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Procurement of PPP and the use of Competitive Dialogue in Europe

A review of public sector practices across the EU

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ABSTRACT

This report reviews PPP procurement practices across Europe with a particular focus on competitive dialogue. The report seeks to identify the main benefits and problems with the use of the competitive dialogue procedure based on the experience of the EU Member States to date.

The European PPP Expertise Centre (EPEC) is a joint initiative involving the European Investment Bank (EIB), the European Commission, Member States of the European Union, Candidate States and certain other States. For more information about EPEC and its membership, please visit <http://www.eib.org/epec/>.

This publication has been prepared to contribute to and stimulate discussions on public-private partnerships (PPPs) as well as to foster the dissemination of best practices in this area.

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1. Introduction

One of the first choices to be made by a contracting authority following the decision on PPP procurement is to select the procurement procedure. This is an important decision which should be taken after proper consideration of all available options and specifics of a particular PPP. Effective preparation and implementation of the procurement procedure can significantly contribute to the success of a PPP project.

EU legislation provides for four procurement procedures: open, restricted (these two are also sometimes referred to as “standard procedures”), negotiated and competitive dialogue (the use of which is subject to conditions). Annex 1 to this report compares key features of the EU procurement procedures. It should be noted that these procedures are not designed specifically for PPPs: they apply to all goods, works or services contracts. As far as procurement of PPP is concerned, the procurement options to choose from may be more limited under national laws and specific legal advice is required for each jurisdiction.

2. Purpose of review and target audience

The purpose of this report is to review procurement procedures used in PPP procurements across Europe with a particular focus on competitive dialogue. The report seeks to identify the main benefits and problems with the use of the competitive dialogue procedure based on practical experience of the EU Member States to date.

3. Scope of review and process

The methodology for this study was established by a working group of EPEC members and comprised:

- Desktop study of the extent to which Council Directive 2004/18/EC (the Procurement Directive) has been translated into national laws of the EU Member States¹;
- Review of OJEU notices (both contract notices and contract award notices) with the aim of establishing the main procurement procedures used for procurement of PPP projects launched in 19 selected EU Member States since the beginning of 2007 until mid December 2009²;
- Completion by EPEC members of a questionnaire on PPP procurement practices.

EPEC members in 24 countries in Europe (through their PPP units or other bodies in charge of overseeing the PPP market) were asked to fill in the questionnaire on PPP procurement practices in their jurisdictions. EPEC received 17 responses to Part I of the questionnaire (General procurement issues) and 12 responses to Part II (Competitive dialogue). This sample includes most of the countries in Europe that have had significant experience in the use of competitive dialogue³;

- Discussions within the working group.

¹ Please see a summary of the results in Annex 2.

² This data often proved difficult to interpret because of language and terminology issues. A high level summary is provided in Annex 3.

³ Countries which have not responded to Part II are those with no, or limited, experience with competitive dialogue.

Key issues coming out of the survey were extensively discussed with some members within the working group. Such discussions yielded a number of additional valuable data.

It should be noted that the survey has been limited to EPEC members and therefore mostly reflects the views of the public sector.

4. Key findings

4.1. Issues identified

Our desktop survey shows that all EU Member States have now transposed the Procurement Directive into their national procurement laws and that almost all of them have implemented national laws dealing with procurements under the competitive dialogue procedure.

Although PPP projects will often fit in the category of “particularly complex contracts” for which the competitive dialogue procedure has been designed, the Procurement Directive does not provide for exclusive use of this method for PPP procurements. Many countries have therefore chosen to resort to other procurement routes in their procurement practices, even in some cases for complex PPPs. The review of OJEU notices and the results of our survey show that all four major procurement procedures available under EU legislation, i.e. open, restricted, negotiated procedures and competitive dialogue, are currently being used to procure PPPs, although to a different extent. Competitive dialogue appears to be the most commonly used, with over 70% of respondents reporting using it “frequently” or “occasionally”.

The following positive aspects of the competitive dialogue procedure are reported by the countries that use it relatively frequently compared to alternative procurement procedures:

- **Improved communication between the contracting authority and the bidders** during the dialogue, which allows to better define the contracting authority’s needs and come up with better design and innovative solutions;
- **Enhanced competitive tension** during the dialogue period which allows the contracting authority to achieve better value for money and agree on all vital commercial issues while there is still competition among participating bidders;
- **Better price discipline** which leaves less room for “price creep” at the post preferred bidder stage.

In addition, there seems to be a general perception that competitive dialogue does not expose the contracting authority to greater risk of legal challenges than alternative procurement procedures.

On the other hand, most respondents expressed the following main concerns regarding the use of competitive dialogue:

- Competitive dialogue is perceived as a **complex procedure, with a negative impact on procurement cost and time**. The process is perceived as resource-intensive and lengthy (half of the respondents report that procurement under competitive dialogue normally lasts between 1 and 2 years). Most contracting authorities admit that their staff are not well prepared to conduct such complex proceedings and has to rely excessively on external advisors;
- Competitive dialogue is perceived as **lacking flexibility and/or clarity** and having insufficient ability to adjust to changed circumstances. The concepts of “fine-tuning” and “confirmation of commitments” set out in the Procurement

Directives are interpreted in very different ways in different jurisdictions. A strict interpretation is perceived as leading to insufficient flexibility, particularly for complex projects. A loose interpretation may, on the opposite, undermine the benefit of the competitive and price discipline and expose the contracting authority to an increased legal risk.

Finally, there was a shared concern between both “supporters” and “sceptics” of the competitive dialogue procedure that the recent financial crisis has created conditions which make the application of competitive dialogue more problematic. This is because the procedure calls for final offers being submitted before the selection of a preferred bidder, with limited room for further adjustments. At the same time, over 60% of our respondents report being currently unable to secure committed financial offers before financial close. This situation may lead to extensive adjustments of the selected offer after the financing package is eventually confirmed, which could be seen as going beyond the terms of the Procurement Directive.

Many contracting authorities, however, take a pragmatic approach to this issue and allow amendments to tenders post preferred bidder if this is necessary to reflect the terms of the financial offers, as long as such amendments do not modify substantial aspects of the tender, distort competition or cause discrimination among bidders.

4.2. Issues worth further consideration

This report is not intended to provide a detailed, “fit for all”, guidance on how best to procure PPPs. Such guidance, if needed, should come from each national procurement authority or relevant expert bodies. The analysis of the results of our survey, however, points in the following directions:

- The procurement method for each particular project must be selected to best fit the specific requirements of such project. Indiscriminate use of competitive dialogue is likely to be sub-optimal;
- When competitive dialogue is selected, more effective use of the flexibility and options allowed for by the Procurement Directive should be made;
- It is essential to keep strengthening the public sector’s awareness and understanding of the procedure and raise the ability of the contracting authorities to cope with its added demands in terms of staff resources and qualification.

5. Summary analysis of the responses to the questionnaire

5.1. General procurement issues

The questionnaire covered a wide range of procurement matters. The following issues were most consistently reported:

5.1.1. Choice of procurement procedure and effect on competition

All of the procurement procedures provided for in the Procurement Directive (i.e. open, restricted and negotiated procedures and competitive dialogue) appear to be in use to procure PPPs. This said, our survey shows that competitive dialogue is used more frequently⁴ than other procurement procedures. While 60% of respondents declare using competitive dialogue “frequently” in PPP procurements, the same is true for only 31% of respondents in the case of the open and negotiated procedures and 12% of respondents in the case of the restricted procedure.

The results of our survey show that sector and size considerations do not normally influence the choice of procurement procedure. Contracting authorities tend to make their choice by reference to their national procurement laws and the applicable

⁴ Measured by number of deals.

European Community law, but may also take a case by case view as to the merits of various procurement options in the particular circumstances of their projects or markets⁵.

From a bidder's point of view, the willingness to participate in a PPP project is normally determined by his expectations regarding the experience / preparedness of the contracting authority, the perceived project certainty and bid cost estimates rather than by the procurement procedure chosen⁶.

Half of the respondents carry out market soundings prior to launching a procurement procedure and most will normally take legal advice before making their procurement choice.

5.1.2. Selection / changes of bidding groups

Because PPPs involve both technical and financial matters, bidding groups almost always consist of consortia of contractors / operators and funders. On large PPPs this can involve 5 to 10 partners with different profiles, sizes and priorities. Groups have often to be formed when projects are still at an early conceptual stage, in particular regarding financial matters. This entails that PPP bidding groups are often subject to changes during the procurement process. For example, a new equity investor may be brought in when an earlier one decides to drop out of the tender. A funding group may be modified or changed altogether. Changes in bidding group composition seem to be a common issue. 70% of the respondents report that they have faced changes in bidding groups, frequently or occasionally, during their procurements.

It should be noted that the Procurement Directive (Articles 44 to 52) does not provide for a specific set of prequalification criteria which would apply in PPP procurements and would account for the heterogeneous nature of PPP bidding groups, nor does it explicitly define to what extent changes in bidding groups are allowed and, if so, under which conditions.

The majority of respondents indicate that, as far as the laws of their respective jurisdictions are concerned, the composition of a bidding group can be changed but only subject to approval of the relevant contracting authority⁷. Such approval is generally granted by benchmarking the new group against the prequalification criteria to ensure that the bid remains compliant. Alternatively, contracting authorities may ask the new bidding group to demonstrate that its technical and financial qualifications are at least equivalent to that of the original group.

5.1.3. Reliance on external advisors and use of standard documentation

In the overwhelming number of cases external advisors are involved at the initial feasibility stage.

⁵ In certain jurisdictions contracting authorities tend to use certain procurement option as the default, or even exclusive, procurement option for PPP projects. For example, competitive dialogue seems to be a first choice option for PPP procurements in France, the Netherlands and the United Kingdom. So is the open procedure for Spain and a form of the negotiated procedure (*Verhandlungsverfahren*) for Germany.

⁶ It is essential to remember in this regard that we have not approached the private sector to verify this position with them. It can thus not be excluded that the level of interest in a particular project is rather defined by intrinsic limitations in the number of contractors active in the respective market than by the choice of the procurement procedure by the contracting authority.

⁷ This is true for 13 out of 16 respondents.

The extent of the involvement of external advisors in the procurement process varies according to a number of factors such as the experience of the relevant contracting authority, the administrative level at which a project is implemented, the extent of the reliance on standard terms.

Although the experience can be somewhat contradictory, the availability of approved sets of standard documentation and guidance have generally proved effective in making public authorities more confident of their ability to deal with the process, saving time and helping them exert better control over the proceedings. It also makes them less dependant on external advisors⁸.

5.1.4 Impact of the financial crisis⁹

There is general agreement among the respondents that the recent financial crisis has had a significant impact on their procurement practices.

As a consequence of the credit crisis and the ensuing acute liquidity shortage, funders' appetite for the type of long-term lending required to finance PPPs has decreased sharply. Many lending institutions have withdrawn from the PPP market, reducing competition between the remaining funders. The tightening of syndication markets has forced sponsors to revert to often cumbersome "club deals". This has a significant negative impact on the financial terms of a PPP and leads to a more conservative lenders' approach toward risk sharing. In this context, agreement on financial terms is more difficult to reach and / or takes much longer.

The results of the survey show that more than 60% of the respondents are not able to receive committed offers before financial close and only a third is able to obtain such commitments at the preferred bidder stage. The main reasons quoted for failures to obtain compliant financial offers include:

- Insufficient amounts available (75% of the respondents);
- Lack of credit committee approval (60% of the respondents);
- Unacceptable terms (45% of the respondents).

In addition, funders are generally unwilling to complete their due diligence before the selection of a preferred bidder and tend to wait until the negotiations are finalised and all members of the funding group are assembled before confirming their commitments. All these issues postpone the availability of a committed financing package toward the end of the procurement process, generally near financial close.

Numerous instances of projects being delayed or put on hold were reported in our survey. Some projects had to be stopped, having become non-viable (either

⁸ A good example of the benefits which can be brought by standardisation is the UK PPP market. HM Treasury have issued standard wording and guidance for use by public sector bodies when drafting PFI contracts. This is called Standardisation of PFI Contracts, currently in version 4 (SoPC4). Contracting authorities must submit any requests to derogate from the standard wording and core principles of SoPC4 to the sponsoring government department. Final approval for derogations, where required, will be from HM Treasury. In addition, Local Partnerships, which is jointly owned by HM Treasury and the Local Government Association and which provides technical assistance to local authorities and other local public bodies in the UK in order to improve their ability to source and deliver high quality, cost-effective public services and infrastructure, has also produced a number of sector-specific "procurement packs" which contain guidance and model form procurement documents (such as standard pre-qualification questionnaire (PQQ), invitation to submit outline solution (ISOS)) as well as standard model form contracts.

⁹ For more details on this please see *The financial crisis and the PPP market. Potential Remedial Actions*, European PPP Expertise Centre – EPEC (Abridged version, August, 2009).

unaffordable or no longer offering value for money) as a result of the deteriorated financial terms.

5.2. Issues specific to competitive dialogue

5.2.1. Overview

Competitive dialogue was introduced into the Community law in 2004. This additional procurement option is expected to be used in the case of “particularly complex contracts where contracting authorities consider that the use of the open and restricted procedure will not allow the award of the contract” (Article 29 of the Procurement Directive)¹⁰. The main idea behind the procedure is that an improved communication with the bidders, within a prescriptive and transparent framework, is able to deliver more innovative and responsive solutions from the private sector and optimise value for money for the public sector, while maintaining transparency and price discipline.

The procedure was gradually translated into procurement laws of the EU Member States (e.g. the implementing regulations entered into force in June 2004 in France and in January 2006 in the United Kingdom). With very few exceptions, competitive dialogue has now been transposed into national laws of all EU Member States¹¹.

Although competitive dialogue has been in use in certain countries since 2005, it still remains a relatively “unexplored” procedure at the European level in the sense that the bulk of experience comes from a small number of countries: only the UK, France and Ireland have used competitive dialogue in a sufficient number of instances to provide a reliable basis for analysis¹². Besides, the procedure is applied in different ways across countries (indeed, often by sector or region inside the same country). Finally, the recent financial crisis has affected the way competitive dialogue procurements have been conducted (see § 5.2.4).

Extent of use of competitive dialogue across EU countries

As already pointed out, competitive dialogue is not used universally at the moment to procure PPPs across Europe. Our survey shows that only 60% of the respondents report using competitive dialogue frequently¹³, 12% of respondents say that they use competitive dialogue at least occasionally and 28% say that they never use competitive dialogue in their PPP procurements.

Those countries not using competitive dialogue are not doing so for a number of reasons:

¹⁰ The procurement authority has to take into account a number of factors, including the form and scope of bidders' involvement which may be required to define the final form of the project, when selecting the procurement procedure to be used in each particular case. Making a choice between the competitive dialogue and negotiated procedures can prove a particular challenge in practice. The general guidance on this can be found in the Procurement Directive (see Recital 31, Articles 1(11)(c), 29-31), the Commission Explanatory Note on Competitive Dialogue (CC/2005/04_rev 1 of 5.10.2005, section 2) and the Commission Green Paper on Public-Private Partnerships (COM (2004) 327 final), paragraphs 24-25).

¹¹ Please see Annex 2 for more detail on this.

¹² Some other countries use competitive dialogue systematically, but their PPP markets are small.

¹³ 8 out of 14 responses.

- They prefer to use procurement methods more familiar to them and better suited to particular conditions of their domestic markets¹⁴, or prescribed by their national procurement laws, such as the open or restricted procedures;
- A small number of the respondents believe that competitive dialogue is not well adapted to the procurement of PPPs, because of its perceived excessive length and cost;
- Contracting authorities in some countries have concerns that the competitive dialogue procedure is less transparent and thus more prone to corruption risks than other procurement procedures.

Duration of the process

The duration of competitive dialogue differs from jurisdiction to jurisdiction. In 67% of cases the overall procurement process (i.e. from publication of a contract notice until financial close) took between 1 to 2 years to complete. In 25% of cases, and mostly with reference to large PPP projects, the overall duration of procurement exceeded 2 years. This is clearly linked to the multi-stage approach promoted under the procedure¹⁵, with several cycles of submissions, dialogues and evaluations.

Withdrawal of bidders

Almost all of the respondents confirm that they faced withdrawal of bidders during the dialogue stage. When this happens, they confirm that they normally carry on with a limited number of bidders rather than replace the bidders who dropped-out, except when it is essential to maintain the level of competition.

The majority of the respondents agree, however, that (i) the number of bidders who withdrew from the procurement process under competitive dialogue was not greater than normally happens under alternative procurement procedures and (ii) any increase in withdrawals was more likely due to market conditions.

Preserving confidentiality of bidders' proposals

Confidentiality is a sensitive and challenging matter for contracting authorities and for bidders alike. Although it is almost always quoted as one of the main problems of the competitive dialogue procedure, practical solutions seem to be implemented with some success. Solutions are mostly procedural and vary in scope and form. Examples include:

- Implementation of specific rules / codes of conduct by contracting authorities¹⁶;
- Execution of confidentiality agreements with bidders¹⁷;
- Reliance on the general legal requirement not to disclose proposed solutions and other confidential information without obtaining consent from the bidder concerned¹⁸.

A frequent consequence of this perceived risk, however, is that bidders tend to retain their most competitive or innovative solutions until the very last stage of the dialogue to avoid any risk of leakage to their competitors.

Risk of challenge

There is no consensus among the respondents as to whether competitive dialogue exposes contracting authorities to a greater (or lower) risk of challenge compared to

¹⁴ An example is the German ÖPP-Verhandlungsverfahren mentioned earlier.

¹⁵ The number of dialogue stages does not normally exceed 3.

¹⁶ As in the Netherlands and the United Kingdom.

¹⁷ As in Scotland and Ireland.

¹⁸ As in France and Romania.

alternative procurement procedures¹⁹. Of the countries which have carried out any significant number of competitive dialogue procurements, there is no evidence that the number of challenges under competitive dialogue has been any higher than under alternative procurement procedures.

Moreover, the majority of the respondents agree that in practice the main reasons for challenges seem to relate to perceived failures and inconsistencies in evaluation and selection practices, rather than in the choice of the procurement procedure itself.

The above submission, however, needs to be verified against the number of procurements carried out with reference to each particular procurement procedure and bearing in mind that different jurisdictions may have very different attitudes toward litigations.

5.2.2. Perceived benefits brought by competitive dialogue

A number of positive aspects of the procedure have been reported.

Better projects

The majority of the respondents believe that competitive dialogue provides better outcomes compared to alternative procurement procedures in terms of each of the following features:

(Out of a sample of 9 to 10 responses)

- Meeting the contracting authority's needs (6 positive responses);
- Design and innovative solutions (9 positive responses);
- Contract terms (9 positive responses);
- Value for money (7 positive responses).

This could be the result of a more open communication between the contracting authority and the bidders, combined with the fact that competitive dialogue forces the private sector to come up with solutions while there is still a competitive pressure. In addition, there are good reasons to believe that, if properly implemented, the structure of the procedure itself allows achievement of greater transparency of the procurement process and helps secure a level playing field for all bidders.

Enhanced competition

Almost all the respondents (8 out of 9) believe that competitive dialogue results in greater competitive pressure compared to alternative procurement procedures. This appears to be the consequence of the multi-stage approach, which tends to preserve the competitive environment for an extended period of time. Such increased competitive pressure does not, however, seem to deter bidders from entering a competitive dialogue as there is no reported impact of the procedure on the number of bidders²⁰.

Better price discipline

Improved price discipline is quoted as an advantage by several respondents.

¹⁹ With a possible exception of the negotiated procedure which has been more often reported by the respondents as being prone to challenges than competitive dialogue, albeit not conclusively.

²⁰ This conclusion ought to be monitored closely, however, when more experience on competitive dialogue becomes available.

Because competitive dialogue is perceived as a highly structured and prescriptive process, which provides less room for manoeuvre for the contracting authority, the procedure tends to leave “less opportunities for scope and price creep” and limit “the battle to preserve the contract terms”²¹ with the preferred bidder.

Improved bidders / contracting authority relationship

This is a highly subjective criterion, but it is mentioned by over 60% of the respondents. Interestingly, the improved relationship observed during the dialogue stage is often reported to filter through to the contract execution stage.

5.2.3. Perceived problems related to competitive dialogue

The respondents have noted a number of downsides to the competitive dialogue procedure.

Competitive dialogue takes longer

The respondents share the feeling that a PPP tendered using competitive dialogue takes longer to procure than under alternative procedures.

A number of possible reasons for this longer timeline have been given, in particular:

- Competitive dialogue normally involves more detailed discussions with a greater number of participants and in several successive stages;
- Competitive dialogue being a very prescriptive procedure, it requires additional care and diligence from all participants to ensure compliance with all procedural requirements along the way.

A logical response to this problem would appear to be the reduction in the number of bidders as early as possible in the process. This would ensure that the process is leaner and more focused as the dialogue progresses. This could be achieved with a limited loss to competition, as the less responsive bids would be eliminated first.

Such possibility is specifically mentioned in Article 29 of the Procurement Directive²². It can therefore be considered as part of the rationale of the concept of competitive dialogue. So far, however, it is only used by half of the respondents²³.

One of the benefits of the procedure (with potentially significant cost and length implications) appears to be underestimated. If non responsive bidders are kept in the competition up until late stages of the procedure, this is likely to lead to inefficiencies in the procurement process. In addition, the knowledge that bidders will have a chance to make further submissions later in the process can act as a disincentive for them to table competitive proposals early in the dialogue process²⁴.

²¹ Quotes from the survey.

²² Please also refer to the opening paragraphs of the Procurement Directive (Recital 41) which specifically refer to this option as a means to tackle increased procurement costs: “In the competitive dialogue <>, in view of the flexibility which may be required and the high level of costs associated with such methods of procurement, contracting authorities should be entitled to make provision for the procedure to be conducted in successive stages in order gradually to reduce, on the basis of previously indicated contract award criteria, the number of tenders which they will go on to discuss <>”.

²³ The relevant break-down of the responses was 55% to 45%. Most respondents confirmed that they normally expect to see 2-3 bidders proceed to the final offer stage.

²⁴ There are several possible explanations for this failure to exploit the opportunity provided under the Procurement Directive: (i) in order to eliminate bidders contracting authorities need to carry out a more thorough evaluation and ranking process at each stage, which may be perceived as adding complexity and lengthening the process; (ii) the selection criteria set forth in the tender notice may not be appropriate at all

Competitive dialogue is more expensive to use

There is a common perception among the respondents that competitive dialogue is more resource-intensive and expensive compared to alternative procurement procedures for both contracting authorities and bidders. As much as 30% of respondents admit that they are unable to provide the additional resources required on the public side. This often translates into an increased reliance on external advisors.

Some respondents point out that it proves useful in their experience to run focused “specialists only” sessions before finalizing the relevant aspects of the project proposal at an all-parties session.

The increase in costs is often a result of extensive dialogue meetings²⁵. In order to drive down the overall procurement costs, some of contracting authorities try to keep the number of participants at a manageable level (e.g. reducing the number of bidders invited to conduct a dialogue, as well as using the option to down scale discussed before).

Box 1: Sharing of bid costs

In order to mitigate the negative cost impact for the bidders some contracting authorities agree to compensate losing bidders for some of their bid costs. Such practice seems to be relatively rare and in many cases is a response to the deteriorated financing conditions which have led to difficulties in securing competition. It obviously has the effect of increasing the cost for the authority.

The payment of compensation is normally designed to keep as many bidders as possible (particularly the smaller ones) in the process, up to the final offer stage. To discourage malpractice, such payment can be made dependent on achieving financial close under a project or on the absence of challenges of the procurement procedure. The budget for compensation can be drawn either from available public funds or be charged to the winning bidder.

An overview of some reimbursement practices currently utilised in Europe is available in Annex 4.

stages of the dialogue; (iii) if, following a down scaling, the contracting authority decides to modify any substantial conditions in its procurement programme, it may open itself to challenges by the eliminated bidders on the ground of inequality of treatment, including possible failures by the contracting authority to secure equal access to the review procedures available under the new Remedies Directive (Directive 2007/66/EC) and relevant national law.

²⁵ Some of the respondents noted the risk of having too many points on the discussion agenda. This is often a result of contracting authorities failing to do their “homework” prior to the start of procurement process and / or lack of sufficient experience and confidence on their part. Inadequate preparation by contracting authorities is by itself a threat to effective procurement process and is likely to result in increased procurement time and costs. Useful references on the key issues and procedures involved in the procurement of PPPs can be found in *A Guide to Guidance. Sourcebook for PPPs*, European PPP Expertise Centre – EPEC.

Competitive dialogue is complex

Competitive dialogue is a relatively new procedure for which no established practice is available in many countries in Europe. It raises a number of unfamiliar issues such as confidentiality, proprietary information, down-scaling of bidders and, more generally, the mechanics of running several parallel negotiations with different bidders in a multi-stage procedure. The dialogue stage requires careful preparation in order to be effective. This may not be compatible with the tight schedules many contracting authorities are often working under. It also implies the availability of experienced procurement staff with specific training.

One of the telling results of the survey is that almost 90% of respondents consider that contracting authorities (at all levels) are not “fully up to speed” with the use of the competitive dialogue procedure.

Competitive dialogue has limited flexibility and ability to adjust to changing circumstances

Two thirds of the respondents²⁶ believe that the level of flexibility allowed at the post final offer stage is not sufficient for such complex contracts as PPP²⁷. The concepts of “fine-tuning” and “confirmation of commitments” set forth by the Procurement Directive can be interpreted in very different ways in different jurisdictions.

A strict interpretation may provide insufficient flexibility, particularly for complex projects, and potentially lead to poorly defined or imbalanced contracts. This is because the procedure calls for a high degree of finalization of the contracts at the final offer stage. This may not always prove practical in a situation when several bidders are still in competition, and more so, if such bidders offer very different solutions. As a result, the selection is made on contracts which are not yet fully elaborated and more time may be required to perfect the contract with the selected bidder than can be anticipated under the competitive dialogue approach.

A loose interpretation, on the opposite side, may undermine the benefit of the competitive and price discipline and expose the contracting authority to an increased legal risk.

Making a decision on the extent of “fine-tuning” clearly is a difficult balancing act for the contracting authorities. Such decision may be influenced by market circumstances, competition level, project size and complexity.

Our survey shows that, in practice, the “post final offer” stage lasts between 3 to 6 months in 75% of cases²⁸. This seems to show that most contracting authorities, while they adhere to the spirit of the competitive dialogue concept, by limiting as much as possible the amount of issues left outstanding after selection of the preferred bidder²⁹, take a pragmatic approach to this problem.

5.2.4. Issues linked to the financial crisis

Competitive dialogue appears to be particularly affected by the tighter credit situation described in § 5.1.4. This is because, if interpreted strictly, the procedure calls for final offers (including a finalized financing package) to be submitted before the selection of a preferred bidder. As described earlier, this is not always possible in the context of the credit crisis which often leads to the need to adjust the selected offer at the post preferred bidder stage in order to make it consistent with the final terms of the financing proposal.

²⁶ 6 out of 9.

²⁷ The lack of sufficient flexibility was one of the reasons why many respondents believe that competitive dialogue has not fared well in the current financial crisis.

²⁸ It is even longer in the remaining 25% of cases.

²⁹ Under the negotiated procedure, for example, this finalisation period can be much longer.

Not all contracting authorities, however, agree with this strict interpretation. Some believe that adjustments required to reflect the final financing package are acceptable as long as they do not contradict the basic principles of Article 29 of the Procurement Directive, i.e. they do not “have the effect of modifying substantial aspects of the tender” or “risk distorting competition or causing discrimination”.

There is no doubt that this issue creates legal uncertainty for contracting authorities. In certain markets, particularly those known for their litigious environment, this may not be considered acceptable. The newly enacted Remedies Directive is likely to make this issue more acute.

Although the negative impact of the financial crisis would appear to be diminishing, the liquidity constraints in the markets affecting the achievability and timing of financial close under PPP procurements using competitive dialogue mean the issues raised may continue to be relevant for some time.

Box 2: Article 30 (1) (a) of the Procurement Directive

One possible response to the above issue would be to rely on Art 30 (1) (a) of the Procurement Directive, which allows a contracting authority to revert to the negotiated procedure if, at the end of the dialogue, such contracting authority receives “irregular” or “unacceptable” offers. Non-committed financing proposal would seem to qualify as being irregular and / or unacceptable.

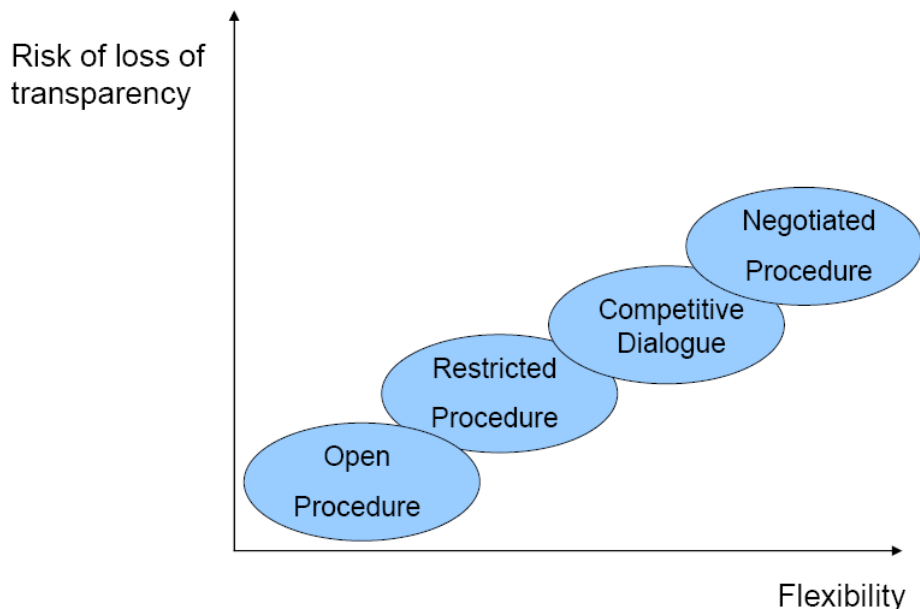
Our survey shows that no established practice is available in this respect (only two cases in the same jurisdiction are reported).

Recourse to this solution is likely to raise a number of practical issues. In particular, such switch in procedure may result in a substantial increase in procurement time and expose the contracting authority to a higher risk of legal challenges. It is, nevertheless, a welcome flexibility built into the Procurement Directive, which contracting authorities should be aware of.

6. Conclusion and way forward

EPEC’s review of the initial experience of contracting authorities in Europe with the use of competitive dialogue has highlighted some interesting trends and concerns:

- All four procurement routes provided for in the Procurement Directive are being used to procure PPPs across the EU. This reflects the fact that PPPs cover a broad range of projects (i.e. from small size facilities with little functional complexity to multi-billions complex projects involving a large array of potential solutions);
- Multiple factors guide contracting authorities in the choice of the preferred procurement route. Generally, the open and restricted procedures are applied for simpler projects, where a contracting authority can specify all its requirements in advance. As projects become more complex and the need to involve bidders to define an optimal solution grows, contracting authorities tend to choose the more flexible competitive dialogue or negotiated procedures. This may, however, be at the expense of some transparency, as the four procurement procedures imply a “trade-off” between the risk of transparency loss and flexibility, as can be illustrated below:



- Competitive dialogue is intended to provide a procurement method which is both transparent and sufficiently flexible to fit complex projects like PPPs. Although it goes some way in achieving this goal in terms of increased transparency (subject to confidentiality and protection of intellectual property issues), our survey shows that it falls short in terms of flexibility in certain of its key provisions;
- Whilst competitive dialogue appears to have distinct advantages in the quality and value of projects it is able to deliver, this comes at the expense of significantly increased transaction cost and time;
- Competitive dialogue does not therefore appear as a “one fits all” solution for PPPs and contracting authorities should be encouraged to take a case by case view on whether competitive dialogue is likely to deliver best results.

EPEC review suggests that there are several ways to capitalise on the strengths of competitive dialogue while mitigating its main drawbacks:

- Competitive dialogue appears to deliver its best results on issues such as fostering innovation and facilitating a constructive dialogue between the contracting authority and the bidders. This results in solutions that better fit the needs of the contracting authority. This is particularly relevant for complex facilities or buildings (e.g. hospitals, prisons) where functional design and technology are critical to the success of a project but where many means to achieve the goals are available. In such cases the improved outcome which can be expected from the dialogue can potentially offset the increased cost and time derived from the procedure. Competitive dialogue would be suited strongly to projects where such features are important.

Other examples may be found in projects where the financial solution is particularly challenging;

- As a corollary, projects of (i) repetitive nature, (ii) for which standardised terms and contracts are readily available, (iii) for which design solutions are already well established and proved to be effective and (iv) which have limited opportunity for innovation, may not benefit from the use of competitive dialogue. In such cases, the added cost may not be justified by the potential outcome improvements and the open or restricted procedure would be more suitable;
- An effective use of the procedure may imply taking more advantage of the flexibility offered in the Procurement Directive by reducing the number of

bidders in the successive stages of the dialogue. This can help reduce cost and time as well as allow the contracting authorities to focus on the more responsive proposals.

EPEC review has demonstrated that there is a clear need to strengthen the public sector's awareness and understanding of the competitive dialogue procedure, as well as its ability to cope with the increased demands on qualified staff and financial resources:

- While it seems inevitable that, to a significant extent, the learning process will take place “on the ground”, it is important to develop the preparatory training capabilities of individual procuring institutions. One way to achieve this would be through investing time and effort in the development of in-house procedures on PPP procurements using competitive dialogue;
- The vast majority of the respondents would welcome additional guidance on the use of the procedure. The professional procurement community in Europe could, in particular, benefit from clarifications on the degree of flexibility in interpreting certain provisions of the Procurement Directive (e.g. the “fine-tuning” and “confirmation of commitments” after selection of the preferred bidder) and on how to best overcome the limitations of competitive dialogue in coping with the current credit crisis;
- Additional guidance should be given with due regard to the variety of PPP projects and the differences in national laws and regulatory practices across Europe. Most respondents therefore expect any further guidance would come from their national procurement authorities, and / or through advice of their relevant professional bodies, supported in both cases by the European Commission as far as application of the existing rules is concerned, rather than from further regulations at the EU level.

Annex 1. A comparison of EU procurement procedures

| | Open Procedure | Restricted Procedure | Competitive Dialogue | Negotiated Procedure |
|---|--|---|--|--|
| Possibility to limit number of bidders | No prequalification or pre-selection is permitted. Any interested company may submit a bid. | The number of bidders may be limited to no less than five in accordance with criteria specified in contract notice (prequalification and shortlisting permitted). | The number of bidders may be limited to no less than three in accordance with criteria specified in contract notice (prequalification and shortlisting permitted). | The number of bidders may be limited to no less than three in accordance with criteria specified in contract notice (prequalification and shortlisting permitted). |
| Discussions during process | The specifications may not be changed during the bidding process, and no negotiations or dialogue may take place with bidders. Clarification is permitted. | The specifications may not be changed during the bidding process, and no negotiations or dialogue may take place with bidders. Clarification is permitted. | Dialogue with bidders permitted on all aspects (down-scaling bidders permitted between successive stages of the dialogue). When dialogue is concluded, final complete bids must be requested based on the solution(s) presented during the dialogue phase. | Negotiations permitted throughout process. Successive stages can be used to reduce the number of bidders (further short-listing). |
| Discussions after final bid is submitted | No scope for negotiations with a bidder after bids are submitted. | No scope for negotiations with a bidder after bids are submitted. | Only permitted to clarify, fine tune or specify a bid or confirm commitments. No changes permitted to basic features. | Not relevant because the negotiations can continue until the contract is agreed. There need be no "final bid" per se. |
| Basis for award | Lowest price or most economically advantageous tender. | Lowest price or most economically advantageous tender. | Most economically advantageous tender. | Lowest price or most economically advantageous tender. |

Annex 2: Transposition table for the Procurement Directive

The table below shows our understanding of the current transposition status for the Procurement Directive into national laws of the EU Member States.

| | Jurisdiction | Was the Directive transposed into national laws? | Applicable national laws | Comments | Is the competitive dialogue procedure (CDP) used (i) in general or (ii) for PPPs only |
|---|-----------------|---|--|--|--|
| 1 | Austria | Transposed | <i>Bundesvergabegesetz 2006</i> | | CDP can be used for all types of projects, irrespective of PPP or not. |
| 2 | Belgium | Transposed. CDP is foreseen in legislation that has not entered into force yet. | | Most mandatory provisions have now been implemented, albeit late. CDP being optional, this didn't seem to be a priority. | N/A |
| 3 | Bulgaria | Transposed | <p>Law on Public Procurement, in force as of 01.10.2004.</p> <p>Regulation on the Implementation of the Law on Public Procurement, adopted with a Decree of the Council of Ministers No 150 of 21.06.2006, in force as of 01.07.2006.</p> <p>Regulation on the Award of Small Public Procurement, adopted with a Decree of the Council of Ministers No 249 of 17.09.2004, in force as of 1.10.2004.</p> <p>Law on Concessions, in force as of 01.07.2006.</p> <p>Regulation on the Implementation of the Law on Concessions,</p> | <p>The national regime regulating public procurement is slightly more restrictive than the one envisaged by the EC Procurement Directives.</p> <p>However, as regards CDP, there seem to be no material differences between the rules implemented for the transposition of the Directive and the Directive itself.</p> | CDP is rarely used. Its use in practice is not limited to PPPs only but to all particularly complex contracts. |

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| | | | adopted with a Decree of the Council of Ministers No 161 of 29.06.2006, in force as of 01.07.2006. | | |
| 4 | Croatia | Transposed | Public Procurement Act adopted by the Parliament of the Republic Croatia on 3 October 2007, as amended on 17 October 2008. | | CDP can be used for all types of particularly complex projects, irrespective of PPP or not. |
| 5 | Cyprus | Transposed | The Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts, Public Service Contracts and for the Related Matters Law of 2006 (Law 12(I)/06). | The provisions of the Cypriot laws in respect of CDP are identical to the relevant provisions of the Directive. | CDP can be used in general under Cypriot law. Law 12(I)/2006 does not place any restrictions for the use of CDP for PPPs only, hence non-PPPs can also be procured using this procedure. |
| 6 | Czech Republic | Transposed | Act. No. 137/2006 Coll., as amended, on public procurement. | The procedure for successive stages of competitive dialogue (as provided for in Article 29(4) of the Directive) and specification of prices or payments to the participants (as provided for in Article 29(8) of the Directive) have been enacted. | CDP can be used for all types of projects and is not restricted to PPPs. |
| 7 | Denmark | Transposed | Executive order no. 937 of 16 September 2004 (effective 1 January 2008). | The Directive has been implemented into Danish law by executive order with minor clarifications, but without any changes. | CDP can be used in general. However, in practice this procedure has mainly been used for PPPs. |
| 8 | Estonia | Transposed | Estonian Public Procurement Act, adopted by the Parliament of the Republic of Estonia on 24 January 2007) (Section 26) (<i>Riigihangete Seadus</i>). | The contracting authority is entitled to use CDP, provided the estimated value of the public procurement is below the international threshold. | CDP can be used for PPPs, but also in complicated ordinary procurements (IT, construction) where the contracting authority is not objectively able to specify the legal or financial circumstances related to the procurement with |

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| | | | | | adequate precision. |
| 9 | Finland | Transposed | <p>Act on Public Contracts (<i>Laki julkisista hankinnoista</i> 30.3.2007/348) (the ACP).</p> <p>Act on the Public Contracts by units operating water and energy services, transport and postal services (<i>Laki vesi- ja energiahuollon, liikenteen ja postipalvelujen alalla toimivien yksikoeden hankinnoista</i> 30.3.2007/349).</p> | APC by large contains equivalent provisions to the ones in the Directive. | CDP can be used in general and is not restricted to PPPs only. |
| 10 | France | Transposed | <p>Depends on the type of public contract:</p> <p>(1) <u>Public procurement contracts entered into by the State, local authorities and some public entities:</u></p> <p>Public procurement contracts Code, as amended by a Government order dated 1 August 2006.</p> <p>(2) <u>Public procurement contracts entered into by contracting authorities other than those concerned by the public procurement contracts Code:</u></p> <p>Ordinance dated 6 June 2005.</p> <p>(3) <u>Partnership contracts (PPPs):</u></p> <p>Ordinance dated 17 June 2004.</p> <p>(4) <u>Public works</u></p> | For PPPs in the health sector and in justice, police and defence matters, contracting authorities are entitled to choose either the Partnership contracts (PPPs) legal framework or the specific legal frameworks for PPPs in the relevant sectors. | CDP can be used for all kinds of public procurement contracts and not for PPP projects only. |

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| | | | <p><u>concessions:</u></p> <p>Ordinance dated 16 July 2009.</p> <p>(5) <u>PPPs for hospitals and justice, police or defence projects:</u></p> <p>Ordinance dated 4 September 2003 (hospitals).</p> <p>Law dated 6 August 2002 and Government Order dated 6 January 2004 (justice, police, defence).</p> | | |
| 11 | Germany | Transposed | <p>Procurement Modernisation Act (<i>Gesetz zur Modernisierung des Vergaberechts</i>) amending the following Acts:</p> <p>(1) Act Against Unfair Competition (<i>Gesetz gegen Wettbewerbsbeschränkungen</i>).</p> <p>(2) Procurement Regulation (<i>Vergabeverordnung</i>).</p> | CDP has been implemented into German law without any significant variations when compared to the Directive. | CDP is used for all types of procurement other than in the fields of water, traffic or energy supply. |
| 12 | Greece | Transposed | Presidential Decree 60/2007 (Government Gazette A64/16-3-2007). | CDP was implemented with few slight variations in wording. | CDP can be used for all types of procurement. |
| 13 | Hungary | Transposed | Act 129 on Public Procurement of 2003. | CDP has been implemented into Hungarian law in line with the Directive but with more details of applicable procedures. | CDP can be used for all types of procurement. |
| 14 | Ireland | Transposed | The European Communities (Award of Public Authorities' Contracts) Regulations 2006, SI No. 329 of 2006 (the Public Sector | CDP is substantially the same as set out in the Directive. | The procedure has been used on a number of PPPs to date, and has also been used on a wide range of other projects, such as IT contracts and |

| | | | Regulations). | | property development agreements. |
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| 15 | Italy | Fully transposed but CDP suspended by article 1, Legislative Decree 113/2007 | <p>The Directive has been implemented by Article 58 of Legislative Decree 163/2006 – Code of public works contracts, public service contracts and public supply contracts (the Code).</p> <p>CDP is provided in article 58 of the Code.</p> <p>According to Article 253 of the Code, the applicability of Article 58 of the Code is suspended until the entry in force of the implementing regulation of the Code. Nevertheless, CDP is allowed for project financings under Article 153 of the Code.</p> | <p>CDP can be used in the same cases as envisaged in the Directive. The Code also develops the concept of "complex contracts" provided by the Directive, clarifying what contract can be deemed "complex" (i.e. inter alia where <i>"contracting authorities, due to objective causes, don't have studies regarding the identification and quantification of their needs or studies regarding the possible economical, social and environmental consequences of the planned projects"</i>).</p> <p>A previous opinion of the Superior Council for Public Works (<i>Consiglio superiore dei lavori pubblici</i>) and – when applicable – of the Superior Council for Cultural Heritage is required for public works contracts.</p> <p>If the contracting authority considers that none of the offers is appropriate, the relevant bidders will not be entitled to a refund.</p> | <p>CDP can potentially be used for all types of procurement contracts, provided that they are classified as "complex contracts" (although due to the lack of implementing regulation of the Code, CDP is currently used for PPPs only).</p> <p>The Code also contains a list of works for which CDP can not be used. In particular, CDP can not be used for strategic infrastructures of national interest.</p> |
| 16 | Latvia | Transposed | <p>Public Procurement Law dated 6 April 2006, as amended (the PP Law).</p> <p>Law on Public and Private Partnership dated 18 June 2009; came into force on 1 October 2009.</p> | <p>Latvian procedural and substantive rules on CDP are analogous to the rules set forth in the Directive. No variations in the procedure have been implemented as part of the transposition.</p> | <p>CDP can be used for all types of procurement.</p> <p>However, in practice CDP has not been used yet, since the applicable norms have been adopted only recently.</p> |

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| 17 | Lithuania | Transposed | Law on Public Procurement, adopted by the Seimas of the Republic of Lithuania (No. X-471, 22-12-2005, Žin., 2006, No. 4-102 (12-01-2006)). | Lithuanian procedural and substantive rules on CDP are analogous to the rules set forth in the Directive. Variations are minor and do not change the rules of the Directive. | CDP can be used for all types of procurement. However, it is not used very widely in practice (neither in traditional public procurement procedures, nor in PPPs). |
| 18 | Luxembourg | Transposed | The law on public procurement dated 25 June 2009 (<i>Loi du 25 juin 2009 sur les marches publics</i>). | The law of 25 June 2009 introduced CDP as a new form of procurement in Luxembourg. | CDP is not limited to PPPs according to the wording of the law of 25 June 2009. However, the procedure can only be used for particularly complex procurement projects (<i>marchés particulièrement complexes</i>) which will in practice imply that CDP will almost exclusively be used for PPPs. |
| 19 | Malta | Transposed | The Directive was transposed in the Public Contracts Regulations (Legal Notice 177 of 2005 as amended) (the Public Contracts Regulations) issued under the Financial Administration and Audit Act (Chapter 174 of the Laws of Malta). | The Public Contract Regulations do not vary from the minimum requirements in the Directive as regards CDP, although provide for some variations to the procedure set forth in the Directive. In particular, Article 47(9) of the Public Contract Regulations provides for the possibility to appoint an "ad hoc" committee with the responsibility for conducting CDP on behalf of the respective contracting authority. | The Public Contracts Regulations do not specify whether CDP may or may not be used for PPPs and do not provide any specific procedures for CDP to be used in PPPs. In practice, CDP has been used in local PPP projects and the contracting authorities involved would opt for the setting up of an "ad hoc" committee in terms of Article 47(9) of the Public Contracts Regulations. |
| 20 | Netherlands | Transposed | Award of Public Works Decree (<i>Besluit Aanbestedingsregels Overheidsopdrachten</i>) | Currently, a legislative proposal is drafted by the Ministry of Economic Affairs, | CDP has not only been used in large projects, but also in smaller projects. The majority or even all of |

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| | | | <p>under the Procurement Framework Act EEC-regulations (<i>Raamwet EEG-voorschriften aanbestedingen</i>).</p> | <p>regarding the new Procurement Act (<i>Aanbestedingswet</i>). This proposal has been submitted to the House of Representatives in July 2010. It is unclear when it will be adopted. When adopted, this act will replace the current applicable national laws regarding procurement.</p> <p>The stipulations regarding CDP in articles 28 and 29 of the <i>Besluit Aanbestedingsregels Overheidsopdrachten</i> are similar to article 29 of the Directive.</p> | <p>the projects where CDP was used were PPP projects.</p> |
| 21 | Poland | Transposed | <p>Act of 7 April 2006 amending Public Procurement Law dated 29 January 2004 (consolidated text: Journal of Laws 2007, No. 223, item 1655, as amended).</p> | <p>The regulations transposing CDP into the Polish Procurement Law are generally less flexible than the rules in the Directive. For instance, articles 60a-60e of the Polish Procurement Law do not allow for the multistage procedure, as provided for in article 29(4) of the Directive.</p> | <p>CDP applies to public contracts in general, that is contracts for pecuniary interest concluded between an awarding entity and economic operator, having as their object services, supplies or works.</p> |
| 22 | Portugal | Transposed | <p>Public Contracts Code (<i>Código dos Contratos Públicos</i>), approved by Decree-law nr. 18/2008, January 29th, as amended by Decree-law 278/2009, of October 2nd.</p> | <p>CDP was generally transposed into national law as it is envisaged by the Directive.</p> <p>There are, however, some variations, including the following:</p> <p>(i) each participant may present no more than one solution;</p> <p>(ii) the dialogue continues until the contracting entity</p> | <p>CDP is not widely used in Portugal either in general or for PPPs.</p> <p>CDP was used by the Lisbon Municipality to create, implement and finance a network of shared-use bicycles in Lisbon, complementary to public transportation. However, there were some doubts as to whether the grounds for the use of CDP were</p> |

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| | | | | <p>identifies one solution as capable of meeting its needs;</p> <p>(iii) each participant is asked to submit its tender on the basis of the sole solution that was chosen by the contracting entity.</p> | justifiable. |
| 23 | Romania | Transposed | <p>Primary legislation - Government Emergency Ordinance No. 34 / 2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts.</p> <p>Secondary legislation - Government Decision No. 71/2007 for approving the norms for the implementation of the provisions on the award of concession contracts of public works and services as set forth in the Government Emergency Ordinance No 34/2006 regarding the award of public procurement contracts, public works concession contracts and services concession contracts.</p> <p>Tertiary legislation - Guidelines for implementing works and services concession projects in Romania approved by the MPF/NARMPP order no. 1517/9574/2009.</p> | <p>CDP is substantially the same as set out in the Directive.</p> <p>When it comes to variations, the GEO on Public Procurement provides that the awarding authority may award a premium to the candidates who make it to the dialogue phase, but who have not been awarded a contract.</p> <p>The premium shall not exceed 2% of the estimated value of the relevant contract.</p> | <p>The contracting authority has the right to apply the CDP for awarding a public procurement contract if the two following conditions are cumulatively fulfilled:</p> <p>(a) the respective contract is considered to be particularly complex;</p> <p>(b) the application of the open or restricted procedure would not allow awarding of the respective public procurement contract.</p> <p>The particularly complex contract is considered the public procurement contract for which the contracting authority is not objectively able:</p> <p>(a) to define technical specifications, technical means that can satisfy the needs and exigencies; and/or</p> <p>(b) to establish the legal and/or financial framework for the implementation of a project.</p> <p>CDP was used for awarding the following major work concession contracts:</p> <p>-A3 motorway Comarnic Brasov.</p> <p>-"Universitatea"</p> |

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| | | | | | <p>underground parking in Bucharest .</p> <p>-“Netcity” (optic fiber network technologies) in Bucharest.</p> |
| 24 | Slovakia | Transposed | Act No. 25/2006 Coll. on public procurement. | CDP is substantially the same as set out in the Directive. | CDP can be used in general, however, in practice this procedure is not applied very often. |
| 25 | Slovenia | Transposed | <p>Public Procurement Act (<i>Zakon o javnem naročanju</i>), Official Gazette of the Republic of Slovenia, no. 128/2006, as amended (the Public Procurement Act).</p> <p>Public-Private Partnership Act (<i>Zakon o javno-zasebnem partnerstvu</i>), Official Gazette of the Republic of Slovenia, no. 127/2006, as amended (the PPP Law).</p> | <p>The Public Procurement Act is the general public procurement statute which transposes the entire Directive.</p> <p>The PPP Law regulates PPPs specifically and in detail.</p> <p>CDP as envisaged in the Directive is transposed in the PPP Law with the following variations:</p> <p>(i) there is no requirement in the PPP Law that a contract should be particularly complex for CDP to be used;</p> <p>(ii) if there are grounds permitting the award of a contract without a public tender (i.e. protection of exclusive rights, exceptional urgency), the minimum number of candidates in CDP can be less than three;</p> <p>(iii) prices or payments to the participants in the dialogue may only be provided if the public partner has decided to purchase documents which describe thoroughly the legal,</p> | CDP can be used in general. |

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| | | | | economic, technical, environmental or other conditions for carrying out the procedure or represent an original solution. | |
| 26 | Spain | Transposed | Spanish Law 30/2007, dated 30 October, on Public Sector Contracts (Law 30/2007) and Royal Decree-Law 817/2009, dated 8 May, on Public Sector Contracts, which explains Law 30/2007 (RDL 817/2009). | <p>Regulation of CDP is almost the same as in the Directive, subject to the following variations:</p> <p>(i) a particularly complex contract is defined as the one where the contracting authority is unable to objectively define the technical means best suited to satisfy its needs;</p> <p>(ii) CDP is a default option for contracts of collaboration between public and private sectors, unless specific situations in which negotiated procedure will be applicable;</p> <p>(iii) the number of companies participating in the dialogue can be limited to at least three;</p> <p>(iv) various criteria (although not specified in the applicable laws) shall be taken into account when awarding a contract using CDP. It is not possible to award the contract on the sole basis of the most economically advantageous tender.</p> <p>A special "concessionary board for the competitive dialogue" is usually formed for running CDP in each particular case.</p> | <p>CDP can be used for PPP projects in Spain by reference to "collaboration between public and private sectors", although the negotiated procedure can also be used under certain circumstances.</p> <p>PPP in the form of a concession will not be developed under CDP.</p> <p>CDP can also be applied for all conventional public procurements (i.e. with no private sector participation) where the contracting authority is not able to decide on technical design of a project (<i>particularly complex contracts</i>).</p> |

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| 27 | Sweden | Transposed | <p><i>Lagen (2007:1091) om offentlig upphandling (the Law on Public Procurement).</i></p> | CDP is substantially the same as set out in the Directive. | N/A |
| 28 | United Kingdom | Transposed | <p>The Public Contracts Regulations 2006 (Statutory instrument (SI), number: SI 2006/5; Official Journal: Her Majesty's Stationery Office (HMSO), number: 0110738853, Entry into force: 31/01/2006; Reference: (MNE(2006)51844) (the PCR).</p> <p>The Public Contracts (Scotland) Regulations 2006 (Scottish Statutory Instrument 2006 No1) came into force 31 January 2006.</p> | CDP was implemented with few slight variations in wording. | CDP is used for all types of procurement. The joint guidance of the Office of Government Commerce and the Treasury published in June 2008 states that CDP should "replace the negotiated procedure as the main procedure for complex public procurements where open and restricted procedures are deemed unsuitable." |

Annex 3: Summary of review of OJEU notices

In order to form a preliminary view on which PPP procurement procedures are used in the EU Member States to date, EPEC has conducted an independent review of OJEU contract notices related to PPP projects launched in 19 selected EU Member States from the beginning of 2007 up until mid of December 2009.

Although the review of the notices proved useful in getting a feeling about the scope of application of each of the available procurement procedures as far as PPP projects in Europe are concerned, it still fell short of delivering reliable data in all cases. This is due to the fact that comprehensive summary of OJEU notices in English is not available in many cases, as well as that such notices are not classified by project type (i.e. PPP or traditional public procurement) in Tenders Electronic Daily (TED).

It should be noted that our review did not cover the United Kingdom and France, which are the two largest markets for PPPs³⁰. It is, however, well established that both use competitive dialogue almost exclusively to procure their PPPs³¹. In addition, a separate major review of the competitive dialogue practices in the United Kingdom has been commissioned by HM Treasury and is expected to be publicly available shortly.

| Jurisdiction | Notices relating to PPPs and involving the use of the competitive dialogue procedure (01.01.2007 – mid-December 2009) | Other notices relating to PPPs (01.01.2007 – mid-December 2009) |
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| Austria | There seem to be no contract notices involving the competitive dialogue procedure. | The negotiated procedure seems to be the most frequently used procurement route for PPPs in Austria with open procedure being mainly used for procurement of service contracts. Available for review: 9 contract notices; 5 contract award notices |
| Belgium | The competitive dialogue procedure is not fully transposed into the local laws yet. No contract notices involving the competitive dialogue procedure have been published during the reviewed period. | All sizable PPPs in Belgium have been procured using the negotiated procedure. Available for review: 13 contract notices; 2 contract award notices |

³⁰ The size of the sample would not have been manageable in the context of this survey: over 1000 competitive dialogue procurements have been launched in each of the UK and France, across all types of projects.

³¹ More than 100 PPP/PFI projects using competitive dialogue have been procured in each of the United Kingdom and France by the end of 2009.

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| Bulgaria | No contract notices involving the competitive dialogue procedure have been published during the reviewed period. | No contract notices relating to alternative procurement procedures have been published during the reviewed period. |
| Cyprus | No contract notices involving the competitive dialogue procedure have been published during the reviewed period. The competitive dialogue procedure was used for projects other than PPP projects. | The negotiated procedure seems to be used in Cyprus for procurement of PPP projects and concessions. Available for review: 1 contract notice; 1 contract award notice |
| Czech Republic | The competitive dialogue procedure seems to be used relatively often in procurement of public services contracts. However, no PPP projects seem to have been awarded using this procedure so far. Available for review: 1 contract notice | There seem to be no contract notices involving alternative procurement procedures. |
| Denmark | The competitive dialogue procedure seems to have been used in a number of PPP procurements. Available for review: 2 contract notices; 2 contract award notices | There seem to be no contract notices involving alternative procurement procedures. |
| Finland | The competitive dialogue procedure seems to be used quite often for procurement of IT contracts. However, no contract notices involving the use of the competitive dialogue procedure for PPP have been published during the reviewed period. | No contract notices relating to alternative procurement procedures have been published during the reviewed period. |
| Germany | The competitive dialogue procedure is rarely used. Available for review: 9 contract notices | The majority of PPP projects are procured using the negotiated procedure. Available for review: In excess of 100 contract notices |
| Greece | There seem to be no contract notices | PPP projects seem to be procured using |

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| | involving the competitive dialogue procedure. | the restricted procedure. Available for review: 1 contract notice |
| Hungary | There seem to be no contract notices involving the competitive dialogue procedure. | The majority of PPP projects seem to be procured using the negotiated procedure. The only other alternative procurement procedure used in Hungary seems to be the open procedure; however, it is used to a much lesser extent. Available for review: 2 contract notices; 2 contract award notices |
| Ireland | The competitive dialogue procedure has been used relatively extensively prior to the outbreak of the recent financial crisis. Available for review: 7 contract notices; 1 contract award notices | Alternative existing PPP projects have been procured using the negotiated and restricted procedures. Available for review: 2 contract award notices |
| Italy | No contract notices involving the competitive dialogue procedure have been published during the reviewed period. The use of the competitive dialogue procedure is suspended until the entry in force of the implementing regulation of the Code of public contract (Code). | Alternative procurement routes are used to approximately equal extent. Available for review: 12 contract notices; 9 contract award notices |
| Malta | There seem to be no contract notices involving the competitive dialogue procedure. | The restricted procedure seems to be used for PPP procurements. Available for review: 1 contract notice; 1 contract award notice |
| Netherlands | Competitive dialogue is the default procurement option. Available for review: 5 contract notices; 6 contract award notices | No contract notices relating to alternative procurement procedures have been published during the reviewed period. |

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| <p>Poland</p> | <p>The competitive dialogue is one of the procedures used in PPP procurements in Poland.</p> <p>Available for review:</p> <p>7 contract notices; 2 contract award notices</p> | <p>The negotiated procedure seems to be used as an alternative to competitive dialogue for PPP procurements.</p> <p>Available for review:</p> <p>4 contract notices</p> |
| <p>Portugal</p> | <p>There seem to be no contract notices involving the competitive dialogue procedure.</p> | <p>The open procedure seems to be frequently used for PPP procurements. There also seem to be certain usage preferences sector-wise. Most of transport PPPs seem to be procured using the open procedure (government's road programme), while most of healthcare projects seem to be procured using the negotiated procedure.</p> <p>Available for review:</p> <p>12 contract notices; 14 contract award notices</p> |
| <p>Romania</p> | <p>The competitive dialogue procedure does not seem to be used frequently.</p> <p>Available for review:</p> <p>1 contract notices; 1 contract award notices</p> | <p>The open procedure is frequently used for procurement of concessions.</p> |
| <p>Slovakia</p> | <p>3 PPP road projects have been procured using the special "concession dialogue" procedure. This procedure reflects all the features of the competitive dialogue procedure as the latter is envisaged in the Procurement Directive and was used prior to the legislative decision to extend the use of the competitive dialogue procedure in Slovakia to concessions.</p> | <p>The open and negotiated procedures are equally used in PPP procurements.</p> <p>Available for review:</p> <p>4 contract notices; 4 contract award notices</p> |
| <p>Spain</p> | <p>The competitive dialogue procedure is not frequently used.</p> <p>Available for review:</p> <p>1 contract notice; 1 contract award notice</p> | <p>The majority of PPP projects are procured using the open procedure.</p> <p>Available for review:</p> <p>14 contract notices; 14 contract award notices</p> |

Annex 4: Sharing of bid costs

The decision on whether to pay compensation to losing bidders as well as on the amount of such compensation is normally made on a case by case basis **in Finland**. This is a common practice in design and build projects in the road sector. It has only been used once in PPP procurements so far. If approved, compensation is normally payable to all bidders who submitted "accepted bids", i.e. those bidders who submitted eligible bids at the preferred bidder stage but did not win the tender. The amount of compensation which can be paid to losing bidders is normally subject to caps. No compensation is normally payable in case of project cancellation (e.g. if the project proved non-viable from financing perspective), in case of "ineligible" bids (i.e. those bids which fell short of announced eligibility criteria) as well as in case of a bidder's refusal to transfer ownership rights to its bid material to the contracting authority.

As far as the existing practices **in the Netherlands** are concerned, payment of compensation to losing bidders is currently used in PPPs in the transport and housing sectors as a measure aimed to bolster private sector participation. Payment of such compensation is dependant on entering a valid tender in a competitive dialogue for a PPP project and is normally subject to caps. For most central government agencies there are official policies on cost reimbursement to bidders, in which case each particular decision on reimbursement of bid costs is expected to be made with reference to such policies. In some cases (e.g. when the contracting authority decides to prematurely abort the tender process of the competitive dialogue) the winning bidder can also claim compensation of at least part of its bidding costs.

Reimbursement of bidding costs **in Poland** normally depends on the position of a particular awarding entity and is therefore decided on a case by case basis. The decision on reimbursement of the costs normally indicates the amount of costs which can be expected to be reimbursed and can also introduce possible conditions to be complied with by a bidder to be eligible to claim reimbursement. If introduced, such conditions apply equally to all bidders. In addition, in cases where the procurement proceedings have been cancelled due to a fault of the awarding entity (e.g. due to an irreparable failure to comply with applicable publication and / or notification requirements), the tenderers who submitted "non-rejectable tenders" (i.e. those tenders which complied with the requirements set out by the awarding entity) are entitled to "justified costs of participation in the procedure". What costs can be considered "justified" will be decided by the awarding entity in each particular case but such costs can be expected to include, among others, costs incurred in relation to preparation of the tender, travel costs, certain costs related to possible legal proceedings.

Compensation of costs incurred by losing bidders as a result of participation in a tender is not compulsory **in France** as far as PPP projects are concerned. A contracting authority may, however, take a decision to compensate losing bidders for part of their costs if according to its estimates such costs prove high. The terms of compensation, including any applicable cap, as well as the conditions to be met by a losing bidder to claim such compensation are to be published by the contracting authority in the beginning of the procurement process. To incentivise bidders to submit compliant and well-thought bids and discourage opportunistic bids, compensation is normally paid only to those losing bidders who have managed to proceed to the preferred bidder stage.

In the United Kingdom HM Treasury confirmed in 2008 that there should be a strong presumption against contributing to bid costs – although it clarified that it can be justified where there are legitimate concerns about competitive tension that cannot otherwise be addressed (to be judged on a case by case basis). The only

sector where certain kinds of bid costs are more systematically considered for reimbursement is in waste. For example, planning costs are high in the waste sector, as is the risk of not obtaining planning consent, and the contracting authority would normally share planning appeal costs with the contractor if the planning application is unsuccessful at the detailed planning application stage. In some instances the contracting authority can also agree to pay planning development costs in order to accelerate the preparation of planning applications.



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