requirement for a JV (or not as the case may be) but by voting to leave it as a possible outcome of the process, even though the business case dismissed it as risky and expensive, they have effectively denied themselves the right to even influence whether or not a JV is the eventual preferred solution.

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