



Government  
Commercial  
Function

# DIALOGUE AND NEGOTIATION

Outsourcing Guidance Note



# Dialogue and Negotiation

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Sub-optimal allocation of risk can occur for a variety of reasons - policy or commercial decisions, lack of transparency, inadequate or incomplete understanding of ownership of risk at the time of starting procurement. These factors can usually be mitigated through the structured use of risk analysis techniques, and through going to market using a procurement route that allows for genuine two-way conversation between the Authority and bidders.

Cabinet Office policy on the choice of procurement procedure can be found [here](#). This policy includes a procurement decision tree for procurements subject to the Public Contract Regulations 2015<sup>1</sup>.

The Competitive Dialogue (CD) and Competitive Procedure with Negotiation (CPN) routes allow for a reduction in the number of suppliers to be invited to tender, the ability to dialogue and negotiate complex issues and areas of risk. CD also provides a basis for post tender clarification and optimisation of the preferred bid. They are the recommended routes for complex outsourcing procurements.

CPN limits the scope of dialogue, with the Contracting Authority setting minimum requirements that all bidders must commit to delivering or complying with. If using this route, the Authority must ensure that it leaves open for negotiation areas that may involve risk transfer where the Authority is not sufficiently certain of either (i) its intent to transfer the risk to the supplier, or (ii) the impact of transfer of the risk.

In the case of any complex outsource departments should seek assurance that the recommended procurement procedure, including pre market engagement, provides scope for any necessary dialogue or negotiation. The business case should justify the chosen procedure, including any decision to use a Framework Agreement to meet Complex Outsourcing requirements.

Through the remainder of this section we use the term “dialogue” to mean the two-way conversation between the Authority and bidders; it does not imply use of the CD procedure. The following is a list of indicators which might trigger the need for a procurement procedure involving dialogue/negotiation:

- No solution available off-the-shelf.
- Readily available solutions will need adapting to meet requirements.

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<sup>1</sup> The procurement of defence and sensitive security equipment and services by Contracting Authorities in the UK is subject to the EU Defence and Security Public Contracts Regulations

- The solution involves a refreshed or innovative approach to reflect changing conditions and/ or methods of delivery.
- The legal and/or financial framework is complex.
- The delivery of the specified outcomes is reliant on outside factors. It is dependant on the types of solution deployed e.g. due to interoperability requirements.
- Solutions (financial or non-financial) need stress testing to ensure long term viability.
- Milestones and KPIs are complex or have numerous dependencies on all parties.
- Correct risk allocation is critical to both value for money and long term viability.
- A high level of employee transfer is involved.
- Business continuity risk is high.
- The risk that data inaccuracy has a high impact on costs.
- High level of Due Diligence required.
- There is an opportunity to drive cost out without impacting quality.

Deploying a robust dialogue and/or negotiation strategy is key to the successful execution of any complex outsourcing strategy. Correct use of dialogue will help avoid unduly high cost submissions or challenges on cost once contracts are awarded. It can help bidders make more effective use of resources, and better plan for implementation / transition / transformation.

It is also the case that better outcomes are achieved if there is genuine, constructive engagement, dialogue and negotiation with the market from the outset. Where possible pre-procurement supplier engagement should be used as a mechanism to discuss areas of complexity and risk. It should also be used to identify any areas which will need dialogue and/or negotiation during the procurement procedure and, thus, influence the choice of procurement procedure.

A successful dialogue/negotiation strategy will:

- Be value for money<sup>2</sup> and business driven;
- Enable the early identification of areas of complexity and risk that would benefit from dialogue or negotiation;
- Highlight areas of enhanced performance that will positively impact on quality, safety, time and cost benefits or social value.
- Restrict and minimise dialogue/negotiation to areas that will benefit from this process;
- Identify a strong chairperson to lead dialogue/negotiations, supported by a team with defined roles, appropriate skills and experience, together with the authority to negotiate;
- Be based on pre-agreed negotiation positions; and
- Have strong programme and project management discipline to manage timetable, define roles & responsibilities, set boundaries of authority to negotiate and identify the right skills and experience needed for subject matter experts.

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<sup>2</sup> [Annex 4.6 of HM Treasury's Managing Public Money](#)

## What does good dialogue look like?

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The Contracting Authority should set the principles and boundaries for dialogue at the outset of procurement. This should be informed by a genuine, constructive engagement with the market about where these boundaries should be set. For instance, the type of payment mechanism or the principle that charges can / cannot be indexed (and if indexation is to apply, what index or indices will be used) should be determined by the commercial strategy and set by the Authority. Dialogue can then be used to explore more detailed implementation aspects.

The Contracting Authority should clearly define the topics that are allowable in dialogue, and any boundaries or constraints around those topics. As a guiding principle, the Authority should start from a narrow point of definition and expand as it sees fit (as opposed to leaving open a range of items, loosely defined). This should be done through genuine engagement with the market about which areas of any proposal should be open for dialogue.

In the context of the allocation of risk, the following topic areas may be suitable for dialogue:

**Within the pricing mechanism:** recognising that volume risk may not be transferable, and indeed may not be manageable by either party, it is reasonable to leave open for dialogue topics such as price points; volume bands and thresholds; cap and collar levels; which indices are used for indexation.

**Within the performance management regime:** target and threshold levels (though for KPIs, the Authority should have sufficient understanding to set key target performance levels); simplification of definition; exclusions; length of bedding in period (if offered) where some / all KPIs may not apply.

**Within contract terms:** with appropriate use of the model services agreement (which have been regularly reviewed and updated with input from industry), Contracting Authorities can set out the vast majority of contract terms as non-negotiable during the procurement process, as leaving open contract terms for negotiation inevitably extends the procurement process, slows down award and delays the start of transition or mobilisation. That said, some areas of the Model Services Contract require tailoring to reflect priorities and the capability and appetite of particular markets - this should be completed with the aid of legal advice and support. In relation to allocation of risk, the Contracting Authority may wish to leave open the ability to explore appropriate levels of cap on certain liabilities, and insurance coverage. The Model Services Agreement, and its associated guidance, can be found here: [Model Services Contract](#).

## Use of risk pots, allowable assumptions and risk registers

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Government should set clear terms in the procurement documentation for the submission by bidders of the risks and allowable assumptions bidders propose to be Contracting Authority risks. This should also include the process for discussing and (if relevant) agreeing how these will be evaluated at final bid stage. One way would be to allow bidders to propose specific risks in a **risk pot** that will be discussed during dialogue and then evaluated. Any risks included by the bidder in the risk pot should be quantified; and the Contracting Authority should retain the right to reject inclusion of a risk in the risk pot if it feels it is sufficiently within the bidder's control to manage. The funds to pay suppliers against items in the risk pot should a risk materialise should then be budgeted for and held by the Contracting Authority.

**Dialogue or negotiation:** The aim of both the Contracting Authority and the bidder should be to reduce as much uncertainty as possible before final bid submission. This typically would mean focusing on identified, quantified risks and assumptions and seeking to remove these from the risk pot by way of clarification or incorporation in bidder's price.

**Regarding evaluation:** The Contracting Authority will need to determine whether it can reasonably weight quantified risks in scoring, or whether the financial risk should simply be added to bid price. Whatever rule the Authority is going to use should be made clear to all bidders at the start of the procurement.

**Work force matters are a common point of discussion in any outsourcing that involves potential transfer of staff:** (either from the Contracting Authority to the supplier, or between third parties if transitioning from one supplier to another), particularly pension provisions. Bidders should be encouraged to make a realistic assessment of potential TUPE and pensions costs and include these in their risk pot. Where risks are common between suppliers, it is helpful for Contracting Authority to compare cost estimates and probe them in dialogue, but of course costs may vary due to matters such as the risk appetite and particular advantages that a bidder may have.