

FIRST DUTCH COMPETITIVE DIALOGUE PROJECTS: A PROCUREMENT ROUTE CAUGHT BETWEEN COMPETITION AND COLLABORATION¹

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In 2004 the competitive dialogue (CD) was introduced by the European Parliament and the Council. It was presented as a public sector procurement procedure for particularly complex contracts. The purpose of CD is to provide the public client with a flexible procedure to enable a discussion concerning all aspects of the contract with several contenders - to identify and define the means best suited to meeting its objectives - in an intervening stage between the tender announcement and the submission of final tenders. The discussions during the drafting of the CD procedure pivoted around transparent trust based collaboration, preserving fair competition and providing stimulus for innovation. This paper presents the first results of an evaluation study of 15 CD projects (partly still ongoing) in the realm of construction. The findings indicate that clients as well as contenders struggle with a number of practical issues related to the organisation of the dialogue. Furthermore, both struggle with the dynamics of risk avoidance pushing them towards detailing and high transaction costs. The research indicates that the competitive dialogue is an ambivalent procedure: both parties involved in the procedure balance between the wish to cooperate and the sensed need of keeping information to themselves because of competition. Nevertheless both see the potential of the CD procedure. Further research is needed to find out how the two principles of cooperation and competition during the CD procedure are related.

KEYWORDS

Competitiveness, Collaboration, Procurement.

INTRODUCTION

In the period before 2004, of the three procurement procedures available for the procurement of public works contracts, the negotiated procedure got more and more in use due to the fact that projects and project environments became increasingly complex. There are, however, some downsides to this procurement procedure, especially the fact that it leaves room for extensive post-tender negotiations. These were considered to harm fair competition. The EU reacted to this concern by creating new procurement options. The first extension of the negotiated procedure, the

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³ Contenders, who take part in the dialogue before the final bids are made, are named "candidates" in the EU Directive (2004/18/EC). The contenders, who actually made a bid, are named "tenderers" in that same Directive. In our survey both candidates and tenderers were included. Therefore in this paper just the term contenders is used.

competitive dialogue (CD), soon became a fully fledged procedure. Following the CD procedure, clients and contenders³ conduct dialogue about all aspects of the project and contract scope, before the final bids are made. Due to the EU regulation the use of the competitive dialogue is only admitted for complex projects where the client objectively is not able to determine the technical, legal and / or financial means to meet his needs.

Formal objective of the new procedure is to provide for "a flexible procedure which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate". During the legislative process several objectives and perspectives were put forward. Next to fair competition the discussions focussed on creating trust based collaboration and providing stimulus for innovation. In the final formal objective the collaboration aim is transformed to the objective of discussion and innovation is not mentioned.

As with any new procurement method the first Dutch CD projects draw a lot of attention. To capitalise on experiences the initiative to evaluate the first 16 CD projects was taken late 2007. This paper presents the results of a structured survey amongst both clients and contenders involved in 15 of the 16 Dutch construction projects procured by competitive dialogue.

The next section of this paper explains briefly the characteristics of CD, the background and the objectives. Section three describes the research project, the method and the findings. Thereafter follow discussion of the results and subsequently the conclusions and acknowledgements.

COMPETITIVE DIALOGUE

Background

Until recently, based on European legislation, governments had three types of procurement procedures at their disposal. Both the open and restricted procedure were used when technical specifications and appropriate price level could be defined by the contracting agency. When this was not the case, contracting authorities were permitted to make use of the negotiated procedure. Because projects were becoming more and more complex, the urge to use the negotiated procedure was also increasing. There were, however, some concerns about this negotiated procedure. These concerns included the risk of disclosure of confidential information amongst contenders and the possible discriminatory effects of the negotiations and scope alterations that happened after a preferred bidder had been chosen. Extensive post-tender negotiations were therefore considered to harm fair and equal competition.

The European Commission acknowledged the concerns over the negotiated procedure and set out on a study focussed on the question how to procure 'particularly complex contracts' in a more flexible way (COM(2000)0275, Explanatory Memorandum pp.6-8). The outcome can be understood as a compromise between the several institutions involved, including five European Parliament Commissions. The process from Green Paper to Directive lasted from November 1996 till April 2004. The European Commission obviously had difficulty in making choices: Should it design a new procedure, or make adjustments to the existing range of procedures? How should 'complex' be defined? And how flexible should one make the process: what should be spelled out and what left up to the contracting authorities? During the legislative process the new procedure, now called Competitive Dialogue (CD), went from an adjustment of the negotiated procedure to a fully-fledged procedure. The

commissions' struggle with the conditions for permitted use of the CD raised discussion and debate. In the EU Public Sector Procurement Directive (2004/18/EC) as it was published in the Official Journal of the European Union (OJEU), the Competitive Dialogue procedure is described in article 29. It states that public authorities may make use of this procedure in the case of particularly complex contracts ("where the public client is not objectively able to define the technical means capable of satisfying the needs or objectives or able to specify the legal or financial make-up of the project" (2004/18/EC, art. 1.11(c)) and "where [it] consider[s] that direct use of a restricted tender procedure will not allow the contract to be awarded to the tender offering best value for money"(2004/18/EC, art. 29.1). The procedure should however be used with precaution, in view of its exceptional nature.

The Directive prescribes that CD procedure starts with the public client publishing a contract notice setting out the needs and requirements. He opens a dialogue with a minimum of 3 contenders who meet the published selection criteria, with the aim of developing one or more suitable alternative solutions capable of meeting the requirements. All aspects of the project can be discussed during the dialogue; however, the dialogue is conducted with each candidate individually on the basis of their proposed solutions and ideas. When the dialogue is concluded, the public client invites two or more contenders to tender. The client has to ensure the equal treatment of contenders as well as the confidentiality of tenders, which means that "cherry-picking" is not allowed. The awarding method in this procedure always is most economically advantageous tender (MEAT).

Although the Competitive Dialogue contains flexibility for contenders and the contracting authority to discuss how the output specification will be met, there is less scope to make changes to a project after the selection of the preferred bidder. Once the Competitive Dialogue has closed, contenders can only be requested to "fine tune, specify and clarify their bids". No substantial modifications to agreements can be made, and the outcome of the competition may not be distorted by any change to the preferred bid. The definitions of the scope or other changes will be allowed during the preferred bidder stage, though. This should also reduce time and costs during this stage. The risk, however, is that the overall tendering costs for both the public and the private sectors increase, due to the need to negotiate more of the deal with a larger number of contenders prior to the selection of a preferred bidder.

Objectives of the competitive dialogue

Officially the objective of the Competitive Dialogue is to provide for "a flexible procedure [...] which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate" (2004/18/EC, recital 31). This objective is two fold in that it [a] puts focus on preserving competition, and [b] underlines optimisation through interaction. During the legislative process several objectives were discussed. Not all made it into the final statement of the formal objective. In October 2001, the Committee for Economic and Monetary affairs advised the European Parliament that "The content and limits of the negotiated procedure should be made transparent for both contracting authorities and contenders and, in the interests of both parties, should provide the basis for collaboration based on trust" (A5-0378/2001, p.100). Other suggested objectives of the procedure are: 1."Giving the contracting authority the opportunity to [...] create competition between [participants]" (CES0515/2001, par. 4.4.2); and 2. Stimulating innovation ("The contracting authorities may also want to allow

innovative solutions" (COM(2000)0275, p.7), and "giving the contracting authority the opportunity to appropriate the results of participants' inventiveness and innovation" (CES0515/2001, par. 4.4.2)). The "collaboration based on trust", the "innovation stimulus" and the "appropriation" did not make it into the final formal objective of the CD. These items did and do however play an important role in the rhetoric and justification of the competitive dialogue and its roll out in practice.

EVALUATION OF 16 DUTCH CD PROJECTS

In the Netherlands, the Directive and therewith the Competitive Dialogue procedure, is implemented into Dutch legislation in December 2005. Since then 16 projects started in CD. Those projects differ in scope, size and dialogue design (table 1). Early 2008 a research project started to evaluate the interaction process in Dutch CD projects and to suggest ways to improve the CD process in the future (PSIBouw and Balance & Result, 2008).

Table 1: Characteristics of the first 16 Dutch CD projects

	Contract type	Estimated sum (€million)	# conversations	# contenders per dialogue stage
A. Tunnel	DBFM	1300	19	5-3-3
B. Traffic junction, several transport functions	Alliance	130	8	5-3
C. Traffic junction, unlocking of a city	DBM	639	?	5-5-3-3
D. Broadening of a highway with aqueducts.	D&C	700	5	5-5-5-5-5
E. Tax office	DBFMO (15 years)	27	11	5-3-3
F. Detention centre	DBFMO (25 years)	89,5	9	3-3-3
G. Broadening of a connecting road and parallel railroad	D&C	195	3	5-5-5
H. Large-scale maintenance on infrastructure objects (6x)	D&C	13,8 - 62,4	3 to 4	5-5-5
I. Military base	DBFMO (25 years)	250	?	5-3-3
J. Office towers	DBFMO (20 years)	183	?	5-3
K. Sluice renovation	D&C + M (10 - 15 years)	60	?	?-4

Method

Based on a literature & document review and several interviews with experts, a survey was designed with differentiating questionnaires for clients and contenders. The survey was spread under all clients and contenders that were involved in one or more of the Dutch CD projects. Projects where the dialogue was ongoing were deliberately included, to increase the number of projects and to take into account the most recent experiences. In each project one questionnaire was sent to the client, and one to each of the contenders. The response to the questionnaire was 7 out of 16 for the clients and 46 out of 72 for the contenders (covering 15 projects). The questionnaire was built around 55 carefully selected statements - 45 general and 5 differentiated to client or contractor. The responses to the statements were scored on six point - semantic differential - scale ranging from "totally agree" to "totally disagree". Three open

questions and space for concluding remarks in the questionnaire made sure that also other essential information could be put forward. The data of the survey give an impression of how clients and contenders experience interaction. The results were discussed during a workshop with contenders, clients and knowledge institutions.

Results

Clients as well as contenders feel the CD is a procedure that fits the need for interaction of supply and demand in complex projects. Both parties reckon CD as a procurement procedure with great potential, and urge for a wider use to gain experience, acquire knowledge and skills, and overcome teething problems. The use of the CD requires new ways of working. Specifically, the behaviour of the people involved in the CD is perceived a more critical success factor compared to other procurement procedures because of the intense interaction. Given social dynamics the behaviour of one party can, and often will, affect the behaviour of others. Trust, mutual respect, open communication, common responsibility, the necessary flexibility and of course communicative competencies are seen as crucial in the procedure.

Risks avoidance behaviour steered conduct of clients as well as contenders. Clients pushed specifications to too much detailed requirements and contenders put too much effort in detailing the proposed solutions to be sure about the cost estimates. A large majority of contenders declared to have detailed the design far more than was being asked for. This effort raised transaction costs. The respondents feel the clients should aspire to more lean demand specification and the contenders should restrain their urge to think/work out the solutions in detail. In several projects the contenders were reimbursed for the tender costs, however the amount was by large not sufficient.

The contenders stress for more influence during the procurement procedure, regarding the demand specification, the structure of the dialogue, the number of dialogue stages, the agenda and the products which must be submitted per stage. These aspects are of course closely related to the transaction costs which both parties would like to repress. Furthermore the contenders felt they had to put too much effort into the procedure. Overall there was not enough time to prepare for the dialogue sessions and products; The contenders also felt the client was too much focussed on price in stead of quality; They had too little influence on the procedure; The client's team had too little mandate, didn't deliver documents on time and took long to answer questions; The answers the clients came up with were often perceived as not useful.

Clients admit that contenders were given too little opportunities to distinguish from other contenders. Clients also feel that there was too much detail in the specifications, and that in the award decision quality should be given preference to above price more than was the case. Furthermore the clients have the opinion that contenders make their contributions too detailed, and that they do not ask the right questions. The larger part of the client respondents felt that there was mutual dependency between them and the contenders. Therefore they state that they should have taken more risks during the dialogue.

Will the CD be used more often? The respondents feel (and fear) the spread and use will be limited because the legal criteria for "particular complexity" are ambiguous and jurisprudence is not available. The meeting and optimisation of supply and demand require a more freedom and high level specifications, preferably at the level of functional (solution free) demand specification.

So, the CD is seen as a procedure with great potential, but the urge and effort of both client and contenders to eliminate uncertainties, makes that it is not used at its full potential and raises the transaction costs. Clients need to focus on functional specification, and contenders need to prevent to rush into detailing of the solution. Furthermore, the legal criteria for "particular complexity" are that ambiguous, that the respondents fear restricted use of CD. The CD required clients as well as contenders to develop new skills, specifically skills that help them to deal with the social dynamics of the complex interactions. The contenders want to have more influence in the design of the CD procedure.

What about cooperation, competition & innovation?

How do the clients and contenders cope with the tensions between cooperation and competition? The results of the survey, particularly the wish to influence the steps, stages and dialogue products, indicate that there is some ambivalence within the CD procedure. However given the respondents acknowledge the potential of the CD, the overall impression is that in the cases evaluated the tensions are dealt with in a rather constructive way. Both confirm the potential of the CD procedure, but struggle with the workload and pace.

Several of the statements in the survey focussed on the tensions and the issues of trust and collaboration. On the statement "there was mutual trust between client and contenders", the modus of answers "agree" for both client and contractor respondents. In the group of clients only one respondent tends to disagree. The contenders however were more critical. They scored a wider range of answers: 8 out of 39 respondents disagreed in a stronger or weaker sense, and 9 of them just agreed a little.

A closer look at the results of the survey shows that the contenders who felt that there was no mutual trust, also disagree in with the statement "the client gave answers which were of use to the contractor". Whilst contenders who feel that there was mutual trust, agree with this latter statement ($p=0,00002$). Contenders who feel that there was no mutual trust, also disagree with the statement that "the interaction became better as the process continued", whilst contenders who feel that there was mutual trust, agree with that statement ($p=0,0060$). So the assessment of interaction in general and the answers of the client in particular (together: information exchange) correspond with the assessment of mutual trust. This is further supported by the remarks contenders made at the end of the survey: "CD is only working when the client actually is willing to exchange thoughts in a constructive, open manner and without reservations". At the other hand, clients made remarks concerning information exchange as well: "Maximum openness of the contractor is desirable", "time, openness and trust are crucial to the CD procedure" and "crucial aspects of CD are proper questions, open attitude, and change in the legal basic attitude of the contenders". These remarks can be interpreted as expressions of sensed lack of openness and trust.

The respondents tend to agree that "Interaction became better as the process continued". The modus of responses of both client and contractor were "agree". Clients were even unanimous in this opinion. The contenders on the other hand, were far from unanimous. About a quarter of them (12 out of 40) disagree. After contender remarks like "Attention to soft skills is important as well", the idea arose that negative responses to the interaction statements might be due to perceived bad communicative skills of the contract teams of either client or contender. This is, however, not supported by the survey results. All respondents agree with the statements that "the

persons within the own team had the communicative skills necessary to conduct a proper dialogue" and "the persons within the other party's team had the communicative skills necessary to conduct a proper dialogue". There is no correlation between disagreement with the statement that interaction became better as the process continued and the opinion about the communicative skills in both teams.

Both information exchange and trust can be related to the topic "cherry-picking": the passing through of information from the one contractor to the other by clients, in order to receive competing tenders, all containing the best ideas of all contenders involved. Is cherry-picking an issue to the respondents? Yes it is: both contenders and clients agree with the statement that "fear that the provided information will become public, makes that contenders are reserved in the items discussed during the dialogue". At the same time contenders agree with the statement that "the client carefully handled the information brought in by us during the dialogue" (only 6 out of 39 disagree a little). It is however unclear whether the contenders shared all information and ideas with the client. The issue of cherry-picking is of course related to the issue of appropriation. In a competitive environment the uncertainty over appropriation of innovative ideas is a key factor in issues of trust, and lack of openness and disclosure.

Sadly, the survey did not specifically address issues related to competition and its preservation. However the issue of stimulating innovation was addressed: "the procedure drove contenders to come up with innovative solutions" gives a good indication of the meeting of this objective. Both groups of respondents tend to "agree" with this statement. Only 9 out of 39 contenders disagree in a weaker or stronger sense. Remarkable is the fact that clients tend to agree, but only marginal. Remarks made to the survey indicate further that it is especially the range of freedom contenders get which is expected to create the opportunities to be innovative. Some respondents to the open questions comment: "Not CD, but the fixed boundaries set by the client determine/diminish the possibilities to be innovative" and "There will be no innovation, when all one is looking at is the price" and "Dependant on the project team involved, there was more or less chance to innovate. Especially concerning the specifications". Those remarks also point into the direction of risk-avoiding behaviour from client's side. As contenders state: "Don't be too afraid of differing solutions" and "Application of CD will lead to innovation and improved price-quality ratio, provided that the client is willing to play the game by the rules, and does not kill the whole CD principle because of fear for failing procurement.". So the respondents are very well aware of the potential for innovation in the CD context.

DISCUSSION

The CD procedure was developed to overcome the concerns of transparency and fair competition raised over the negotiated tender procedure. CD should shape collaboration whilst preserving competition. The overall impression of the first experiences with the CD procedure in the Netherlands is positive. Clients as well as contenders underline the potential of CD. They however still point to a substantial number of aspects to improve such as the time and effort it takes, the inclination to drift towards detailing and the risk avoidance. In the projects examined the participants seem able to strike balance between collaboration and competition. Although the scores indicate that there were no real trust issues, the attention given to the risks and the high transaction costs do raise concerns about the openness and disclosure in the dialogue. The respondents feel CD provides opportunity for innovation but that is up till now too much stifled by detailing of requirements.

Because the survey did primarily pivot around collaboration no conclusions can be drawn on the issues of fairness and competition. Furthermore, the mindset in the pilots was very much in the direction of try out and experimentation. This probably also has had some effect on the scoring of the respondents.

In essence the CD procedure tries to bridge the gap between strategies of collaboration and strategies of competition. The CD aims to produce trust based collaboration in a context and process of competing contenders. Are collaboration and competition in the same procedure realistically possible? Can a trust based collaboration and optimisation be expected in a competitive environment? In this paper we argue that the struggle with the objectives is exemplar for the tension built into the objective and the CD procedure. One could expect that the double-objective of [a] competition and [b] openness creates ambiguity and ambivalence for all involved. In the dilemma between competition and collaboration the contenders put more weight on the first and the client on the latter. The client seeks collaboration to optimise the project scope. However in seeking this collaboration, the client will be under continuous pressure and strain to prove that he operates transparent and fair. It is a tough task for the client to eliminate doubt about transparency. For the contenders it is not certain that collaboration will improve their chances in the competition. Openness about innovative ideas might even weaken their position. Due to fear that the client may cross contaminate ideas, the contenders struggle with decisions about what and what not to discuss with the client. So given these tensions between the two underlying paradigms of collaboration and competition, it will be very interesting to see how the interactions will evolve once the initial acquaintance with CD is past and the parties get familiar with the procedure.

This paper describes a first evaluation of the Dutch CD projects. The survey and workshop provide indications of the experiences and insights. The survey and the workshop contribute to a PhD research on the relationship between the forming and use of formal and informal contracts in CD. In the near future a number of CD projects will be examined more closely in a case study design looking specifically at collaboration dynamics, trust issues and competitive pressures.

CONCLUSION

In 2005 the competitive dialogue was introduced as a procedure to procure particularly complex projects. An evaluation of 15 Dutch CD projects shows that clients as well as contenders value the potential of the CD, but (still) struggle with a number of practical issues. All involved feel they have to build and develop their skills and competences to really reap the benefits of the dialogues flexibility. Up till now the tendency to avoid risks pushes the dialogue discussions into details and raises transaction costs. Clients as well as companies involved plea for a CD deal flow to gather experience and build a sound CD practice. They fear however such a deal flow is uncertain due to legalistic hassle over the interpretation of "complex" in "particularly complex projects". The aim of the CD procedure to produce trust based collaboration in a context and process of competing contenders leads to ambivalence. For the contractor this leads to tension between investment in the building of a relationship in search of a future partner, and putting pressure in order to employ the competitive character of the CD procedure. For the client there is the tension between being as open as possible to build on the relationship, and holding back on information in the fight for the contract award. Further research is needed to find out how those 2 principles of competition and collaboration during CD are related.

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REFERENCES

2004/18/EC (2004) DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Brussels, 31 March 2004.

A5-0378/2001 (2001) ***I REPORT on the proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (By the Committee on Legal Affairs and the Internal Market of the European Parliament). Brussels, 29 October 2001.

CC/2005/04_rev 1, p.2 (2005) EXPLANATORY NOTE – COMPETITIVE DIALOGUE – CLASSIC DIRECTIVE (From the EUROPEAN COMMISSION, Directorate General Internal Market and Services). Brussels, 5 October 2005.

CES0515/2001 (2001) OPINION of the Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts. Brussels, 26 April 2001

COM(2000)0275 (2000) Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (Presented by the Commission). Brussels, 30 August 2000.

PSIBouw and Balance & Result (2008) “Interactie opdrachtgevers – aanbieders rondom de concurrentiegerichte dialoog”. Deventer: PSIBouw.