

**Conference Paper: Competitive Dialogue and Negotiated Procedure in the
Public Sector Directive 2004/18/EC**

by Ruth Losch, Universität Heidelberg, Germany

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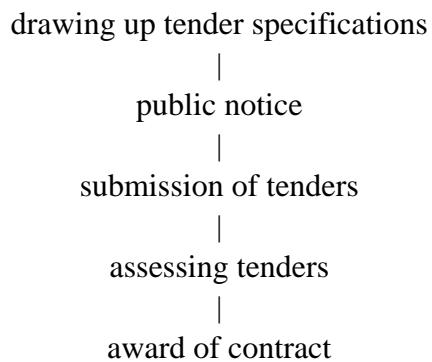
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I. Introduction

The Public Sector Directive 2004/18/EC introduces a new procurement procedure, the competitive dialogue. As the competitive dialogue aims to provide a flexible approach to the award of complex contracts, it seems to take a place where formerly mainly the negotiated procedure has been in use. In this paper, I would like to take a closer look on the prerequisites which have to be fulfilled to enter these two procedures, in order to assess if, and how far, the areas of application overlap. Afterwards, I will briefly consider the basis and the scope of discussions that are allowed when using the competitive dialogue respectively negotiated procedure to show the consequences of choosing one or the other procedure when having the choice to do so.

II. Overview of procurement procedures

The Public Sector Directive offers the open and the restricted procedure as standard procedures, Art. 28.¹ Presupposing the suitability of the tenderers both procedures follow the following pattern:



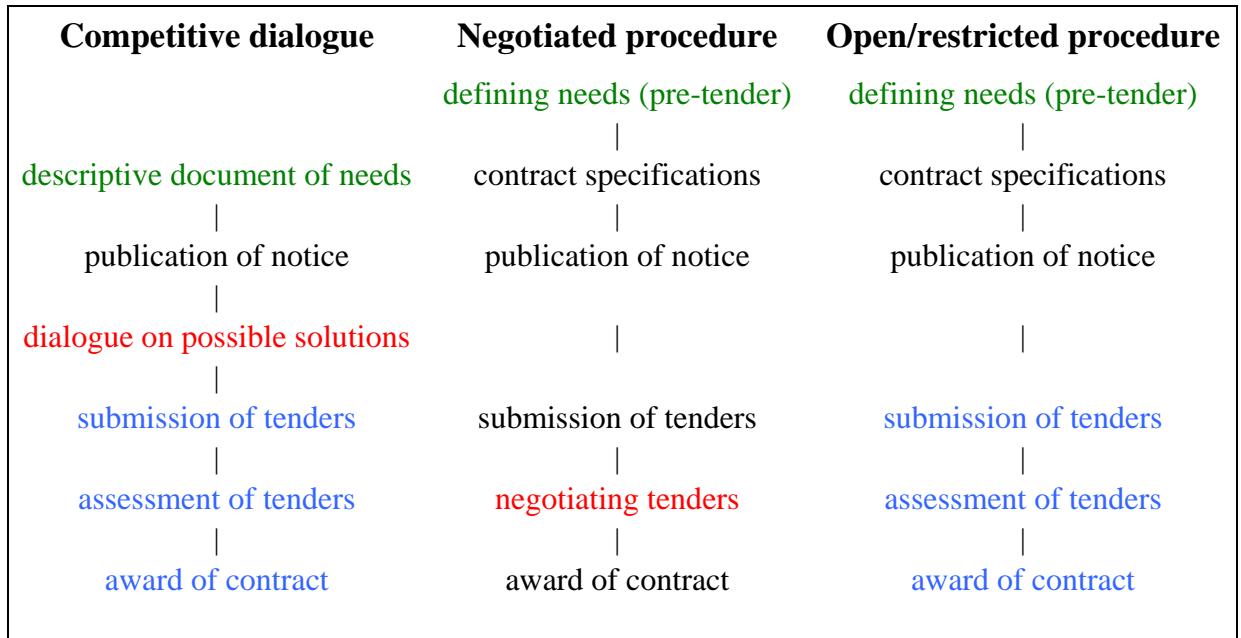
The negotiated procedure follows the same pattern, only that instead of mere assessing of tenders by the procuring entity, it engages in negotiations with the tenderers concerning their initial offers.

In competitive dialogue, the basic structure changes. Whereas open, restricted and negotiated procedure require the drawing up of tender specifications, on which grounds offers by the tenderers are made, the competitive dialogue allows “tender specifications” to be more than unspecific in some points; furthermore, it suffices to provide a “descriptive document” lining out the needs and requirements of the entity, on which grounds a dialogue between the entity and each chosen candidate will take place on which solutions might meet the needs of the entity.

It is only when the dialogue has come to a point that the entity considers its needs to be met by a solution worked out in the dialogue, that it then asks the candidates to submit their tenders. These tenders have to contain all the elements required and necessary for the performance of the project.²

¹ All Articles without further citation refer to the Public Sector Directive 2004/18/EC.

² Art. 29 (3).



Systematically, the main interaction between procuring entity and economic operator during competitive dialogue takes place in a much earlier stage than in the “classical procedures”, i.e. to say before the scope of the tender has become quite clear.

III. The pre-requisites of entering into a competitive dialogue or a negotiated procedure

The competitive dialogue requires a “particularly complex” contract, where the contracting authority considers that the use of the open or restricted procedure will not allow the award of the contract (as at Art. 29 (1)).

Art. 1 (11) (c) defines a contract as “particularly complex” when the contracting authorities:

- *are not objectively able to define the technical means in accordance with Art. 23 (3) (b), (c) or (d), capable of satisfying their needs and objectives (technical complexity) and/or*
- *are not objectively able to specify the legal and/or financial make-up of a project (legal/financial complexity).*

Both these requirements connect with the needs and objectives of the procuring entity, and, therefore, with the *content* of the contract to arrive at as they refer to the nature of the underlying works, services or supplies, or its legal and financial clauses. It, therefore, is deemed useful to distinguish between pre-requisites for the negotiated procedure that are based on the content of the procurement and those that are not.

1. Pre-requisites for negotiated procedures which do not refer to the content of the contract

Art. 30 (1) (a) allows the use of the negotiated procedure with a notice in the case of a failure of an open or restricted procedure or a competitive dialogue caused by irregular tenders or the submission of tenders which are unacceptable under national provisions. This is a formal pre-requisite, which does not implicate anything concerning the content of the procurement, meaning that the only importance in regard to competitive dialogue is that the procedure has reached the stage of submitting tenders by the economic operators after concluding the dialogue phase. Its relationship towards the competitive dialog is therefore one of a mere *timely order*.

Art. 30 (1) (d) also does not, in principle, conflict with the competitive dialogue when admitting the negotiated procedure with a notice in respect of public works contracts for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs. These aims do not touch the content of the contract, but only the purposes the *completed* works will serve.

Basically, the same as for Art. 30 (1) (a) and (d) holds for the requirements, which have to be met when the entity plans to engage in a negotiated procedure without a notice, Art. 31. The pre-requisites of this article refer to circumstances, which render it highly unlikely that the contracting authorities will face a “particularly complex” contract as presupposed for the competitive dialogue so that no conflicts between the competitive dialogue and the negotiated procedure without a notice³ are to be expected.

2. Content-related justifications for the negotiated procedure

Unlike those pre-requisites for the negotiated procedure as just lined out in **III 1.** the provisions (b) and (c) of Art. 30 (1) regarding the negotiated procedure with a notice, i.e. the so-called “no overall pricing” and the “no specifications” ground, aim towards the *content* of the procurement, as does the requirement of a particular complex contract in the regulations on the competitive dialogue. It can be expected that it be in these cases, in which the question of which procedure in a given case is the “right” procedure becomes most virulent.

a. Complexity and “no specifications” ground

Art. 30 Nr. 1 (c) holds the negotiated procedure with a notice to be applicable if the nature of services to be provided

is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures.

³ – which is a highly exceptional procedure anyway and which up to now has not been able to find the consent of the ECJ whenever brought before it. See only ECJ C-24/91 (Commission/Spain), C-84/03 (Commission/Italy), C-126/03 (Commission/Germany).

Beforehand, it should be noted that this provision only refers to services, but not to works or supplies.⁴ Especially in the case of “intellectual services” (as also pointed out by the public sector directive) the procuring authority might not be able to describe more than the outlines of the envisaged project and having to rely on the input of the tenderers on what in detail is possible.

aa. Technical complexity and “no specifications” ground

According to Art. 1 (11) (c) Public Sector Directive a contract is considered to be “particularly complex”, if the contracting authorities

- *are not objectively able to define the technical means in accordance with Art. 23 (3) (b), (c) or (d), capable of satisfying their needs or objectives.*

Art. 23 (3) (b) allows to formulate technical specifications

in terms of performance or functional requirements, [...]. However, such parameters must be sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting authorities to award the contract.

As the Art. 23 (3) (c) and (d) presuppose the possibility to refer to standardized technical specifications in the sense of Art. 23 (3) (a) and are therefore stricter than the before quoted (b) I will only examine this broader provision in more detail.

With regard to the competitive dialogue this means that it applies when the authority cannot draw up the parameters of the contract in a sufficiently precise manner in order to allow tenderers to determine the subject matter of the contract and/or contracting authorities the award of the contract. Commonly, two types of technical complexity are being distinguished: one being that the contracting authority does not feel it can determine how its needs can be fulfilled at all, the other that the authority cannot decide between two or more possible options to solve its problem. However, when the procuring authority is not able to think of a possible solution at all, it would be very surprising, if it was not offered different possibilities to solve this problem, so it is in both cases the main characteristic of the competitive dialogue that it points to a range of possible outcomes.

If the competitive dialogue shall only be applicable, if not even Art. 23 (3) (b) can be fulfilled, two points become crucial to the relationship between negotiated procedure and competitive dialogue based on technical complexity:

1. Does art. 23 (3) fully apply to negotiated procedures?

If negotiated procedures do not have to follow suit to Art. 23 (3) it can be concluded that there are serious overlaps between the two procedures when based on the “no

⁴ But as Art. 30 Nr. 1 (c) does not speak of service *contracts* but merely of services it can not be excluded that the negotiated procedure with a notice is to be made accessible if a works or supplies contract contains service elements that fall under this provision; Arrowsmith, The Law of Public and Utilities Procurement, 2nd ed. 2005, para 8.14.

specifications” ground resp. technical complexity. If, on the other hand, Art. 23 (3) has to be complied to in the case of all negotiated procedure there might still be room for overlaps, depending on how free the procuring authority is in determining whether it is able to comply with Art. 23 (3), or if it faces a particularly complex contract, which leads to the question:

2. Does the procuring authority have any discretionary power in deciding whether it can meet the criteria lined out in Art. 23 (3)?

(1.) Art. 23 (3) and the negotiated procedure

It is out of question that, if an entity intends to use an open or restricted procedure, it has to follow suit to Art. 23 (3). However, it is uncertain if this provision also has to be met when the entity plans to use the negotiated procedure.⁵

Against the application of Art. 23 (3) to negotiated procedures holds that Art. 29 (1) for the applicability of the competitive dialogue does not mention the negotiated procedure, but only refers to open and restricted procedure, which in the given case would not allow the award of a particularly contract. This could lead to the conclusion *e contrario* that in fact there are particularly complex contracts not following Art. 23 (3), which can be awarded using – though not the open or restricted – the negotiated procedure.⁶

Another argument can be drawn from the wording of Art. 23 (3) regarding “technical” specifications, whereas the rules governing the negotiated procedure merely speak of “specifications” or “contract specifications”.

An argument **in favour of** the application of Art. 23 (3) to negotiated procedures is that there is no indication why the need to draw up technical specifications in form of performance or functional requirements should not be a general rule. This is supported by consideration 29 Public Sector Directive:

The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. [...]

Also, Art. 1 (11) (c) explicitly exempts technical complex contracts from Art. 23 (3), but none of that is provided for cases, in which the negotiated procedure can be used. The reason that Art. 30 (1) (c) does not speak of “technical specifications”, but of “specifications” in general might as well simply point to the fact that not all specifications of a contract are of a technical character. Annex VI (1) (b) Public Sector Directive states that “technical specifications” define the required *characteristics* of a service. Finally, Art. 30 (1) (c) does not hold that contract specifications cannot be drawn up at all, but that it must not be

⁵ Arrowsmith, (fn. 4), para 17.68.

⁶ Also states consideration 31:

To the extent that the use of open or restricted procedures does not allow the award of such contracts a flexible procedure should be provided which preserves [...] the need for the contracting authorities to discuss all aspects of the contract with each candidate.

possible to establish the specifications *with sufficient precision* to allow the award of the contract using the open or restricted procedure.

Constraining the use of the negotiated procedure to Art. 23 (3) would not render this procedure unpractical or too narrow. There are no grounds on which one could assume that contract specifications used in a negotiated procedure have to be as detailed as in an open or restricted procedure, esp. as Art. 30 (1) (c) only states that they cannot be drawn up *as* for an open or restricted procedure, which does not entail that specifications cannot be drawn up at all. However, this understanding would still rule out an inaccuracy of the basic feature of the tender, so that if choosing the negotiated procedure the authority would explicitly have to admit variants in the sense of Art. 24, which would include stating minimum and specific requirements, Art. 24 (2).

(2.) The contracting authority's discretion in identifying the complexity of the contract

When following the point of view that Art. 23 (3) applies to negotiated procedures there still might be some room for factual overlaps with technical complex contracts, depending on how strict the *objectivity* of a complex contract is defined in a single case.

Art. 29 (1) states that in the case of a particularly complex contract where contracting authorities

consider that the use of open or restricted procedure will not allow the award of the contract, [...] [they] may make use of the competitive dialogue.

The words *consider* and *may* indicate a certain degree of discretionary power. On the other hand, Art. 1 (11) (c) states that contracting authorities “must not be objectively able” to define the technical means to fulfil their needs. This wording hardly leaves room for the authority to consider whether it can use the open or restricted procedure, or not. It has been rightly pointed out that, if this objective inability was read in a too strict sense, this would lead to *no-one* being able to draw up technical specifications, i.e. no economic operator either and leave no possible use for the competitive dialogue.⁷

On the other hand, Art. 36 and Annex VII A Public Sector Directive hold that the procuring entity is obliged to define and publish its needs as specific as possible. Or with the words of the ECJ:

That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the [...] market to be opened up to competition and the impartiality of procurement procedures.⁸

Having to find a balance between the practical need for flexibility and the aim of equal treatment and transparency, this leads to the assumption that the procuring authority cannot

⁷ Alexander Kus, Die richtige Verfahrensart bei PPP-Modellen, insbesondere Verhandlungsverfahren und wettbewerblicher Dialog, Vergaberecht 2006, p 858.

⁸ ECJ, C-470/99 (Universale Bau), para 93.

at its free discretion choose the competitive dialogue, whenever it fears the work of developing the contract specifications itself, but has to be able to justify its assumption that a contract is particularly complex.⁹ Also, the grounds for deciding on this must fully stand up to a review before a judge.¹⁰ The same holds for the decision whether in a given case the “no specification” ground justifying the use of the negotiated procedure can be applied.

It has been discussed whether the procuring authority has to engage in a “technical dialogue” (consideration 8 Public Sector Directive) with an economic operator in order to establish contract specifications.¹¹ However, by doing so, the authority risks to lose one possible tenderer. Allowing the economic operator to take part in the award procedure would often indicate a threat to equal treatment and competition, because it is hard to exclude that the economic operator adjusts the contract specifications to its own strengths and economic situation.¹² But in situations, where only few economic operators are at disposal at all, losing a potential bidder can lead to restriction of competition as well. As the competitive dialogue was designed to avoid this problem,¹³ it follows that at least in procurements where there are few suitable economic operators, the procuring authority should not be obliged engage in a technical dialogue. However, the procuring authority will have to be able to prove serious efforts on its behalf in determining the contract specifications.

It also has to be born in mind that even though it might not be in the procuring authority’s discretion to decide whether a contract is particularly complex or the “no specifications” ground applies, it is in the authorities discretion to decide what its needs are. Or as a German court put it:

To exaggerate, one might say that if a procuring authority ordered golden tabs for train lavatories, this would in all probability be a case for the supervisory board or the Audit Office. From a public procurement point of view this would not be a problem, because solely the procuring authority decides what it wants and how it wants it.¹⁴

If it is in the authority’s discretion to decide what it wants, this leads to the resumption that the contracting authority can influence the procedure it wants to use by deciding on its needs. If an entity wants to use the negotiated procedure, it has to be able to draw up contract specifications that stand up to Art. 23 (3), if need be, by restricting its demands. Otherwise, it has to use the competitive dialogue or organise a design contest.

⁹ Hans-Joachim Prieß, Handbuch des europäischen Vergaberechts, 3rd ed. 2005, p. 202 with further reference.

¹⁰ Hermann Pünder / Ingo Franzius, Auftragsvergabe im wettbewerblichen Dialog, ZfBR 2006, p. 20.

¹¹ Matthias Knauff, Im wettbewerblichen Dialog zur Public Private Partnership?, NZBau 2005, p. 253 with further reference.

¹² Steen Treumer, Technical dialogue and the principle of equal treatment, P.P.L.R. 2007, p. 99 ff.

¹³ Elke Bischof / Jörg Stoye, Vergaberechtliche Neuerungen für IT/TK-Beschaffungen der öffentlichen Hand – Das ÖPP-Beschleunigungsgesetz als erste Umsetzung des EU-Richtlinienpakets, MMR 2006, p. 143.

¹⁴ OLG Koblenz (German Higher Regional Court), Decision of 5. 9. 2002 - 1 Verg 2/02:

Überspitzt ausgedrückt: Verlangt ein Aufgabenträger die Ausstattung der Zugtoiletten mit goldenen Armaturen, so ist das mit hoher Wahrscheinlichkeit ein Fall für Aufsichtsbehörde oder Rechnungshof. Vergaberechtlich wäre dagegen nichts einzuwenden, weil allein der Auftraggeber entscheidet, was er haben will und wie er es haben will.

In the end it has to be kept in mind that the question, whether an intended project cannot be specified to meet the requirements of Art. 23 (3), will always be a decision of degree, which will have to be formed out by the contracting authorities and approved by the courts in particular cases.¹⁵ As German courts are considering the negotiated procedure as an exceptional one in general, they will more likely restrict the scope of the negotiated procedure with a notice - which is also backed up by the comparatively strict German system, in which even the restricted procedure is deemed exceptional in relation to the open procedure. The Public Sector Directive leaves room for both possibilities, although in my opinion the need for equal treatment and transparency as lined out by the ECJ hold against a too broad conception of the entering pre-requisites of the negotiated procedure.

bb. Legal/financial complexity and “no specifications” ground

Next to technical complexity the use of the competitive dialogue can be established on legal/financial complexity. According to Art. 1 (11) (c) a contract is considered to be “particularly complex” where the contracting authorities

– are not objectively able to specify the legal and/or financial make-up of a project.

The Public Sector Directive offers no further explanations on this point. During the drafting procedure of the directive, legal and financial complexity was mainly linked to privatisations falling under the public procurement regime,¹⁶ where in fact numerous legal and financial facts have to be considered deriving from special legal provisions and circumstances as public finances, the wish of remaining influence of the public sector or the distribution of contract risks. The competitive dialogue may be used in these cases when ways of privatisation are at hand which are so different that without participation of specialized economic operators no reliable statement on the best solution could be made.¹⁷

The financial complexity may in many cases come together with technical complexity. For the use of competitive dialogue it suffices as a single reason though, so that in this latter case the technical specifications of the project might well be definable in the sense of Art. 23 (3). In relation to the “no specifications” ground for the use of the negotiated procedure then follows that both procedures are open to the contracting authority.

One could argue that it was contradictory to allow a broad variation of legal/financial constructions, but not a broad approach to the definition of technical specifications as an entry pre-requisite for the negotiated procedure. But for one thing, Art. 1 (11) (c) does in this respect not refer to a norm like Art. 23 (3). Additionally, legal and financial make-up is more unlikely to influence the comparability of the tenders as it is easier assessable in money terms.

¹⁵ See also Steen Treumer, The field of application of competitive dialogue, P.P.L.R. 2006, p. 312.

¹⁶ See in detail, Pünder / Franzius (fn. 7), fn. 19.

¹⁷ However, the procedure is inapplicable, as far as the procuring authority knows the framework from former, alike privatisations.

b. Complexity and “no overall pricing” ground

Art. 30 (1) (b) allows the use of the negotiated procedure with a notice in

exceptional cases, when the nature of the works, supplies or services or the risks attached thereto do not permit overall pricing; (“no overall pricing ground”);

Following Arrowsmith, the appropriate interpretation of overall pricing is that it refers to whether it is possible to establish a single pricing structure. This might be the case when facing unpredictable geological conditions or uncertainty of user demand so that negotiations become necessary to evaluate the bidders’ readiness to accept risks or the need of introducing a “cost-plus” pricing which will shift the risk to the procuring entity.¹⁸

The “no overall pricing” ground is in many cases not clearly distinguishable from the “no specifications” ground, as the difficulty of setting up technical specifications will often lead to difficulties to set up a pricing structure. As a result the “no overall pricing” ground can – concerning works and supplies – cover up a little in respect to the non-applicability of the “no specifications” ground on works and supplies.

aa. Technical complexity and “no overall pricing” ground

If at the same time a project is technically complex and the “no overall pricing” ground can be applied the procuring entity might be able to reduce the technical complexity by deciding on a pattern of specifications that accord to Art. 23 (3) and then choose the negotiated procedure. If this is not possible or desirable though, it will have to enter the competitive dialogue procedure being the procedure allowing a broader scope of discussions.

bb. Legal/financial complexity and “no overall pricing” ground

Whereas the collision of legal/financial complexity and the “no specifications” ground not necessarily relate to the same side of the contract it seems hard to imagine cases where uncertainty about the legal or financial make-up of a project as needed for the competitive dialogue would not at the same time lead to the “no overall pricing” ground which justifies the use of the negotiated procedure and vice versa. In this situation the applicability of the competitive dialogue does not exclude the applicability of the negotiated procedure.¹⁹

3. Conclusion on entry pre-requisites

After looking at the pre-requisites of the competitive dialogue and the negotiated procedure one can conclude that, when a contract is particularly complex due to technical complexity,

¹⁸ Arrowsmith, (fn. 4), para 8.9 and ff.

¹⁹ Otherwise European Commission, Green Paper on PPP, COM (2004) 327, para 24:

The derogation under Article 7 (2) of Directive 93/37/EEC, which provides for recourse to negotiated procedure in the case of a contract when “the nature of the works or the risks attaching thereto do not permit prior overall pricing” is of limited scope. This derogation is to cover solely the exceptional situations in which there is uncertainty a priori regarding the nature or scope of the work to be carried out, but is not to cover situations in which the uncertainties result from other causes, such as the difficulty of prior pricing owing to the complexity of the legal and financial package put in place.

the competitive dialogue is the only admissible procedure. However, this is rather not a question of priority but one of alternative scenarios. In the case of particularly complex contracts based only on legal/financial complexity generally both procedures are open to the choice of the procuring authority. The decision of the procuring authority of which procedure to choose will depend on which best meets its needs regarding form and scope in a given case.

IV. Procedural aspects of the competitive dialogue and the negotiated procedure

For the purpose of this speech I will restrict my considerations on the procedure to the scope and place of discussion being held with invited and therefore *suitable* procuring entities, which are allowed in the two procedures. I will therefore set aside more detailed questions concerning the different procedural steps.²⁰

1. Discussion phase

I will not talk of rules structuring the discussion phase (as e.g. introducing different rounds) – I assume that here the jurisdiction concerning equal treatment of tenderers in the negotiated procedure will in most of the cases apply to the participants of the competitive dialogue also.

a. Basic structure of discussion

Despite some similarities in the general pattern negotiated procedure and competitive dialogue have different starting points. Whereas negotiations in the negotiated procedure are held on the basis of initial tenders there is no such formal starting point in the competitive dialogue.

As a result, initial **tenders** in the negotiated procedure have to hold up against the contract specifications as they would in an open or restricted procedure, i.e. they have to be complete with all requested documents, and – though in the somewhat broader scope of negotiated procedure contract specifications – all information necessary for concluding the contract as price, performance and place of performance.²¹ Tenders that do not live up to these criteria cannot be completed but have to be excluded, as well as tenderers whose tenders failed to meet the contract specifications.²²

²⁰ However, it should be born in mind that a lot of rules that have been developed for the negotiated procedure can be used for the competitive dialogue as well, e.g. the regulations concerning equal treatment of the tenderers as here *procedural* equality is concerned. Also, both forms of discussion can be held in phases in which at the end there have to be at least two candidates left (Art. 44 (4)), so that discussions with only one preferred bidder/candidate are no longer possible.

²¹ Jan Byok, *Das Verhandlungsverfahren*, 2006, p. 105.

²² EC, T-40/01, Scan Office Design, Slg. 2002, II-5043; BGH (German Federal High Court of Justice), X ZR 115/04 of 1.8.2006, both stating that when in the negotiated procedure the contracting authority voluntarily includes requirements in the tender specifications these hold valid during the procedure because it cannot be excluded that bidders did not refrain from taking part in the procedure. Also, Arrowsmith, (fn. 4), para 7.158.

The competitive dialogue on the other hand is not based on binding tenders but on **proposals** on how possibly the needs of the procuring authority could be met. There is no legal *constraint* of excluding candidates from the dialogue because they did not hand in fully worked out offers or because the proposals did not meet the needs and requirements set out in the contract notice.²³

Another consequence of submitting tenders in the negotiated procedure is that each new tender renders the former one void whereas in the competitive dialogue there is no offer which can be taken back or be binding in the dialogue phase. Also, it is not impossible – and in fact that was one of the ideas the competitive dialogue started from – that during the dialogue the candidates will as a team develop the solutions. However, it is hard to imagine how this possibility can be more than a theoretical one. Not only that the candidates will most probably not be ready to share information, but also it is also difficult to imagine how this “think-tank” could be organised without seriously distorting competition.

b. Scope of tenders

aa. Negotiated procedure

When asking what can be discussed, and how far discussions can go, Art. 30 (2) holds for the negotiated procedure that

contracting authorities shall negotiate with tenderers the tenders in order to adapt them to the requirements, which they have set out in the contract notice, the specifications and additional documents, if any.

In this framework set out by the documents mentioned in Art. 30 (2) the single tenders can be substantially changed.²⁴ As concerns negotiating the *framework*, the possibility of changes after selecting the tenderers will mainly depend on whether the changes are likely to change the identity of the participants²⁵ and/or whether they are likely to distort competition between the chosen participants. While it is admissible to render the tender documents more specific on some points²⁶ it can already be questionable if it is allowed to abandon parts of the procurement²⁷ and even more difficult to add or change parts of it. It has been proposed to draw a border-line where changes in the specifications would involve changes of the award criteria.²⁸ However, it would be inconsistent if the rule of Art. 23 (3) could be avoided by allowing changes to the tender documents that led to a broader scope of tenders in the negotiated procedure.

²³ This does not mean that the procuring authority may not exclude participants from further rounds in the dialogue, because they failed to meet *indicated* requirements.

²⁴ Answer of the Commission to written question E-2798/02 by MEP Lucas.

²⁵ Arrowsmith, (fn. 4), para 7.158.

²⁶ Eva-Dorothee Ebert, Möglichkeiten und Grenzen im Verhandlungsverfahren, 2005, p. 152.

²⁷ VK Bund (German Federal Chamber of Public Procurement), decision of 11.03.2004 – VK 1-151/03.

²⁸ Ebert, (fn. 26), p. 154.

The scope of discussion therefore limits itself to the scope the contract specifications allow (which, as referred to above, have to accord to Art. 23 (3)). If the contracting authority wanted to go beyond these requirements it would have to allow variants (Art. 24) which would then include setting up minimum and specific criteria for each point where it expected differing proposals from the tenderers.

bb. Competitive dialogue

While in negotiated procedures the scope of discussions is limited by the tender specifications it is “needs and requirements”, which are published when using the competitive dialogue.²⁹

According to Art. 29 (3) contracting authorities

shall open [...] a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.

(1) Needs

In competitive dialogue the procuring authority should not need to change its already broadly defined needs if thoroughly prepared. If, however, for e.g. external reasons its needs changed, a relatively high probability can be expected that the waiver of publishing a new notice will distort competition. For not only might changing the needs have changed the possible set of participants, but it can also harder be excluded that there is no unequal treatment regarding the participants’ capacities of meeting the authority’s needs.

If the main aim is to develop solutions for the procuring authorities *needs*, it becomes interesting what happens if these needs can be met best by altering the requirements set out in the contract notice and the descriptive document. So, it is important, how “requirements” are to be understood in this context and how, if at all, they can be changed during the procedure.

(2) Requirements

When looking at the German and Danish language version of the Directive, one could come to think that “requirements” were to be understood as *procedural* requirements only, like dialogue phases or submission dates, because according to Art. 29 (5) solutions capable of meeting the authority’s needs are to be identified, and because Art. 29 (6) holds in these languages that the tenders shall contain all “necessary elements” for the performance of the project instead of “all elements necessary and *required*” as in most other languages.³⁰ The Commission apparently presupposes requirements related to the

²⁹ Art. 29 (2).

³⁰ At least the English, French, Spanish, Italian, Polish, Dutch and Swedish version.

content of the contract;³¹ also does at least the German language allow to read “erforderlich” as “both necessary and required”.

Also, one could come to think that everything that did not constitute the particular complexity of the contract – which in the case of only legal/financial complexity would be the whole set of technical specifications – would have to be set down as a requirement in the descriptive document. As a consequence, this would lead to the applicability of Art. 23 (3) for legally/ financially complex contracts. If these technical requirements were not allowed to be altered during the dialogue phase the advantage of the competitive dialogue, being that candidates can independently develop solutions, could be rendered more or less void, as sometimes a small change in the authority’s requirements can lead to substantial improvement in efficiency. If the procuring authority did not think of this possibility beforehand and allowed variants on this point it might lose considerable advantages.

The European Commission is quite vague on this point when stating that *substantial* or *even fundamental* requirements may not be altered unless explicit provision is made for such a possibility right from the beginning of the procedure.³²

It might therefore be preferable to allow the contracting authority to require only what it considers as not dispensable and to formulate other requirements in terms of more functional needs.³³ Doing this, the economic entity that helped drawing up the descriptive document would not so easily be lost as a potential candidate/bidder when changes to the requirements were allowed. Otherwise, it would go too far to understand „requirements“ in the sense of unalterable contract specifications. On the contrary, it can be seen as the specific advantage of the competitive dialogue procedure that the dialogue phase is as broad as the definition of the authority’s need in the descriptive documents allows it to be.

cc. Conclusion on scope

The question of scope of competitive dialogue and negotiated procedure is the question that will in the end decide about the question whether the competitive dialogue is a new, genuine procedure at all. If there were no differences in possible outcomes because contract specifications were to the same degree (not) binding in both procedures it would not have been necessary to introduce the competitive dialogue at all. I therefore come to the conclusion that a procuring authority might in that case prefer the competitive dialogue over the negotiated procedure when the financial/legal complexity³⁴ of the contract invokes the possibility of major differences regarding the technical specifications of the project.

³¹ CC/2005/04_rev_1 of 5.10.2005.

³² CC/2005/04_rev_1 of 5.10.2005, p. 4 and fn. 14.

³³ In the case VK 30 / 2006 – L of 11.08.2006, recently decided by the Vergabekammer bei der Bezirksregierung Düsseldorf (German regional Chamber of Public Procurement), the contracting authority instead of requiring a single database for address files could have formulated the need of as few (maintainable) network links as possible, which in fact was the reason, why it decided on the requirement of a single database, not knowing that the number of links was in this case not directly connected with the number of data bases.

³⁴ Following my findings in III. that (“unreducible”) technical complexity can only be tackled by using the competitive dialogue.

2. Assessing tenders

A consequence of allowing discussions on all aspects of the contract in the competitive dialogue procedure is that the scope of the tenders after the conclusion of the dialogue phase might be very broad.

Additionally, when finally assessing the tenders in order to award the contract in the competitive dialogue procedure the procuring authority will for the first time receive a legally binding tender from the economic operator – whereas the final tenders in negotiated procedures will be the result of discussion around concrete tenders.

With regard to these uncertainties in the competitive dialogue Art. 29 (6) provides that

tenders may be clarified, specified and fine-tuned at the request of the contracting authority. However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect.

As these clarifications etc. must not lead to substantial changes to the basic features it has been argued that the scope cannot exceed the request for information, which can be asked for in an open or restricted procedure.³⁵ This opinion does not take into account that when using the competitive dialogue there are no pre-set contract specifications on which grounds tenders are being submitted,³⁶ so that there is no identical set of documents, plans etc. which has to be submitted by each tenderer. Also, the suitability of tenderers has to be defined prior to knowing the exact shape of the contract. As a result the suitability cannot be verified as detailed as in the classical procedures³⁷ and additional documents might be needed to prove the tenderers suitability for the specific tender. I therefore conclude that before assessing the tenders the procuring authority can at least request such information, which it would have requested if it had set up contract specifications for this concrete tender before its submission. However, if a tender has been handed in that is in such a way incomplete that additional information had to be requested in order to provide all necessary and required³⁸ elements of an offer this tender would have to be rejected as incomplete.³⁹

Furthermore, Art. 29 (7) states that

³⁵ Matthias Knauff, Neues europäisches Vergaberecht: Der wettbewerbliche Dialog, Vergaberecht 2004, 294.

³⁶ although the French Code des Marchés Publics 2004 which came into force even before the Public Sector Directive provided for the drawing up of tender specifications by the procuring authority with the end of the dialogue. This obligation was abolished with the new Code des Marchés Publics 2006, as it was deemed not only unpractical but also a threat to the protection of confidential information and equal treatment, even though the specifications were supposed to be quite broad, presenting only the “core” of the different propositions made by the economic operators; www.minefi.fr as on 11.11.2005.

³⁷ During the drafting procedure it was discussed whether after the conclusion of the dialogue phase the suitability of the candidates/tenderers should be assessed a second time. In the end this was conceived to be dangerous to risk manipulation in favour of the secretly preferred candidate.

³⁸ Art. 29 (6).

³⁹ See also Steven Verschuur, Competitive Dialogue and the Scope for Discussion after Tenders and Before Selecting the Preferred Bidder - What is Fine Tuning, etc.? P.P.L.R. 2006, p. 328.

at the request of the contracting authority the tenderer having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risks distorting competition or causing discrimination.

With regard to this provision, it is currently being discussed whether post-tender discussions with a preferred bidder should be allowed in competitive dialogue.⁴⁰ Even though there are (mainly pragmatic) reasons, which may render post-tender negotiations desirable, there are also serious objections against it. For one thing, post-tender negotiations were explicitly not implemented in the Public Sector Directive during its drafting.⁴¹

The Public Procurement Directive allows to ask all tenderers clarification, specification and fine-tuning (Art. 29 (6)). Furthermore, the tenderer having submitted the most economically advantageous tender may be asked for clarification and confirming of commitments contained in the tender only – specification and fine-tuning are no further mentioned in Art. 29 (7). Whereas in the pre-selection phase clarification, specification and fine-tuning may lead to “additional information”,⁴² art. 29 (7) does not assume there be such “additional information”. This wording points towards a smaller scope of interaction with the tenderer having submitted the most economically advantageous tender compared to the situation of Art. 29 (6) before ranking the tenders. This opinion is backed up by consideration 31 Public Sector Directive:

However, this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, [...]

So would negotiating a lower price be a substantial new requirement on the successful tenderer as the price is one of the main features of an offer.⁴³ Finally, allowing substantial negotiations with a preferred bidder could lead the authority to prematurely conclude the dialogue phase in order to restrict discussions to the preferred candidate/bidder.

It has to be born in mind that the scope of discussions during the dialogue phase is very broad compared to the negotiated procedure. It should be possible to discuss the solutions during the dialogue phase until a point where the procuring authority does not expect that further negotiations should give it even more advantages. After determining the most economically advantageous tender interaction with the tenderer should be restricted to assuring that the offer made can be put into practice.

⁴⁰ Ciara Kennedy-Loest, What can be done at the Preferred Bidder Stage in Competitive Dialogue? P.P.L.R. 2006, p. 316-326;

⁴¹ Rf. Art. 34 Proposition of the EP, protocol of the EP dated 17.1.2002, A5-0378/2001: www.europarl.eu.int and the reaction of the Commission, OCB EG Nr. C 203E dated 27.8.2002, p. 214.

⁴² Note: the Dutch Version of the Directive does not mention “additional information” but seems to include this in the term “nauwkeuriger umschrijving” which replaces the English “fine-tuning” but might be better translated with “more exact definition”.

⁴³ Kus, (fn. 7), p. 862; in favour of negotiations on price Arrowsmith (fn. 4), para 10.54.

3. Conclusion on procedural aspects

Concluding, competitive dialogue and negotiated procedure prove to be different in scope and systematical place of interaction between procuring authority and economic operator. Compared to the negotiated procedure the competitive dialogue allows a broader scope of discussion and possible outcomes. As these broad variations of tenders submitted in the competitive dialogue cannot be assessed on an identical set of contract specifications as in the negotiated procedure choosing the economically most advantageous tender is considerably more difficult than in the negotiated procedure.

V. Final conclusions

The competitive dialogue has been designed not only to provide a new flexible approach to complicated public procurements, but also to increase competition, equal treatment and transparency.⁴⁴ Therefore, I understand the provisions in the public sector directive in a way that the competitive dialogue by allowing a wider range of discussion than the negotiated procedure the “price” for this is a fairly stricter procedural pattern which e.g. limits post tender discussions to aspects that would not lead to more than assuring the tenders can be put into practice.

The competitive dialogue may be used when alternative outcomes are expected and desired. Most likely this will be the case when the contracting authority’s needs are not only very complicated or new projects are at stake but also in that case where there are not enough potential economic operators who could provide solutions for the entity’s needs. In this case the competitive dialogue allows the contracting authority to access as many economic operators as possible by leaving a margin for different solutions that each economic operator can adjust to its own special economical and technical possibilities and strengths. Additionally, it will not “lose” enterprises involved in the drawing up of tender specifications as potential bidders.

When it is not for technical reasons the procuring entity enjoys a wider range of discretion whether to choose the competitive dialogue or the negotiated procedure. It has to decide whether it opens “all aspects of the contracts” for discussion but risks ending up with different contract specifications and therefore harder to compare tenders or if the technical specifications as laid down in the contract notice should be met by all tenderers, by which possibly missing out on a even better solution but gaining comparability and being able to negotiate on binding offers.

⁴⁴ Consideration 2 Public Sector Directive.