

THE APPLICATION OF THE COMPETITIVE DIALOGUE PROCEDURE IN PUBLIC PROCUREMENT

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1. BACKGROUNDⁱ

The competitive dialogue was first introduced as a public procurement award procedure in the Bulgarian legislation in 2006¹. However, its application by the contracting authorities remains extremely limited. The review of the publicly available information in the Public Procurement Register (PPR) shows that this specific procedure has been used only 15 times for a period of nearly 11 years. Of those 15 procedures, 10 were successfully completed by selecting a contractor (there is information published for one of these procedures that the public contract was terminated earlier) and 5 of them were terminated without award being reached. On the other hand, according to the statistical information of the PPA the average number of procedures notified within a year is around 11,000.

Table 1. Total number of announced public procurement award procedures in the period 2008 - 2015²

Year	2008	2009	2010	2011	2012	2013	2014	2015
Total	13370	7811	7425	8202	10132	11939	11894	11111
Open Procedure	4379	2593	2807	3396	6899	8784	8478	7651
Restricted Procedure	5	2	4	3	17	18	18	24
Accelerated Restricted Procedure	1	0	3	1	5	1	3	2
Negotiated Procedure with Notice	631	404	462	442	260	258	355	423
Accelerated Negotiated Procedure with Notice	23	25	9	13	11	4	4	5
Negotiated Procedure without Notice	1232	841	781	928	2205	2863	3021	3003
Design Contest	30	6	10	3	10	11	15	9
Competitive dialogue³	5	2	0	0	0	0	0	1

It is evident that given the general characteristics of the public procurement sector in Bulgaria, the competitive dialogue remains unfamiliar to the contracting authorities. This in turn leads to missing the opportunity to gain experience and administrative capacity, which further reinforces the negative trend. The prerequisites for this situation are due to a complex set of factors, among which the most important ones can be singled out as follows:

- the specifics of the competitive dialogue allowing it to be characterized as a relatively complex procedure, the successful conduct of which requires the use of expertise the contracting authorities often do not possess;
- the circumstance that the competitive dialogue cannot be recognized as an instrument for successfully satisfying the contracting authorities' specific needs;

¹ Act for Amendment and Supplement to the Public Procurement Act, Prom. SG issue 33 of 21.04.2006

² Source: [Public Procurement Agency](#).

³ Six procedures notified in 2007 and one notified in 2006 remain outside this data.

- due to the existence of certain legal prerequisites, the competitive dialogue is considered an exception, which is not used even though the conditions for conducting it are in place;
- conducting the competitive dialogue involves a number of conventions and elements not explicitly regulated by law, which the contracting authorities see as a drawback related to the presence of a significant risk rather than an opportunity to apply flexible solutions;
- the contracting authorities prefer to apply the formal and set out in detail in the law open procedure rules despite the fact that its implementation is unlikely to lead to the desired outcome;
- the competitive dialogue is not seen as a comprehensive process covering the planning and the preparation of the procurement procedure, the selection of the contractor and the effective execution of the contract, but it is rather seen as a procedure within the law only.

On the other hand, the common European trend in the application of the competitive dialogue is different. In recent years, there has been a significant growth in the use of the competitive dialogue in terms of number and value of the contracts. The competitive dialogue proves to be particularly useful when the contracting authorities are unable to define the means of meeting their needs as well as those of assessing the solutions offered by the market such as technical, financial or legal solutions. Competitive dialogue is more widely used in various cases where open or restricted procedures would not lead to satisfactory results, including within innovative projects in the execution of major projects for integrated transport infrastructure, large computer networks or projects involving complex and structured financing. The procedure is also particularly useful when it is necessary to adapt already existing products, services or works in complex purchases, including such involving high-tech products, intellectual services or large-scale projects in the field of information and communication technologies. In this regard, with the adoption of the new Directive 2014/24/EU and Directive 2014/25/EU⁴, the scope of the competitive dialogue has been extended and the procedure for its conduct - optimized. With the adoption of the new Public Procurement Act (PPA)⁵, the relevant provisions of the Community law were transposed into the Bulgarian legal system.

2. SCOPE AND NATURE OF THE COMPETITIVE DIALOGUE. COMPARISON WITH SIMILAR PUBLIC PROCUREMENT AWARD PROCEDURES

As a general rule, the contracting authority applies the competitive dialogue where the open or the restricted procedure will not produce the desired result – satisfying its specific need, including cases of particularly complex contracts. Assessing whether or not a need is a specific one, respectively – whether or not a contract is particularly complex, is made on the basis of one or more of the following circumstances:

⁴ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

⁵ Promulgated SG Issue 13 of 16 February 2016, in force as of 15 April 2016.

- the needs of the contracting authority cannot be met without adaptation of readily available market solutions;
- the procurement contract involves design and innovation solutions;
- the procurement contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial framework or because of the risks related to them;
- 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;
- the contract refers to services included in the list under Appendix No. 2 to Art. 11, Para 3 of the PPA - List of social services and other specific services⁶;

These are actually the circumstances upon assessing of which the contracting authority faces the possibility to choose among competitive procedure with negotiation or competitive dialogue, and in certain cases innovation partnership procedure. In this regard, it can be concluded that the competitive dialogue is treated equally to the competitive procedure and the innovation partnership. The above circumstances can be applied in the same manner when choosing between these two other types of award procedure. What distinguishes the competitive dialogue and allows its specific scope to be defined is the contracting authority's established inability to describe its needs and the corresponding characteristics (the parameters of the supplies, services or works needed). In these cases, the contracting authority is unable to provide sufficiently accurate information regarding the subject of the contract, on the basis of which, the parties concerned can determine its nature and scope, to prepare their proposals and to decide whether to participate in the procedure.

The legal definition of the competitive dialogue states that it is a procedure "whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to submit their final tenders". Another specific feature allowing differentiation of the competitive dialogue from the competitive procedure with negotiation and the partnership for innovation can be derived from the above definition. As for the innovation partnership, the legislator states that it is a specific procurement procedure providing the contracting authority with the possibility of "establishing partnership with one or more partners who carry out a particular research and development activity" for the purpose of the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market". The competitive procedure with negotiation, in its turn, can be defined as a procedure in which after the selection the contracting authority conducts negotiations with invited tenderers in order to refine the terms and conditions of the contract related to adaptation, design and/or innovation, or other characteristics of the solution, which does not allow the award of the contract without negotiation being conducted. Given the above, the following differences

⁶ In the list of specific CPV codes the following services are individualized: services related to health, social and related activities; administrative, social, educational, health and cultural services; compulsory public security services, except for compulsory social security services; services related to social protection; legal services; general public services and others.

between the three procedures in terms of the specific requirements for their implementation can be outlined:

Table 2. Specifics in the conduct of a Competitive Dialogue, Competitive Procedure with Negotiation and Innovation Partnership

	Competitive Dialogue	Competitive Procedure with Negotiation	Innovation Partnership
Possibility of determining the conditions for the performance of the contract (technical specifications, legal framework, financial framework)	no	✓	✓
Pre-qualification	✓	✓	✓
Possibility of reducing the number of candidates to be invited for tender submission (Staged Pre-qualification)	✓ (the minimum number is three)	✓ (the minimum number is three)	✓ (the minimum number is three)
Conducting a dialogue in order to identify one or more proposed solutions which meet its requirements	✓	no the solution is determined by the technical specifications and the requirements of the contracting authority are in its common part known	no the contracting authority's requirements to the R&D to be carried out are known and are included in the technical specifications
Possibility of reducing the number of the solutions (Staged Pre-qualification)	✓	n/a	n/a
Submission of initial tenders and conduct of negotiations	✓	✓ the initial tenders are submitted with the aim of improving the content of the initial and subsequent tenders	✓ the initial tenders are submitted with the aim of improving the content of the initial and subsequent tenders
Possibility of reducing the number of the tenderers (Staged Negotiations)	no after completing the dialogue, the contracting authority evaluates the proposals and selects	✓	✓

Application of Competitive Dialogue Procedure in Public Procurement

	Competitive Dialogue	Competitive Procedure with Negotiation	Innovation Partnership
	the tenderer who submitted a tender with optimum quality/price ratio		
Possibility of conducting negotiations with the tendered who submitted a tender with optimum quality/price ratio before signing the contract	✓ in order to confirm the financial commitments or other terms in the tender and provide the final terms of the contract	no upon the completion of the negotiations above and the ranking of the tenderers, a contractor is selected	no upon the completion of the negotiations above and the ranking of the tenderers, a partner or partners is selected for signing innovation partnership contracts
Possibility of signing several contracts with several selected tenderers	no one contractor is selected	no one contractor is selected	yes the contracting authority may sign several partnership contracts; in the course of their implementation the number may be reduced by terminating particular contracts after each implementation stage

With a view to the above, the competitive dialogue may be defined, along with the existing legal definition, as a specialised, secondary (derivative) and multi-stage procedure for selection of a contractor. The competitive dialogue is a secondary (derivative) procedure, as it may be applied only in case the relevant legal requirements⁷ are present. The competitive dialogue is also a multi-stage procedure, as during its implementation the stage of evaluation of the tenderers' or candidates' compliance with the selection criteria finishes with an explicit decision of the contracting authority, and the next actions for selection of a contractor may be also performed in stages for the purpose of reducing the number of decisions (upon conducting the dialogue). The competitive dialogue is a specialised procedure, as its conducting is related to specific needs of the contracting authority, and in general a specialised solution is necessary for their satisfaction which cannot be achieved by the usually available products, services or works in the market.

⁷ **Primary** are procedures which may be applied by contracting authorities without limitation. For public (classic) contracting authorities, the open and restricted procedures are primary. On the other hand, **secondary (derivative)** procedures may be applied by contracting authorities only subject to particular statutory conditions. These conditions may refer to an unsuccessfully conducted procedure, to special characteristics of a public procurement contract which is being performed or has been already performed, and to specificities of the subject of the contract to be awarded or performed.

3. CONDUCTING OF THE COMPETITIVE DIALOGUE PROCEDURE

The conducting of the competitive dialogue should be regarded as an integrated process which includes the procedure for selection of a contractor as well as preparatory activities related to the procedure. In this regard, the competitive dialogue comprises the following phases:

3.1. PHASE 1: ESTABLISHMENT AND IDENTIFICATION OF THE NEED

This phase comprises the establishment and identification of the specific need of the contracting authority. The establishment and identification of the need: may be the result of intentional actions (for instance, as a result of conducted needs assessment); may result from other research; may ensue from the necessity of applying a specific national or local strategy or policy; may be established in the course of the contracting authority's usual activity. Regardless of the specific prerequisites, the result will be initiation of a process of reasoning the impossibility of conducting an open or restricted procedure.

3.2. PHASE 2: PREPARATORY PHASE - DEFINING THE INSTRUMENTS FOR SATISFYING THE IDENTIFIED NEED.

This phase is directly and inextricably bound with the establishment and identification of the need. Its main function is to determine the expedient and lawful actions for finding the relevant solution, giving them content and planning their performance. The said actions are related to:

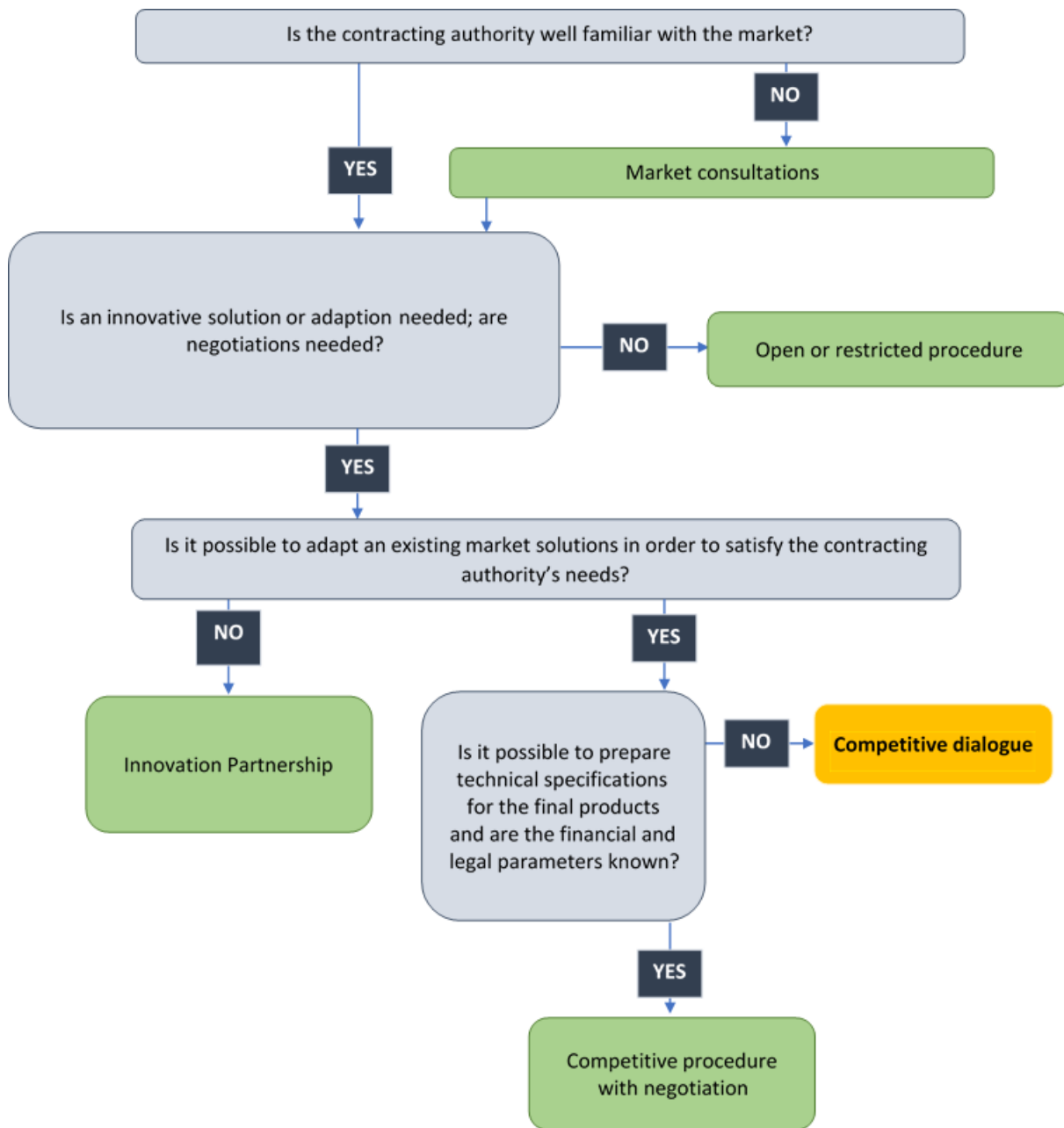
- Capacity building;

The availability of expertise is of key importance to meet the challenges related to the development of innovations and to be committed to the planning, structuring and management of the innovation partnership. Should it prove that the contracting authority does not have the adequate capacity to determine the parameters of the future solution, the involvement of external expertise will be necessary for the purposes of preparatory actions for a (possible) future procedure as well as in connection with the performance of the contract. This external expertise will be subject of other public procurement contracts and shall be engaged within a separate selection of a contractor(s) following the respective applicable legal procedure.

- Structuring and preliminary market consultations

It is of primary importance for the next steps to be taken to consider to what extent the contracting authority knows the market – both with regard to offered solutions and with respect to the potential contractors. In this regard, should it prove that the contracting authority's knowledge of the market is insufficient, then market consultations will be recommendable. The preliminary market consultations will facilitate the conclusive establishment of the impossibility of the contracting authority to describe its need and the necessary characteristics of its needs (the parameters of the necessary supplies, services or works), as well as the impossibility to provide sufficiently correct and relevant information on the basis of which the interested persons can make assessment of their participation and a possible proposal.

Figure 1. Selection of a competitive dialogue procedure



The market consultations will provide the possibility of differentiation of the competitive dialogue as the applicable procedure for performance, compared to the competitive procedure with negotiation and the innovation partnership.

The results of the market consultations shall be:

- establishment of selection criteria for candidates, including for the purposes of reducing the number of candidates, if applicable;
- establishment of evaluation indicators, within the criterion of optimum quality/price ratio, for the selection of a contractor;

- establishment of the conditions for conducting the dialogue, and where planned to be staged for the reduction of the number of solutions – determining the conditions therefor;
- specifying the characteristics of the necessary supplies, services or works as much as possible;
- determining the financial parameters, in general and as far as possible.

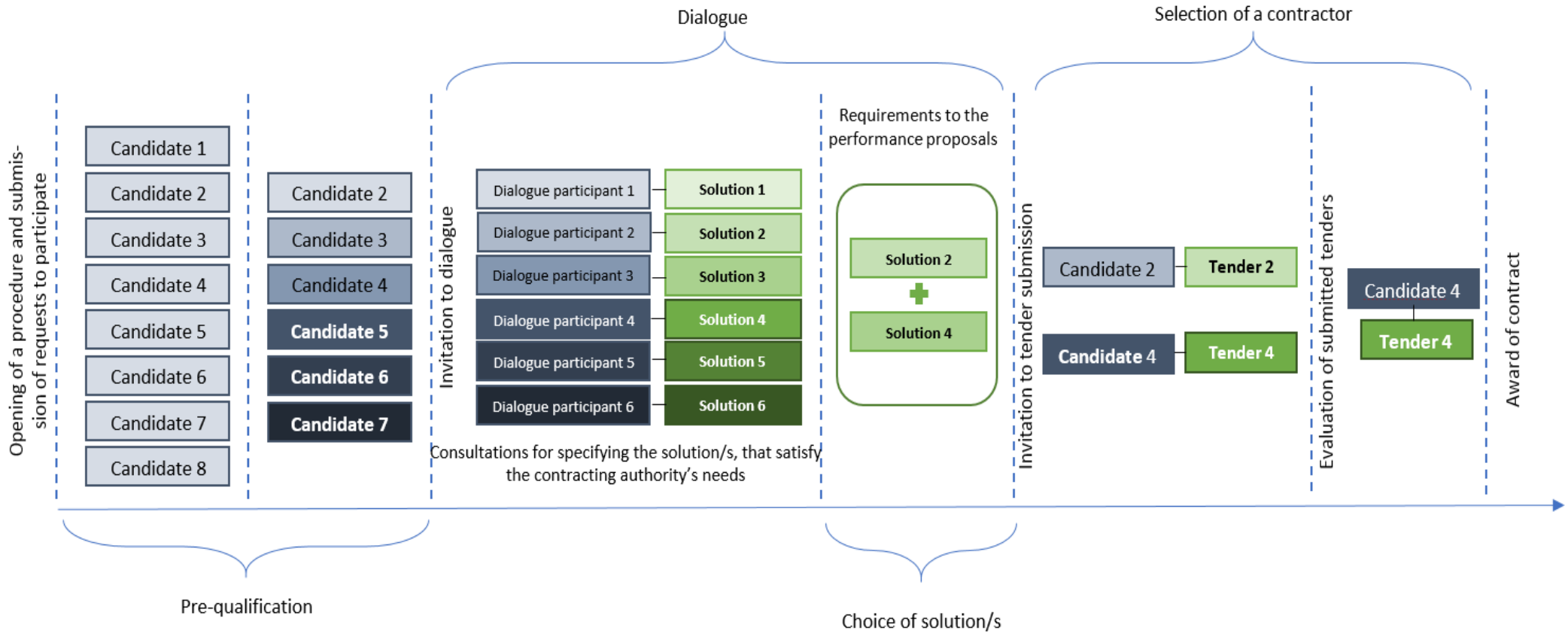
Two substantial specificities of the competitive dialogue arise here, making its application especially difficult. As mentioned above, the grounds making possible the use of this specific kind of procedure are related to the particular complexity of the public contract which does not allow the contracting authority to determine (accurately enough) the technical specifications and/or financial and/or legal framework of the public procurement. This impossibility is conditioned by the necessity of adapting the solutions available in the market; the application of an innovative solution; complexity of the legal and financial framework; related risks, etc. Thus, on the one hand, contracting authorities are obliged to determine selection criteria (to be in compliance with the subject of the public procurement in terms of content, volume and complexity, as well as with the financial parameters for its award – estimate value), and on the other hand – to apply a methodology for evaluation based on the criterion of optimum quality/price ratio, together with the indicators to be included therein and the determination of their relative weighting (or in descending order of importance). The indicators should be related to the subject of the public procurement. At the same time, the contracting authority applies the competitive dialogue namely because it is impossible to define the essential elements of the subject of the contract – technical specifications and/or financial parameters and/or legal framework. These three elements of the public procurement subject are directly related to the determination of the selection criteria as well as to the content of the indicators included in the award criterion. All this reveals the important role of market consultations whose main purpose, inter alia, will be to determine these elements to such an extent that will provide prerequisites for the conducting of a lawful procedure and the achievement of the best possible outcome.

3.3. PHASE 3: CONDUCTING THE COMPETITIVE DIALOGUE PROCEDURE

- Publication of an opening decision, a contract notice and a descriptive document; it should be noted here that for the purposes of the competitive dialogue, the contracting authorities shall not draft technical specifications – it is replaced by the descriptive document; the latter should specify the contracting authority's needs and requirements with respect to the outcome of the public procurement, the award criteria, the evaluation indicators for the tenders and an indicative schedule for conducting the public procurement;
- The term for submission of requests to participate starts running as of the date of publication in the national Public Procurement Register or OJ of the EU. The said term may not be less than 30 days;
 - interested persons can make proposals for amendments in the public procurement documentation within 10 days as of the publication of the contract notice in the Public Procurement Register announcing the opening of the public procurement procedure;

- Opportunity for a single amendment in the public procurement documentation or provision of additional information by the contracting authorities within 14 days as of the publication in the national Public Procurement Register of the contract notice announcing the opening of the public procurement procedure;
- Opportunity for requesting clarifications on the public procurement procedure within 10 days before expiry of the term for receipt of the requests to participate;
- Appointment of the evaluation commission (possible negotiations);
- Expiry of the term for submission of requests to participate and conducting of a public meeting of the evaluation commission for opening the submitted requests;
- Conduct of closed meetings of the evaluation commission for the purposes of pre-qualification and preparation of minutes specifying the results.
 - When the evaluation commission establishes any omission, incompleteness or discrepancy of the information, including irregularities or factual mistakes, or non-compliance with the requirements to the personal situation or the selection criteria, the commission specifies them in the minutes and sends it to all candidates
 - Within 5 business days as of receipt of the minutes, the candidates with established discrepancy or lack of information may present to the commission a new ESPD and/or other documents which contain the amended and/or supplemented information. The additionally provided information may also cover facts and circumstances which occurred after the deadline for receipt of tenders or requests to participate. This opportunity is also applicable for subcontractors and the third parties specified by the respective candidate. Subcontractors or third parties may be replaced upon establishing that they fail to meet the contracting authority's requirements, but only when this does not entail any change in the technical proposal;
 - After expiry of the 5 business days' term the commission commences examining the additionally provided documents with respect to the compliance of the candidates with the requirements to the personal situation and the selection criteria;
 - In case a possibility is provided for reduction of the number of candidates meeting the selection criteria and if the number of candidates having submitted requests to participate and meeting the selection criteria exceeds the announced maximum number of persons to be invited to participate in the dialogue, a selection is carried out based on the objective and non-discriminatory criteria specified in the contract notice; the minimum number of candidates shall not be less than three; in any case, the number of the invited candidates should be enough to guarantee effective competition;
 - The evaluation commission provides to the contracting authority the minutes with the results of the pre-qualification;
- The contracting authority announces by a decision the candidates to be invited to participate in the dialogue, as well as the candidates that do not meet the contracting authority's requirements and the argumentation thereof;

Figure 2. Structure of the competitive dialogue procedure



- After entry into force of the selection decision, the contracting authority sends an invitation for participation in the dialogue to the respective candidates. The invitation has to contain at least: a reference to the published contract notice; the date and address set for the commencement of the consultations within the dialogue, and the used language or languages; a reference to any documents, including certificates, to be submitted, in support of or in addition to the circumstances and information specified in ESPD; the award criteria, and where appropriate, the evaluation indicators, their relative weighting or, where appropriate, such indicators in descending order of importance (where they are not specified in the contract notice or the technical specifications);
- The evaluation commission conducts a dialogue with the participants in order to establish one or more proposed solutions meeting the requirements;
 - if staged implementation of the dialogue is envisaged to reduce the number of solutions, the evaluation commission applies the award criteria and the evaluation indicators specified in the contract notice or in the descriptive document;
 - the dialogue is conducted until the establishment of the solution or solutions capable of satisfying the contracting authority's needs; the ultimate number of solutions should guarantee effective competition (as far as there are enough solutions available to satisfy the requirements of the contracting authority or admitted candidates);
 - the contracting authority (respectively the evaluation commission) shall not disclose to the other participants solutions proposed or any other confidential information received from a participant in the dialogue without the respective participant's explicit consent for each particular case;
- The commission prepares minutes on the results of its work, which, inter alia, contains information regarding the actions in connection to the conducted dialogue; ranking of the solutions; the reasons for admission or disqualification of the proposed solutions; proposal for selection of the respective solution(s);
- After announcing the closure of the dialogue, the contracting authority notifies all participants that have reached the last stage and invites them to present final tenders based on the solution or solutions specified during the dialogue. The invitation should contain at least: a reference to the published contract notice; deadline for receipt of the tenders, the address to which the tenders must be sent and the language or languages in which the tenders must be drawn up; a reference to any documents, including certificates, to be submitted, in support of or in addition to the circumstances and information specified in ESPD; the award criteria, and where appropriate, the evaluation indicators, their relative weighting or, where appropriate, such indicators in descending order of importance (where they are not specified in the contract notice or the technical specifications); the tenders should contain all mandatory elements necessary for the implementation of the public procurement;
- After expiry of the term for submission of tenders, the received tenders are opened at a public meeting of the evaluation commission;

- The commission examines the tenders at closed meetings, checks up their compliance with the set conditions and evaluates them according to the criterion of optimum quality/price ratio and in compliance with the indicators specified in the contract notice or in the descriptive document;
- The commission may request that the tenders be explained, clarified or improved. Any clarifications, explanations and improvements, as well as provided additional information shall not change the main characteristics of the tender or the public procurement, including the needs and requirements specified in the contract notice or in the descriptive document if this could lead to distortion of competition or to discrimination;
- After finishing its work, the commission prepares minutes on the results, which, inter alia, contains information regarding the actions in connection to the opening, examination and evaluation of each tender; participants' ranking; proposal for disqualification of participants; reasons for the admission or disqualification of each participant; proposal for conclusion of a contract with the first-ranked participant or proposal for termination of the procedure on the relevant legal grounds;

The contracting authority may conduct negotiations with the participant that has submitted a tender with the optimum quality/price ratio in order to confirm the financial obligations or other conditions in the tender and to make final stipulations of the tender conditions. The using of this opportunity shall not entail substantive changes in the main parameters of the tender or the public procurement, including in the needs and requirements specified in the contract notice or in the descriptive document, or lead to violation of competition or to discrimination;

- The contracting authority issues a decision for award of a contractor, and after its entry into force the parties agree on the date and manner of concluding the contract.

4. CONDUCTING A DIALOGUE

The stage of the procedure within which a dialogue takes place between the contracting authority and the candidates that have successfully passed the pre-qualification can be described as the most significant difference that distinguishes the competitive dialogue from other multistage procedures. In fact, the legal requirements to conduct a dialogue are few and are related to:

- The presence of dialogue freedom between the contracting authority and the participants to discuss all issues related to the procurement in order to determine the parameters that most closely meet the identified needs;
- The requirement to ensure equal treatment of the participants by providing information in a manner that does not give an advantage to some participants over others;
- Restriction to spread proposals or other confidential information obtained from the participants without their explicit consent for each specific case;

- Possibility to structure the dialogue in phases to reduce the number of solutions under consideration⁸ when applying the award criterion and the indicators selected for evaluation.

Apart from the above explicit requirements of the law (and also in compliance with the fundamental principles of public procurement), the contracting authorities are free to structure the dialogue in a way that best suits the task set before them - to determine the parameters of a future solution which satisfies to a greatest extent the identified needs. In this sense, the following description is intended to illustrate two fundamental elements of the process of dialogue based on several phases without being exhaustive.

Prior to the actual start of a dialogue and the consultations with individual participants, the contracting authority sends an invitation for participation in the dialogue, with the minimum contents level as specified above. In this sense, it is necessary to be defined (as part of the indicative schedule for the procedure): timeframes; the number of stages; and the methods of evaluation (i.e. what must be submitted for each phase), representing the dialogue components; to provide preliminary information on the meetings (consultations) to be held and the main issues that will be discussed (consultations are held with each participant individually - arg. from the confidentiality requirement). It is possible with the initiation of the dialogue, the contracting authority to invite participants to submit their initial solutions (initial proposals) incl. the requirement to indicate an estimated value for their implementation without considering it as a representation of a specific and binding price proposal. The requirements of the contracting authority for the initial proposals should be based on the award criteria and the included assessment parameters, because the purpose of the initial proposals is to lay the foundation for the evaluation and scoring of the proposed solutions and eliminate some of them (those who are rated below certain number of assessment points, those who receive the low of assessment points – e.g. the two most inferior assessment proposals etc.). It can be provided:

- to submit the initial proposals once before the consultations are made, as part of the first phase of the dialogue, and the second time - after their completion; or
- initial proposals to be submitted after the consultations have been conducted.

For conducting the subsequent phases the contracting authority may require the remaining participants in the dialogue to submit their detailed solutions (detailed proposals). The number of solutions and the content requirements of the detailed solutions shall be determined in accordance with the number and purposes of the dialogue phases, as pre-defined by the contracting authority. These detailed proposals may also serve as a basis for

⁸ In this connection, it should be noted that the law (Art. 77, Para 8 PPA) refers to reducing the proposed solutions, but not to reduce the number of participants in the dialogue – i.e. it is not specifically required to terminate the participation of the participant, who made the proposal, along with the rejection of the proposal itself. In this sense, it can be concluded that there is a possibility for all participants in the dialogue to submit tenders, although their specific solutions to have been rejected. However, when describing the further development of the procedure (Art. 77, Para 10), the legislator states that after announcing the dialogue as completed, the contracting authority notifies all participants **remaining in the final stage** (of the dialogue), and invites them to present final tenders prepared on the basis of the solution or solutions specified during the dialogue. In this sense, the termination of the participation of an economic operator whose solution has been rejected, is presumed. Currently, no unambiguous answer could be given to this question, incl. on the basis of the content of the directives of 2014, since in this part, they have been transposed without significant amendments affecting the meaning of those provisions.

disqualification of solutions that have not demonstrated sufficient degree of compliance with the requirements of the contracting authority by applying the assessment methodology.

Prior to finalizing the dialogue, within its last phase, the contracting authority may require the participants to present their final solutions (final proposals). The finalization of the proposals made so far shall be aimed through these final proposals, in order to achieve full compliance with the results of the dialogue. The successful completion of the dialogue will be achieved when there is a high degree of certainty that all questions and issues subject to consultation were fully addressed, clarified and finalized. Only then will the contracting authority declare the dialogue closed and shall invite tenders to submit tenderers.

While conducting the dialogue a special attention should be paid to the following:

- Schedule - the preparation of a detailed schedule including the themes for discussion for the individual consultations can be considered good practice;
- Communication – a special communication order with participants must ensure that every one of them will receive the same information at the same time as the others.
- Human resources and time - the dialogue is a time-consuming process involving substantial resources, both for the contracting authority, and the participants. This fact should be taken into account during the planning phase for its implementation.
- Completion of the dialogue - reaching an agreement on all essential elements of the implementation of the future contract is necessary for finalizing the dialogue. These elements must be included in the final tenders of the participants. This is necessary since after the completion of the dialogue, the opportunities for further discussions are highly restricted. Indeed, the contracting authority may negotiate with the participant who submitted a tender with an optimum quality/ price ratio, but in the context of these negotiations no substantive changes to the basic parameters of the tender or the contract are allowed, including the defined needs and requirements in the notice or the descriptive document. Negotiations can only be used to confirm financial commitments or other terms in the tender and provide the final terms of the contract outside the structured basic parameters.

5. BENEFITS AND RISKS IN CONDUCTING THE COMPETITIVE DIALOGUE

The conduct of the competitive dialogue is related to the implementation of a complex and lengthy process that requires the commitment of significant resources in every respect, both from the contracting authority and from the candidates and the tenderers in the process. The essential benefits it provides are related to the flexible mechanism by which the contracting authorities are allowed to set specific parameters to the specific needs and structure the prerequisites, terms and conditions accordingly, in close cooperation with the private sector. Meanwhile, the strong aspects of the competitive dialogue may become its weakness if the awarding process is not structured correctly and/or is not correctly implemented. In this sense, the risks that are associated with the implementation of the procedure can be divided into two main groups as follows: risks arising from preparatory activities; and risks associated with the conduct of the procedure.

Table 3. Risks arising from preparatory activities

Risk
Incorrectly identifying the needs of the contracting authority;
Incorrect determination of the competitive dialogue as applicable procedure – lack of required prerequisites;
Improper planning of the procedure and the conditions for conducting the dialogue;
Incorrectly defined criteria for selecting candidates;
Incorrectly identifying the assessment indicators within the criteria of optimum quality/price ratio in order to select a contractor;
Measures for mitigating the negative consequences
<p>In general, the implementation of these risks can be attributed to improper assessment of market opportunities and/or available solutions; this can refer to:</p> <ul style="list-style-type: none"> - the needs of the contracting authority can be met actually without adapting commercially available solutions; and/or the procurement does not include a solution/solutions related to innovation; - there are no special circumstances relating to the nature, complexity, or the legal and financial framework, or the associated risks to justify the dialogue; - the technical specifications may be established by the contracting authority with reasonable accuracy. <p>The implementation of each of these risks may have the effect of a snowball process that may compromise the overall process of selection of a contractor.</p> <p>The contracting authority must involve resources to eliminate or mitigate the negative consequences of such listed risks that are associated with:</p> <ul style="list-style-type: none"> - providing and engaging the necessary expertise and capacity building; - exploring alternative possibilities and approaches; - careful and comprehensive study of the market by conducting structured market consultations; - involvement of potentially interested persons and contractors from the outset and ensuring a maximum degree of publicity and transparency; etc.

Table 4. Risks associated with the conduct of the procedure

Risk
Lack of competition during the procedure, especially at the stages following the pre-qualification stage – lack of efficient competition;
Violation of the rules for disclosure of information to candidates or participants within the dialogue;
Change of the conditions and requirements in the course of the procedure (intentionally or unintentionally);
Applying an approach typical for the more commonly used competitive procedure with negotiation (negotiation instead of a dialogue);
Non-applying the indicators of criteria for selection of a contractor;
Substantial alteration of the basic parameters of the tender or procurement when negotiating with participant whose proposal has an optimum quality/price ratio.
Measures for mitigating negative consequences
<p>The implementation of each of the above risks may have consequences in two directions - 1) unlawful procurement procedure, which in turn increases the risk of its successful appeal; and / or 2) inexpedience of the established and selected solution; and/or 3) selection of a contractor who may not perform the negotiated solution (quality, functionality, parameters, deadlines deviations, etc.).</p> <p>The elimination of these risks, respectively mitigating their negative effects can be achieved through: full complying with the legal requirements; complying with the requirements of the contracting authority to conduct the dialogue; proper reference of the proposed solutions by the participants to the needs of the contracting authority; involvement of persons with appropriate qualifications and experience in the commission; avoid procurement awarding at any price (in some cases the most appropriate and lawful solution would be terminating the procurement); etc.</p>

6. APPLICABILITY OF THE COMPETITIVE DIALOGUE WITHIN EU-FUNDED PROJECTS AND PROGRAMS

The review of the national operational programs financed by the Structural and Investment EU Funds shows that the implementation of project activities through competitive dialogue is generally admissible. However, given the specific requirements for the preparation of project proposals which would grant funding to contracting authorities for activity implementation, the scope of the competitive dialogue is considerably narrowed, to a degree next to complete practical inapplicability⁹. This is because operational programs are

⁹ As evident from the information in the PPR, no competitive dialogue procedure has been announced in Bulgaria with the aim of selecting a contractor under a contract, financed by any of the operational programs.

generally result-oriented, which means the existence of clearly defined parameters of performance, both in terms of content of the project, and financial parameters. In this sense the setting of targets, defining the actions to achieve them and receiving a financial aid are related to: 1) a high degree of detail specification of the technical requirements of the contracting authority towards the results of the project at the stage of submission of project proposal; 2) a clear legal framework and 3) determining the financial resources for the implementation of the activities. In other words - unknown project parameters must be minimized, thus excluding the prerequisites for competitive dialogue. In addition, it should be said that the risks of failure to conduct competitive dialogue are substantially greater than the risks associated with conducting any of the traditional procurement procedures, and as a result it is avoided by contracting authorities (the project beneficiaries), with a view to possible loss of financial aid.

The competitive dialogue would be a legitimate means to achieve the objectives of an OP funded project as far as pursuant to the requirements for preparation of project proposals the inability of the contracting authority to describe its needs and respective characteristics of its needs (the parameters of the necessary supplies, services or works, as part of the technical specification), as well as to provide sufficiently accurate and relevant information, would not constitute a prerequisite for inadmissibility of the project proposal.

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