ABSTRACT

From the start of European cooperation (1958), which now as the European Union comprises 27 member states and a population of over 450 million people, the leading goal has been to create economic integration through the creation of an internal market. The European Commission realised early on that the public procurement sector represents a major slice of this economic activity and one that may be put under control of European rules (“directives”).

After a long evolution, the current directive that governs public procurement in all EU member states is Directive 2004/18. Because the subject of “early contractor involvement” merits particular attention, this article reviews the constraints that the EU Directive 2004/18 imposes on the tendering process for complex infrastructure works.

INTRODUCTION

Currently the European Union (EU) comprises 27 member states and a population of over 450 million people. From the start of European cooperation (1958) the leading goal has been to create economic integration. The Treaty for the European Union makes this perfectly clear and provides the basic principles to reach this goal.

The instrument to reach this goal is the creation of an internal market. To underpin one internal market a number of basic rights have been defined: Free movement of persons, free movement of goods, freedom of establishment and freedom to provide services within the Union.

Specifically Recital 2 of the current Directive on Public Procurement states: The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.

While these principles and goals may be quite clear, their application within the Union to public procurement has many obstacles: Established practices, cultural differences, language barriers, differences in market structure, national standards – all of these could result in preferential treatment of one or more bidders.

The European Commission realised early on that the public procurement sector represents a major slice of EU economic activity and one that could be put under control of European rules (“directives”). The current directive that governs public procurement (Directive 2004/18) in all EU member states is the latest in an evolution that started in 1971. Although the rules and practices of public procurement have evolved, the goal remains the same: To ensure that economic operators benefit fully
from the opportunities that an integrated market provides and at the same time to find the public benefit that should result from optimal and transparent procurement practices. This article reviews the constraints that the EU directives impose on the tendering process for complex infrastructure works with an examination of the subject of “early contractor involvement”.

**THE EU PUBLIC PROCUREMENT DIRECTIVE**

Directive 2004/18 provides rules for procurement of goods, services and works. In this article the focus is on the procurement of public works. Special EU rules apply to public tenders for works above the threshold of € 5,000,000. The type of contracts covered by the current directive concerning “works” is limited to construction, design and construct or public works concessions. The concept of a public works concession is not very well defined and differences of interpretation remain on the types of contracts that fall under the rules of public procurement.

Note that other, more complex types of contracts, in particular public-private partnerships, are not covered by the specific rules of the directive, but only by the general rules of the Treaty. This aspect is discussed below. The Commission has recently published proposals to cover more complex forms of contract with a separate directive. This development is discussed under the heading of public-private partnerships and in the section on upcoming revisions to the framework of procurement legislation.

**Procedures**

The current directive limits the procedures for tendering and bid award to the following categories:

- **Open procedure**: any economic operator may submit a tender in response to a published notice.

- **Restricted procedure**: after a round of prequalification a restricted number of contractors that qualify are invited to bid.

- **Competitive dialogue**: the Contracting Authority conducts a dialogue with a selected number of contractors in view of obtaining professional input and selecting state-of-the-art solutions for particularly complex projects.

- **Negotiated procedure**: if, for a particular invitation to tender, no satisfactory proposal has been received under an open or restricted procedure, the Contracting Authority may opt to negotiate with one or more contractors in view of defining an acceptable solution. Additions to the scope of an existing contract may also be negotiated under certain conditions. The specifics are more restrictive but are not developed in this article.

Both the selection criteria and the award criteria must be published up front in a contract notice. The current directive emphasises that the criterion to award the contract to the lowest bidder may be appropriate for run-of-the-mill works, but that for more complex projects – and certainly for tenders in response to functional requirements – the award on the basis of “the most economically advantageous” bid is strongly recommended.

**The “Competitive Dialogue”**

The current directive provides for a new procedure, “the competitive dialogue", which is intended to be used in the case of “particularly complex contracts” to obtain input of qualified contractors in order to define the optimal technical or financial solution (Figures 1 and 2).

The procedure as outlined in the directive is as follows:

(a) Indicate selection criteria: Publish a contract notice that defines the needs and requirements of the Contracting Authority with an invitation to indicate interest to participate in the competitive dialogue.

(b) Select from the responding contractors those that qualify considering capabilities, experience, financial strength,....

(c) Maintain the principle of equal treatment: Open a dialogue with a minimum of three qualified bidders, in order to define the best (technical) solution that each contractor could offer in response to the requirements. Note that each contractor must be treated on the same basis and that under no circumstances should important information be provided to one contractor, but not to another.

(d) Respect confidentiality and intellectual property rights: The Contracting Authority may not share particularly promising solutions of one contractor with any others unless authorised by this contractor.

(e) The process is likely to result in a multi-track situation with different possible solutions in parallel. To make the procedure less cumbersome, the Contracting Authority may structure the process in successive stages and reduce the number of solutions at each stage by applying the formally published award criteria.

(f) The dialogue may continue until the optimal solution or solutions which may meet the Contracting Authority’s needs have been identified.

(g) If and when the dialogue has been concluded all participants will be notified.

(h) The Contracting Authority will then request the remaining candidates to submit final priced tenders on the basis of the respective solution(s) that has/have been specified during the dialogue. The competitive process requires that at least two contractors are retained at this stage, unless it can be demonstrated, in exceptional cases, that only one contractor can provide an acceptable solution.

(i) The tenders may be further clarified, specified and fine-tuned at the request of...
the Contracting Authority, provided that the fundamental features of the tender are not changed. Variants at this stage of the procedure are not acceptable. Innovative and cost-effective solutions should have been put forward earlier during the competitive dialogue. Clearly the same extent of information should be shared with all bidders. The Contracting Authority will now select the successful bidder on the basis of the most economically advantageous bid, in accordance with the award criteria as published.

(j) Even now, the Contracting Authority may find a need to clarify certain aspects of the tender or to confirm commitments, provided that the fundamentals of the tender are not changed.

(k) Award the contract.

(l) The Directive stipulates explicitly that in the procedure of a competitive dialogue the Contracting Authority may foresee a financial compensation for the efforts provided by contractors during the dialogue stage.

Comments on the Competitive Dialogue procedure

The European Commission recognises that standard procurement procedures do not always provide the best results, especially pertaining to the building and design of complex infrastructure projects. The competitive dialogue procedure is an attempt to diversify procurement procedures and stimulate professional input early in the tendering process.

At the same time the procedure is clearly quite complex and not free from pitfalls. The fundamental demand is that the dialogue with different bidders must take place in parallel. Since the Contracting Authority may not share solutions proposed by different candidates, entirely different technical approaches could be developed in parallel, a situation which can complicate the life of the Contracting Authority. The temptation to provide hints to competitors on the strength of a solution proposed by another contractor is very real.

The concern of the Contracting Authority is to keep the bid evaluation process manageable and to maintain effective competition.

The interest of the parties invited to such a dialogue is the opposite: Attempt to be as creative as possible and provide cost-effective solutions, preferably protected by patents that provide an unbeatable competitive advantage. This is likely to make the Contracting Authority feel vulnerable, because it realises early in the dialogue that one of the invited bidders may develop a strong advantage over the rest.

"Particularly Complex Projects"

The European Commission recognised the complexity of the dialogue procedure quite soon. In 2005 the EC published ‘Explanatory Note’ (CC/2005/04) to explicate the competitive dialogue procedure in more detail, apparently because the text of the Directive is not sufficiently clear. One specific element warrants emphasis: The procedure can only be applied for “particularly complex projects” where:

• the Contracting Authority is not objectively able to define the technical means capable of satisfying its objectives or is not able to determine which of several possible solutions is best suited to satisfy its needs, and the technical complexity of an envisaged project is at stake.
• the Contracting Authority is not objectively able to specify the legal or financial make-up of a project. This situation may arise with plans or projects that require complex and structured financing as is the case with most public-private partnerships. Another instance could be when the contractors are expected to carry higher than normal financial and contractual risks in a contract...
situation based on performance criteria, for instance with certain forms of turnkey contracts or with concessions where the contractor collects the revenue from the concession as payment.

Most complex contract forms, such as DFBO (design-finance-build-operate) or public-private partnerships, are not covered by the scope of this directive. The “competitive dialogue” format may still be used, but the detailed restrictions of the directive could possibly be relaxed. This aspect is addressed in the new proposal for a directive on concession contracts (see below).

Although the experience with “competitive dialogue” is limited at present, the European Commission has invited feedback on the functioning of the revised Directive in its Green Paper COM(2011)15, “On the modernisation of EU public procurement policy”.

Feedback from the industry
Some feedback from the industry is already available. The question was: “Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes?”

The response of the European Federation of Building Contractors (FIEC) was: On the Competitive Dialogue – There is diverging feedback regarding this procedure according to national experience. It is reported that this procedure leads to confidentiality problems and cherry-picking in some member states, as well as to higher costs and lengthy procedures in general. It therefore requires stronger safeguards: enhancing contracting authorities’ capacity building; addressing the length of procedures with better project preparation according to the subject matter of the contract and the publication of the procedure schedule in the call for tender. Also, it is more specifically appropriate for big complex projects.

The Commission itself, in the Green Paper, remarks: ‘Cherry picking’ of intellectual property rights or of innovative solutions themselves has been raised as an issue of concern, particularly with regard to the competitive dialogue: if a participant discloses the unique features of its solution, these may become known to the other candidates. While the current rules require that such information must be kept confidential, the Contracting Authority is nevertheless in a bind between the obligation to protect the confidential information and the need to disclose some information in order to identify solutions which are best suited to satisfying its needs. Contracting authorities might be tempted to put pressure on tenderers to agree to disclosure.

Finally, the Dutch government amongst others also responded to this Green Paper and pointed out in general terms that the public procurement procedures involve heavy administrative efforts by the authorities and often lead to lengthy procedures. Specifically the Dutch reaction was that the current limits of the competitive dialogue to “particularly complex projects” are too restrictive. The procedure provides more flexibility and interaction with the economic actors and should be allowed more widely for “complex projects” in general.

In conclusion, the EU public procurement rules at this stage restrict “early contractor involvement” to a bare minimum: Only for very complex and demanding projects where a technical, functional or performance specification cannot be established by the Contracting Authority is a competitive dialogue with candidate contractors allowed.

In fact, the scope of the directive is limited to the three contract types (construct; design and build; or simple concessions). In practice particularly complex projects are likely to take on other contract forms, such as DBO or DFBO or build and maintain, or any public-private partnership contract; none of these are covered by the directive. They are thus far covered by the general rules of the Treaty, but these rules are less restrictive: The principles of the Treaty must be respected (equal treatment, non-discrimination, competition, transparency…), but the procedure is not cast in stone.

WHAT ABOUT OTHER COMPLEX CONTRACTS?
The directive on public procurement – as far as works are concerned – takes for granted that in the majority of cases detailed technical specifications are included in the tender documents and in some cases functional or performance specifications. Tender documents are prepared by the Contracting Authority, possibly with the help of a consultant.

Presumably, when drafting the procurement directive, the Commission considered that authorities might lack specific knowledge in drawing up tender documents for “complex contracts” and would organise first a consulting phase, during which one or more consultants would provide the necessary technical input. Only in the case of “particularly complex contracts” would direct input by contractors be necessary because even consultants do not have sufficient expertise for such complexity.

The current rules leave the contractor little room for initiative and do not provide an incentive for innovation. Using the traditional approach, that is, separating design, construction and operation processes has discouraged the private sector from making a fully effective contribution to public works projects as well as discouraged entrepreneurial risk capital (Cowie 1996).

Finding effective ways for more contractor input during the procurement process is important especially for large (infrastructure) works, which seek to optimise the life-cycle cost and to stimulate innovation.

Figure 3 presents a graph of various contract models that are common today, while distinguishing between contract forms covered by the public procurement directive 2004/18 and other, more complex contract forms. It illustrates that most of the more complex forms that would be considered for large infrastructure projects do not fall under the specific rules of the current directive.

On the other hand, a standard tender procedure clearly does not fit the more complex relationships between the Contracting Authority and the contractor.

Risks
For all contract forms that are not classical works contracts, fairly detailed contract negotiations are an absolute necessity. The object of such negotiations is not so much the technical concept and the basis for costing, as the allocation and management
The Commission makes a helpful distinction between public and private actors, which is the core element of public-private partnerships (PPPs) (see COM(2006)569). The Commission makes a helpful distinction between:

- **Contractual PPPs**, where the cooperation between the public and the private party is strictly contractual. This category covers not only concessions, but also the various forms of complex contracts (BOT, DFBO, construct and maintain...)

- **Institutional PPPs**, under which the public and the private party cooperate by forming a separate legal entity. In this category many different possible structures can be found in practice, all of which include the creation of a separate legal entity, but the method of financing, the shareholder structure, the extent of subcontracting, the division of risk and responsibility vary.

For both classes of partnering, the Treaty’s principles must be respected: Equal treatment, transparency, mutual recognition, competition.

In the first case, **contractual PPPs**, a procedure identical or similar to the competitive dialogue could be followed (publication of a tender notice, prequalification, parallel negotiation, selection, tendering and award). At least two bidders must be retained until the final stage, unless submitting a price tender is objectively impossible and circumstances might justify a negotiated procedure with only one party. This latter case would be the rare exception.

For the class of institutionalised PPPs the problem is even trickier: The selection of a private partner to form a separate public-private entity needs to take place in a process where competition is maintained until the final selection, but nevertheless quite early in the project stage, because legal entities must be established. As the project envisaged (often complex infrastructure) still needs to be designed in detail, selecting the partner with the most economically advantageous offer will be problematical. The selection is likely to be based on qualifications, competences, expertise and financial strength of the private partner. Even though selecting the private partner prior to the “best and final offer” may be the only reasonable solution, the European legislator eyes this with great scepticism. The criticism that the chosen private partner gets preferential treatment is difficult to refute. In short, legal uncertainty on the conditions to be respected during the initial stage of an institutionalised PPP still prevails. This uncertainty obviously does not encourage public contracting authorities to form an institutionalised PPP. The Commission has finally recognised that the trend towards more private sector involvement may need more specific guidance and has published another communication on the subject, COM(2007)6661 – "On the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships”.

Also the Commission has published two new proposals:
- a proposal on revised public procurement directive (COM(2011)896) and
- a proposal on the award of concession contracts (COM(2011)897).

Both take into consideration the feedback received from the public and private sectors on the existing procurement procedures. The further development of these proposals will take place in the coming year.

**EARLY CONTRACTOR INVOLVEMENT**

In terms of the concept of “early contractor involvement”, a review of the European legislation on public procurement and public-private partnerships clearly indicates that the Treaty’s principles give preference to broad competition and leave little room in the proposal stage for relationships with contractors that are closer than at arm’s length. The dominating concern in the various directives is that transparency requires that competition should be maintained throughout the bidding stage.
The public procurement directive 2004/18 does open the possibility for “competitive dialogues”, but only for “particularly complex contracts”. Under this procedure the competition should be maintained to the final bidding stage between at least two contractors. Some problems and pitfalls have been hinted at above. In view of the comments received in a round of consultation on current experiences, the Commission now is proposing to somewhat soften the restrictions and to open the competitive dialogue procedure to all complex contracts where the public authority lacks detailed knowledge on the technical or financial possibilities that may be found in the market (Figure 4). Nonetheless, the requirement that at least two contractors should be consulted in parallel during the competitive dialogue is maintained.

REFERENCES

Bundgaard, Klaas, Klazinga, Dieuwertje and Visser, Marcel (2011). “Traditional Procurement Methods are Broken: Can Early Contractor Involvement be the Cure?” Terra et Aqua, Number 124, September.


CONCLUSIONS

The marine offshore and dredging industry has evolved rapidly over the last two decades. The EU procurement directive introduced in 2004 offers – for the conventional contract forms (construction of works, design and build, works concessions) – a new method of procurement for “particularly complex projects”, namely the competitive dialogue. This procedure allows for structured interaction with candidates during the bidding process. The dialogue is focussed on technical solutions, but may also cover specific financing or contractual arrangements. This instrument offers a possibility to involve the contractor early on in the procurement process.

The scope of the current directive is formally limited to the above-mentioned specific contract forms. However, complex projects tend to be based on other, more complex contract forms and/or various forms of public-private partnerships. For these contract forms, the rules of the existing directive are not directly applicable, but the principles of the EU Treaty apply.

In order to fill this gap in the legislation, the European Commission has recently proposed a new directive to cover most forms of concession contracts. The procurement procedure must respect the Treaty’s principles and follow similar steps as under the works contract.

In all cases maintaining competition throughout the procedure is imperative. But complexity and sharing of risk necessitates early involvement of contractors. Such early involvement should result in an optimised project structure and balanced life-cycle costs.

The “competitive dialogue” format may offer a suitable solution for interaction with candidate bidders early on in the procedure. The restriction to “particularly complex projects” is not relevant here. The Contracting Authority has the freedom to choose a suitable procedure, provided that it satisfies the principles of the Treaty. Under European competition and procurement law the “competitive dialogue” is thus the instrument that offers the best compromise between the requirement of sustained competition and the need to discuss technical approaches.

The “institutional PPP” is more difficult, because selection of the preferred partner must take place on the basis of objective criteria, yet no final offer has been accepted, because the authority and the contractor plan to enter into a joint venture that will be responsible for the design, construction and operation of the works.

In both cases – “competitive dialogue” and “institutional PPP” – two basic rules must be respected during the selection and award phase: transparency and equal treatment.