COMPETITIVE DIALOGUE ABYSS OR OPPORTUNITY?

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ABSTRACT. The objective of the competitive dialogue is to provide for a flexible procedure, which safeguards an open competition while taking the need to discuss all aspects of the contract into account. In this article authors discus the room for flexibility of the competitive dialogue in relation to that of the negotiated procedure, supplemented by best practices used in the Dutch tenders using the competitive dialogue.

INTRODUCTION

With the introduction of the Public Procurement Directive 2004/18/EC[i] (hereafter: Procurement Directive) the competitive dialogue has become part of the procurement tools available to the contracting authority. That is as far as member states have opted for implementation of said procedure. The Dutch government has with the introduction of the Decree for Tender regulations for Award of Contracts by Contracting Authorities[ii] chosen for a virtually one on one implementation of the Procurement Directive. The competitive dialogue has therefore become one of the procurement procedures available.

Before the introduction of the competitive dialogue as procurement tool the negotiated procedure with prior notification (hereafter: negotiated procedure) was used in order to tender PFI/PPP-contracts. In

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recent years after its introduction the Dutch government has put several projects on the market by means of a competitive dialogue.

In this article authors will elaborate on the possibilities of the competitive dialogue in relation to the negotiated procedure and the practices derived from the use of the competitive dialogue. In doing so the problems, possibilities and advantages of the competitive dialogue will pass in review. In all the negotiated procedure and the competitive dialogue do not seem to be hugely different regarding the room for flexibility. There is however much uncertainty about the precise interpretation of the new procurement rules.

Authors will conclude with an elaboration on practices derived form the competitive dialogue to end with their conclusions on the defining question.

DEFINING QUESTION

After several experiences of the Dutch contracting authorities with the competitive dialogue, the question arises whether the competitive dialogue is as flexible as it should be? Does the competitive dialogue live up to its expectations as a flexible procurement tool? Do the possibilities concerning the modifications of award criteria, output specifications and the fine-tuning of the final offers as stipulated by the rules and regulations leave enough room for a flexible and effective procurement procedure?

THE FLEXIBILITY OF THE COMPETITIVE DIALOGUE

Introduction

The competitive dialogue was introduced in order to create more flexibility. According to Recital 31 of the Procurement Directive the objective of the competitive dialogue is to provide for a flexible procedure which safeguards an open competition while taking the need of the contracting authorities into account to discuss all aspects of the contract prior to the final offer of participants.

In the Netherlands PPP/PFI-projects were previously tendered by means of the negotiated procedure. Nowadays several PPP/PFI-projects of both the Dutch Ministry of Transport, Public Works and Water

Management (hereinafter: Ministry of Transport) and the Ministry of Housing, Spatial Planning and Environment (hereinafter: Ministry of HSPE) have been tendered with the use of the competitive dialogue[iii]. The Netherlands seems to opt for the competitive dialogue in favour of the negotiated procedure. This preference for the competitive dialogue may be influenced by the following considerations. First the grounds for use of the competitive dialogue are more widely formulated than those of the negotiated procedure. Second implementation of the competitive dialogue may lead the Court to restrict use of the negotiated procedure even further (also Arrowsmith 2005, page 175-176). As case law is lacking at this moment it is not clear which view the Court will be taking. Third the contracting authority carries the burden of proof of rightfully applying the grounds for use of either procurement procedure.

To elaborate upon the flexibility offered by the competitive dialogue authors focus in the following paragraphs on the in practice vital subjects of award criteria, output specifications and tender conditions, fine-tuning final offers and the remaining need for alternative bids from participants.

Award Criteria

According to article 29 (1) and recital 31 of the Procurement Directive the competitive dialogue can only be used in very complex projects. Projects are deemed to be very complex when contracting authorities find it objectively impossible to either define the means of satisfying their needs or to assess what the market can offer in the way of technical solutions and/or financial/legal solutions.

The tender procedure of a competitive dialogue usually consumes a substantial amount of time. During this period changes may appear in both the requirements of the contracting authority and the possible solutions offered by participants. Considering the impossibility of the contracting authority to either define the means of satisfying its needs or to assess what the market can offer in the way of solutions and the extended length of the tender procedure, contracting authorities may not find it easy to determine the award criteria and weighting factors in advance. An important question is therefore “how and at which point of the tender procedure do contracting authorities have to disclose the exact system of evaluating the offers?”

It is consequent case-law of the Court in open- or restricted procedures that all criteria taken into account in order to identify the

economically most advantageous tender should be, together with the relative weight of these criteria, publicly known by potential participants "when preparing their tenders"[iv]. With regard to weighting factors the Court has stipulated in its ruling in the case ATI EAC of November 24th 2005[v] that Directive 92/50/EC (Service Directive) does not oppose the possibility of identifying the weighting factors in a later stage of the tender procedure. According to the Courts ruling three very specific conditions apply in this case, namely that the decision to do so:

- does not alter the criteria for the award of the contract set out in the contract documents;
- does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and
- was not adopted on the basis of matters likely to give rise to discrimination against one of the participants.

The weighting factors do, however, have to be determined "before the opening of the tenders". The Court has reconfirmed this course of reasoning in its ruling in the case Lianakis of January 24th 2008[vi].

It is still unclear, however, whether the same strict conditions apply in a case concerning the competitive dialogue.

According to article 29(1) of the Procurement Directive the contract may only be awarded to the economically most advantageous tender. Article 29(7) (first sentence) stipulates that the award criteria and their relative weight should be published in the contract notice or in the descriptive document in accordance with article 53(2). The contracting authority may choose to indicate the weighting factors by means of margins with appropriate minimum and maximum levels. An exception is made when "on verifiable grounds" it is not possible to publish the weighting factors in advance. If this is the case mentioning the criteria in order of rank may suffice.

According to the European Commission in its "Explanatory Note" dated October 5th 2005 (Commission 2005 II) it is self-evident to suffice mentioning the award criteria in order of rank when using the competitive dialogue. The European Commission on the other hand however emphasizes (Commission 2005 II, page 6) that the award criteria may not be modified during the award phase of the procedure. That is, at the latest after the transmission of the invitation to participate

in the dialogue. According to the European Commission allowing said modifications may lead to a substantial risk that the procedure will be "steered" for the benefit of one of the participants of the dialogue. The possibility of steering is contrary to the principle of equal treatment.

However, the Commission does not explain at what point during the tender procedure the definite weighting should be determined in cases the weighting factors were only mentioned in order of rank. The possibility of steering also exists when determining the definite weighting. Therefore, it is hard to see the difference between modifying the award criteria and the determination of definite weighting factors.

The determination of the final award criteria and its weighting factors assumes a sound understanding of the possible solutions. This understanding might not yet be present at the start of the dialogue. In a few competitive dialogues in the Netherlands a (further) selection of possible solutions with which the contracting authority wished to continue the dialogue was made after the start of the dialogue phase. This selection took place on the basis of a first (global) vision of the project. Said vision had to be elaborated into a final offer in a later stage. Only after evaluation of this first global vision of the project the contracting authority could form a better picture on the exact award criteria and its weighting factors to be used for the assessment of the final tenders.

The same applies for the possibility to express the weighting factors in margins with appropriate minimum and maximum levels in the contract notice or in the descriptive document. Relatively few contracting authorities exercise this opportunity. By notifying margins the contracting authority however also ensures itself of a certain level of flexibility to determine the final weighting factors in a later stage of the tender procedure. For instance on the criterion "price" the contracting authority could notify that the weighting factor of this criterion will be taken into account for 40 to 60 percent and the criterion relating to the "sustainability of the solution" for 30 to 50 percent.

These regulations are not consequent or clear. The Procurement Directive does not stipulate at which point of the tender procedure the final weighting factors have to be published. Furthermore, these regulations do not exclude the possibility to change the order of ranking of the award criteria by determining the weighting factors or sub-criteria. In the abovementioned situation, the contracting authority can weigh the

criteria “price” at 40 percent and “sustainability” at 50 percent, contrary to all expectations of the participants.

Moreover, the Procurement Directive does not regulate the ex-post determining of the weighting factors or sub-criteria contrary to the specific conditions stated in the Court’s case law. However it seems that imperfections of this kind as such do not necessarily lead to an automatic obligation to entirely re-tender the contract[vii]. Nor does it seem to be desirable to allocate equal weighting factors to the award criteria (see also Arrowsmith 2005, page 526-527).

According to authors modification or fine-tuning of the award criteria should be allowed as long as a commonly competent and reasonably informed participant of the dialogue phase – within reason – could or would have comprehended that the modified criterion would be of importance for the evaluation of the final tender. In our view it appears furthermore of importance that participants should have sufficient opportunity to adjust their final tenders to the (adapted) award criteria and weighting factors. Finally (and not without importance) fine-tuning of the (originally) notified award criteria may not have any impact on the selection of solutions and/or parties participating in the (later stages of the) dialogue

With regard to the foregoing, the following conclusions can be drawn. The regulations in the Procurement Directive do not stipulate at what stadium of the tender procedure the weighting factors for the evaluation of the (final) tenders should be published at the latest. Keeping in mind the flexibility of the competitive dialogue, authors conclude that the Procurement Directive to a certain extent should allow contracting parties to specify both weighting factors and – if necessary – award criteria after the transmission of the invitation to participate in the dialogue.

Output Specifications and Tender Conditions

During the dialogue the contracting authority may feel the need to modify the output specifications and/or descriptive documents. For instance modifications by adding elements to a PPP/PFI-contract or re-allocating project related risks. The need to modify can arise from budgetary consequences or as a result of progressive understanding. It can also arise as a result of input from one or more participants during the dialogue.

The question whether or not modifications of output specifications during the tender procedure are permitted is subject to debate. In view of this question the ruling of the Court in case C-496/99 (Succhi di Frutta) is relevant. In said case the Court stated (rule 115) that the Commission, as a contracting authority, should strictly comply with all the conditions and detailed rules of the award procedure which itself laid down "not only in the tender procedure per se, which is concerned with assessing the tenders submitted and selecting the successful tender, but also, more generally, up to the end of the stage during which the relevant contract is performed."

Does that leave no flexibility al all to contracting authorities to apply scope changes during the tender procedure? In the authors view the Court left a little room for flexibility. In rule 116 the Court states that it's not allowed to amend one of the *essential* conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for participants to submit a *substantially* different tender. Consequently, not essential changes of the conditions are allowed, as long as it is not possible to submit a substantially different tender. Furthermore, the Court emphasized that the case concerned a tender by means of the open procedure and that the specific characteristics of the procedure may be taken into account (rule 108 and 112).

Taking the flexible character of the competitive dialogue into consideration authors are of the opinion that it should be permitted to modify the output specifications of the contract during the dialogue phase. In order to safeguard the principle of equal treatment this could include that, when a contracting authority wishes to apply material changes which may have an effect on the group of potential participants of the tender procedure, it has to revert to a stage of the procedure in which either the effect on the (initial) selection of participants or decisions pertaining the exclusion of solutions are being reversed. Changes of another nature may be carried through without reversal of the procedure.

Furthermore contracting authorities should inform all participants of the dialogue in a timely fashion of the changes concerned so that they may make allowance for these changes in their final tenders. The view on what is to be considered "a timely fashion" depends on the relevant circumstances.

According to Arrowsmith (Arrowsmith 2005, page 659-660) a certain room for modifications is consistent with the more flexible character of the competitive dialogue. She also points out the complexity of the projects subject to this procedure and the more extensive period of the tender as a result of which (self-evidently) the possibility exists that the need for modification increases. Arrowsmith does not even exclude the possibility of carrying through modifications in the output specifications after submission of the final tenders, provided that all participants to the dialogue get the opportunity to submit a new (final) tender.

While issuing modified output specifications contracting authorities should furthermore take into account not to divulge solutions presented confidentially by one or more of the participants[viii]. It should be recommended therefore to formulate the (modified) output specifications as functional as possible.

Fine-Tuning Final Offers

Several authors have cudgelled their brains about the proper answer to the question what room for adjustment article 29(6) of the Procurement Directive allows to modify final tenders in a competitive dialogue.

According to the travaux préparatoires of the Procurement Directive (see amendment number 44) the concept of fine-tuning meant to allow certain changes beyond simply specifying. The explanatory note on the amendment states: “There may be a need for some final adjustments to tenders in very complex procurements that would not be covered by the expressions “clarification” or “specification”. The term “fine-tuning” is meant to cover that final adjustment process, but in a context where fundamental changes cannot be made.”

The Commission however opposed the amendment. More specifically it opposed the addition of the word “fundamental”. The Commission states: “Amendment 44 changes the second paragraph of Article 29(6) in order to allow adjustments to final tenders after the dialogue phase has been concluded, provided the basic features of the tender are not “fundamentally” changed. Such changes to the proposed solutions may be made during the dialogue phase, but not at the final offer stage, as they would be likely to give an advantage to certain participants rather than others by reopening the dialogue phase for some.

This amendment is thus unacceptable, especially since it weakens the safeguard provided in the common position, which is that the basic features of tenders may not be changed." The opposition of the Commission has apparently found a hearing with the European Parliament and Council, as the term " fundamental" has not reached the final version of the Procurement Directive.

The Commission furthermore holds on to a reserved interpretation of article 29(6) of the Procurement Directive. In its Explanatory Note on the Competitive Dialogue (Commission 2005 II) the Commission states: "[…] it may therefore be considered that the room for manoeuvre that contracting authorities have after the submission of a final tender is fairly limited."

A broader view is held by amongst others Arrowsmith (Arrowsmith 2005, paragraph 10.43/10.44, page 654-656 and paragraph 10.46/10.47, page 657-658). With an appeal to the complexity of the contracts tendered with a competitive dialogue she asserts that there is a need for more flexibility in order to create more room for amendments than applicable with the open- and restricted procedure. When faced with an extremely complex tender, authors are of the opinion that it may not be sufficient to limit the possibility of fine-tuning to the restricted view of the Commission. If for instance bidders are suspected to have misunderstood certain aspects of the output specifications or other elements of the descriptive document it should be possible to obtain more detailed information even if this leads to – within the framework of the principle of equal treatment – adjustments of the final tender.

The room for flexibility however in all probability will not reach as far as the view the Commission held in the case of the London Underground[ix]. In the case of the London Underground the Commission accepted the possibility of continuation of the negotiations with the preferred bidder after submission of tenders. The procurement procedure followed was the negotiated procedure. The Commission expressly stated that due to its exceptional character the negotiated procedure is flexible by its nature. The Commission also emphasised the very complex and innovative nature of the contract. With reference to the overlapping grounds for use of and type of contracts appropriate for both the negotiated procedure and the competitive dialogue, authors fail to see the need for a more restricted view towards the possibilities of fine-tuning final offers when applying the competitive dialogue.

Lacking guiding jurisprudence of the Court on the subject of what is or is not permitted with "fine-tuning" final tenders in a competitive dialogue there will be much uncertainty for the time being. Until that time contracting authorities may want to follow the more reserved interpretation of the Commission. On the other hand one should not lose sight of the possibility to apply minor adjustments of final tenders due to the concept of "fine-tuning". The counter-argument that there already has been an entire dialogue phase prior to the tenders in which (preliminary) tenders can be fully synchronized to the requirements of the output specifications fails to observe the economical facts. Considering the available time in the tender procedure and the need to limit transaction costs it is unthinkable that (preliminary) tenders are fully elaborated and discussed during the dialogue phase. On top of that participants will be naturally inclined to apply further optimisations in their solutions. Not infrequently the contracting authority may also want to partly refine its output specifications on the basis of progressive understanding.

With regard to all of the above authors are of the opinion that there will be a need for a certain amount of amendments of the tenders after closing the dialogue phase and the subsequent (invitation to) submission of final tenders. There is also a pressing and legitimate need for a not to restricted view on the concept of fine-tuning, at least not as restricted as the view of the Commission.

Alternative Bids from Participants

Article 24(1) of the Procurement Directive states that when the award criterion economically most advantageous tender is being used the contracting authorities can allow participants to propose "variants". When variants are allowed the procurement documents have to mention the minimum requirements the variants have to meet as well as the manner in which they have to be submitted[x]. The reason for allowing variants is the optimal use of the (technical) knowledge and creativity of participants. On the other hand the principle of equal treatment may be violated when variants deviate from the contract specifications to an extent in which incomparable performances have to be assessed on the basis of the same award criteria. As a rule these criteria will be drafted with the contract specifications in mind. As a result they may not (always) lead to proportional higher scores when confronted with certain – in retrospect – clear economic benefits offered by the submitted

variants. When drafting award criteria it is therefore important to take as many conceivable alternative solutions as possible into account.

Question is if there still is need for the possibility of submitting variants when using the competitive dialogue. In a competitive dialogue functional specifications will be used to draft the contract documents. Market parties will thus be able to offer more than one solution within the stipulated conditions. In consequence there may be no need for variants in the proper sense.

On the subject of possible variants submitted in a competitive dialogue the Commission states in its Explanatory Note (Commission 2005 II):

"Under point 9 of the notice, contracting authorities must indicate whether variants are admitted or not. Variants are useful only as "alternatives" to a "standard" solution/"standard" requirements, given that "standard" solutions will rarely be prescribed in the context of a competitive dialogue, the need to have recourse to variants will doubtlessly be very limited. If, however, contracting authorities find that they need to provide for the possibility of deviating from certain requirements which would otherwise be applicable, then they must not only indicate in the notice that variants are allowed, but also and above all indicate (in the descriptive document) what "the minimum requirements to be met by the variants and any specific requirements for their presentation" (Art. 24(3)) are. Deviations from substantial or even fundamental prescriptions during the award procedure are not possible unless explicit provision is made for such a possibility right from the beginning of the procedure."

According to Dutch experience the view put forward by the Commission that in a competitive dialogue there would hardly be any need for the possibility of submitting variants is open for modification. The view apparently is that – given the functional specifications – several alternatives or variants naturally fit within the contract specifications. Nevertheless it has turned out that it would be well advised that a contracting authority should make solid enquiries into the possible development of desirable variants. This may be especially useful when segments of the contract specifications may prove to be less functional. Experience has pointed out that it is not always possible for the contracting authority to rely entirely on functional output specifications. In some instances it may be necessary to draft more

detailed output specifications in order to prevent undesirable effects during either the final offer stage or the realisation of the project.

As an example for the need to submit variants one could take a complex infrastructure project into account requiring renovations of an existing engineering structure besides constructing a second similar engineering structure with a view to the extension of the existing capacity. Given the maintenance condition and the interconnected and sometimes difficult to assess maintenance risks of said existing structure, it is conceivable that a participant may prefer not to renovate but to take down the engineering structure and to replace it with one large new engineering structure to meet the required capacity in total. In the existing Dutch practice it was shown that participants veritably come forward with this type of alternative solutions. In the case of the 2nd Coentunnel the contracting authority as it turned out could not accept the from an economical point of view attractive alternative solution because the requirements formulated in the specifications did not permit acceptance. In these cases it may be well advised to publish the possibility of submitting variants in order to facilitate non anticipated – but economically very interesting – solutions as much as possible.

BEST PRACTICES IN THE COMPETITIVE DIALOGUE

Introduction

In recent years the Dutch government has tendered several major projects by means of the competitive dialogue. During these tenders the contracting authority has developed several best practices for a smooth and efficient tender in which the room for flexibility of the competitive dialogue has been elaborated upon.

The Ministry of Transport has gained practice with the use of the competitive dialogue with the tender of amongst others the Second Coentunnel. The Coentunnel-project includes the development of the 2nd Coentunnel and the renovation of the existing Coentunnel. Design, build, maintain and finance will, for a period of 30 years, be transferred to the market through a DBFM-contract. Furthermore the widening of the A4 Leiden-Burgerveen has been tendered by means of the competitive dialogue. In addition the Ministry of HSPE has tendered three PFI-projects with the use of the competitive dialogue. It concerned DBFMO-contracts for the development of the Internal Revenues in Doetinchem,

the development of the IBGroup and the Internal Revenues in Groningen and the development of a Prison Facilities in Rotterdam Airport. New tender procedures are currently being prepared.

It is self-evident that the way in which these projects have been tendered in past years differed dependent on the project specific circumstances. Nevertheless several best practices can be elaborated upon. Below authors elaborate on several "best practices" of the competitive dialogue, such as "short listing", "early involvement of contractors" and "risk allocation".

Short Listing

The traditional methods of tendering like the open- and restricted procedure do not offer the possibility to gradually reduce the number of solutions with those seemingly less qualified before the final tender. The competitive dialogue offers the possibility to request participants to specify their proposals in writing in the form of progressively completed/refined tenders[xi]. According to the Commission contracting authorities may in addition provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying award criteria (Commission 2005 II, page 7-8). In the Netherlands this opportunity has been employed both by the Ministry of Transport and the Ministry of HSPE. The Ministry of Transport requires participants in the beginning of the dialogue to submit a provisional offer containing a general strategy for the project at hand within the boundaries of a set budget. The Ministry of HSPE requires a provisional offer containing architectural designs and plans together with an indicative price.

By means of either general strategies or architectural designs participants submit their vision on the project. The fore mentioned general strategy is supplemented with their view on the approach and embedding of the critical success achievement factors (hereinafter: CSAF). The contracting authority requires insight into the expected quality of the final tenders. The Ministry of Transport requires participants to commit themselves to their general strategy for the remainder of the tender procedure. As indicated in the descriptive document participants are required to express this commitment by means of elaborating the CSAF in desired elements as part of the final tender. The thus elaborated CSAF will be assessed on the award criteria.

In this approach after the initial selection of participants on selection criteria – these criteria will have an extensive reach in order to offer a large part of the market the opportunity to participate – a not previously specified or a previously specified number of for instance 5 participants will be enabled to submit a provisional offer on the project. After the initial selection the 3 best provisional offers – usually an equivalent of 3 participants – will be selected on the basis of previously notified award criteria.

Beneficiary to this approach is that – contrary to the traditional methods where participants were selected on the basis of historically proven skills – a further reduction on the basis of the quality of the submitted solutions is being realised. The reasoning is that a selection on historical skills automatically limits the opportunities of new promising businesses. An early selection on the basis of the quality of the solutions submitted opens up the market, while the contracting authority gains insight in the quality of the final tenders. At the same time transaction costs are being restricted by requesting only rudimentary offers in this stage of the dialogue.

An inherent tension with this approach is however that with requesting a provisional offer in an early stage of the competitive dialogue participants can only form a global picture of the project. Therefore no pricing – or in the case of the Ministry of HSPE an indicative price – of the project is being requested for reasons of insufficient information at this stage of the tender procedure. Although progressive knowledge on the methods applied is still being developed authors are convinced of the possibilities of this approach. On the one hand because the competitive dialogue offers an opportunity to submit progressively completed and/or refined tenders. On the other hand because the methods used (architectural designs, -plans, indicative prices, chain of target, CSAF and subsequent actions to elaborate these CSAF monitored by performance indicators) are acknowledged methods to pursue, measure and control pre-set quality standards.

Early Contractor Involvement

The Dutch Ministry of Transport presently offers opportunities for the market to deliver input in the first stages of the tender of PFI-contracts. For this reason the competitive dialogue is being tendered in stages, namely the general strategy phase, the consultation phase and the dialogue phase, followed by the invitation to submit final tenders. After

the general strategy phase, in which a further reduction of solutions occurs, the remaining participants (usually 3) are offered the opportunity to put in their views and/or questions during the consultation phase. The objective is to optimise the tender documents as compiled by the contracting authority. During this phase the opportunity exists for the contracting authority to optimise the tender documents on the basis of its innate progressive understanding. Obscurities and possible mistakes are eliminated as much as possible. Besides a more general form of early contractor involvement the Dutch Ministry of Transport has a more specific method to ensure early contractor involvement at its disposal, called “parallelization” and “interweaving”.

The Ministry of Transport aims at involving contractors earlier and more actively in the development of infrastructure and the generation of solutions for mobility-related problems. The underlying idea is that added value for society can be achieved by providing more room for contractors in early stages of the infrastructure development process. This added value may include innovative solutions, better project control and savings on time and money.

Traditionally, the Dutch tender for the (re)construction of large infrastructure projects only starts after the route determination/EIA-procedure has been completed successfully with a Route Decision that gives planning consent (EIA = environmental impact assessment). The Route Decision determines the final location or route, the detailed design of the road in terms of height and width, and is legally binding. The route determination/EIA-procedure is an extensive procedure whereby the Minister of Transport has to carry out a broad assessment of environmental and other impacts, and in which there is intensive consultation with regional and local authorities and other parties. Because of the direct environmental consequences, only marginal deviations from the Route Decision are allowed during the construction.

The consequence of this approach is that the contractors have very little room for flexibility to deviate from the solution as laid down in the Route Decision. As a result, innovative ideas from the contractors may have become impossible to implement. Room for optimizing is only left for technical details at operational level (e.g. logistics, engineering and choice of materials); the spatial design of the road remains fixed. Because of this, the potential for realizing added value, preventing environmental impacts and achieving cost savings are limited or even

lost completely for the construction contractors. Deviating from the Route Decision would imply that the route determination/EIA-procedure has to be (partly) performed again, which will cost much time and money and is often not realistic in the arena of public/political decision-making.

Because of this the Ministry of Transport has developed a new strategy for early contractor involvement. In this strategy the tender procedure and the infrastructure route determination/EIA-procedure are carried out simultaneously. There are two specific ways to combine the tender procedure with the route determination/ EIA-procedure:

1. Parallelization: the tender procedure starts before the consent decision and therefore runs parallel to the route determination/EIA-procedure. There is no exchange of information between the procedures.
2. Interweaving: the tender procedure starts before the consent decision and is 'interwoven' with the route determination/EIA-procedure, the procedures are coordinated and information is exchanged explicitly.

The main goals of early contractor involvement are:

1. Innovation: using the conceptual freedom, innovative and creative input of contractors (better price/quality ration by competition);
2. Project control: decision-making based on committed bids from contractors, thus creating a more robust information base for the consent decision and a businesslike and transparent decision-making process;
3. Time: gaining time by parallel instead of a sequence of procedures.

By having contractors compete with creative solutions early in the route determination/ EIA-procedure it is anticipated that the best solution can be incorporated in the Route Decision. As a result the knowledge and creativity of contractors can be employed more fully. Because of the complexity of interweaving a justified use of the competitive dialogue on the basis of the no-specifications ground can be fairly easily motivated. However depending on the stage in which both procedures are being interconnected it is also probable that the complexity of the tender gives rise to the need to apply the negotiated procedure. In an interweaving procedure committed tenders of participants serve in part as a basis for the decision-making in the route determination/ EIA-procedure, whilst

the results of the public review are also of influence on the further development of the tender. This reciprocal interference of two in nature totally different procedures leads to complex situations. For instance the complexity concerning the confidentiality of the solutions submitted by participants.

In view of the above it is clear that for interweaving a flexible tender procedure is indispensable. For interweaving the Ministry of Transport considers the competitive dialogue to be indicated. If however the decision to apply the competitive dialogue in favour of the negotiated procedure is relatively automatic, this may be an impediment for successfully interweaving both procedures. If for instance a final tender has been submitted and the route determination/ EIA-procedure gives rise to the need to change (elements of) the tender the possibilities of the competitive dialogue in comparison to those of the negotiated procedure may be too limited (see also the paragraph on fine tuning final offers).

Risk Allocation

Dependent on the specific needs of a project, its size and/or its nature the Dutch contracting authorities apply a tailor made dialogue to each procurement procedure. One of the applied instruments during a competitive dialogue is one of re-allocating a predefined set of risks during the competitive dialogue. The method and theory lying behind this re-allocation is at itself simple. The idea is that the party that is best able to manage or carry the burden of a risk takes charge of it. During the tender procedure the financial translation of the risk assessment by the contracting authority and participants are exchanged. For the purpose of this exchange both the contracting authority and participants label prices to the direct costs and the cost of delay (time and interest) of a specific set of risks. During the dialogue the pricing is compared and the definite allocation of risks is being established. For example:

	Pricing contracting authority	Pricing Participant
Direct costs:	€ 40,000,000	€ 70,000,000
Cost of delay, pertaining		
- Time:	€ 30,000,000	€ 20,000,000
- Interest:	€ 30,000,000	€ 20,000,000
Total costs:	€ 100,000,000	€ 110,000,000

In this example the most economical risk allocation will be to allocate the risk of the costs of delay (time) with the participant, while the contracting authority caries the direct costs (money) of the risks involved. The estimated costs of this risk allocation amount to a sum of € 80,000,000.

As a consequence of this method of risk allocation the opportunity originates to divide the risks as evenly as possible between parties. The following methods of risk allocation can be distinguished.

1. the contracting authority carries the entire risk (time and money);
2. the contracting authority carries the risk of delay (time); and
3. the participant carries the entire risk (time and money).

In addition dependent on the degree in which the participant does or does not carry the burden of the pre-defined risks a fictitious price is added to the tender. To this end the contracting authority deposits the calculated value of the predefined set of risks with a notary public before participants submit their pricing. During the dialogue participants will be informed of the height of the fictitious increase of their tender. Moreover the ceiling price will be either lowered (the risk resides with the contracting authority) or raised (the risk resides with the participant). The view is that this approach limits the risk of insufficient incentive for participants to submit a thorough and earnest pricing of the risk (allocation), whilst at the same time “rewarding” them for taking charge of risks. Chances are that lacking sufficient incentive participants will be inclined to leave the burden of the risks with the contracting authority.

Using the possibilities of the competitive dialogue the contracting authority will be able to customize risk allocation to a certain extend. This opportunity also exists using the negotiated procedure, be it that the contracting authority within the competitive dialogue is restricted to a more structured approach. Dutch practise concerning negotiations on risk allocation during the competitive dialogue has not shown relevant complications at this point.

CONCLUSIONS

Authors conclude that the negotiated procedure and the competitive dialogue do not seem to be hugely different regarding the room for

flexibility during the tender itself. After submitting the final tender however the negotiated procedure leaves more room for flexibility than the competitive dialogue, which may be imperative in very complex tenders like for instance an interweaving or on account of the innovative nature of the contact. The perceived flexibility of the competitive dialogue moreover does not lead to a situation in which the possibility of submitting variants in order to facilitate non anticipated – but economically very interesting – solutions is redundant.

The regulations in the Procurement Directive do not stipulate in what stadium of the tender procedure the weighting factors and sub-criteria for the evaluation of the (final) tenders should be published at the latest. The regulations specifically allow final identification of weighting factors in a later stage of the tender procedure. Keeping in mind the flexibility of the competitive dialogue, authors are of the opinion that the Procurement Directive should also allow contracting parties to a certain extent to alter or determine their sub-criteria after the transmission of the invitation to participate in the dialogue, but (of course) before the opening of the tenders.

There is much uncertainty about the precise interpretation of the new procurement rules and regulations concerning the grounds for use and the room for flexibility allowed. On the one hand this leaves room for the contracting authorities to employ best practices of their own devise. These best practices may lead to a smooth and effective procurement procedure during which demand and possible solutions may be synchronised to match, while at the same time safeguarding the principle of equal treatment. Dutch best practices have shown possibilities of using the method of gradually reducing solutions in an early stage of the procurement procedure, to stimulate the innovative power of the contractors by means of an early contractor involvement and to establish a more balanced risk allocation. The restrictive interpretation of the Commission however does – in the view of authors – unnecessarily limit the flexibility of possibilities offered by the competitive dialogue.

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NOTES

[i] Directive 2004/18/EC of the European Parliament and of the Council on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts (2004, L134/114) as amended (Directive 2004/18/EC for short).

[ii] Decree for Tender regulations for Award of Contracts by Contracting Authorities, dated July 16th 2005, Government Gazette 2005/650.

[iii] For example the PPP/PFI projects of the 2nd Coentunnel, the A4 Burgerveen-Leiden and the building projects of the regional office of the Internal Revenues in Doetinchem and the Prison Facilities in Rotterdam.

[iv] See e.g. Case C-470/99, Universale Bau.

[v] Case C-331/04, ATI EAC.

[vi] Case C-532/06, Lianakis EA.

[vii] See also Case C-448/01, EVN & Wienstrom.

[viii] See article 29 (3) Directive 2004/18/EC.

[ix] Case N-264/2002, London Underground PPS Decision of October 2nd, 2002.

[x] Article 24 (3) Directive 2004/18/EC.

[xi] Article 29(5) Directive 2004/18/EC.