Competitive dialogue in Portugal: key issues so far

Paper presented in the 4th Ph.D. Research Conference

Pedro Telles
School of Law,
University of Nottingham

1. Introduction

This aim of this paper is to present the key issues identified so far with the transposition of the competitive dialogue to Portugal. It is divided in four sections. After the current Section 1, Section 2 explains the research question, which the author wants to see explored. Section 3 analyses the methods adopted to achieve the research's aims, and is subdivided by each of the methods used, doctrinal legal analysis, interviews with the persons involved in the drafting of the competitive dialogue in Portugal, empirical research and comparative law. Section 4 will analyse the key issues found in the competitive dialogue's implementation in Portugal. Finally, Section 5 will cap the paper.

Although the scope of this research project covers the implementation of the competitive dialogue in both Portugal and Spain, the current paper is only focused in Portugal due to the size limit defined and the fact that the legal analysis of this country yielded more interesting findings at this time, as the transposition in this country strays from the EC model with a number of locally developed solutions.[1]

2. Scope of the research project

In this section the scope of the research project undertaken by the author will be introduced.

The aim of this research project is to study how the competitive dialogue has been implemented in Portugal and Spain. The competitive dialogue is a new public procurement award procedure first introduced by the Directive 2004/18. The procedure was introduced to facilitate the award of particularly complex contracts with the stated objective of increasing the flexibility of procurement, which had been previously identified as a shortcoming of the then existing EC procurement framework. Academics researching the procedure at EC-level have already found a number of potential issues with it that may affect its usefulness regarding the stated aims, and it can argued such issues may be relevant in any Member State that transposed the competitive dialogue.

The research question can be defined as the analysis of the legal concept of competitive dialogue as introduced by the Directive 2004/18 as a public

1 This research project is being supervised by Professors Sue Arrowsmith and David Fraser. It is funded by the PPRG.

procurement procedure and the extent that it is used and the way it is used in Portugal and Spain.

The aim of the research is, thus, to investigate in depth the phenomenon of the competitive dialogue's implementation in the target countries. It includes analysing the legal concept of competitive dialogue as introduced by the Directive 2004/18 as a public procurement award procedure and its use in Portugal and Spain to award contracts within or outside the scope of the Directive 2004/18. It has an exploratory nature since it is the first time this topic is being researched in the target countries.

By studying the implementation, the author intends to assess firstly, the way the procedure was *transposed* to national legislation, within the margin of discretion Member States have to transpose EC Directives, identifying potential legal uncertainties in the way it was carried. Secondly, the author pretends to investigate also the *practice* developed in each of these countries connected with the legal rules of the procedure, as to identify other points of legal uncertainty. By practice, the author means the way direct participants in the procedure (contracting authorities, private companies and legal profession) interpret, apply and perceive the competitive dialogue's legal rules in Portugal and Spain. This will allow to assess if the competitive dialogue is a significant practical phenomenon in the target countries. Finally, the analysis undertaken will lead to a comparison between the two countries.

3. Methods adopted

This section briefly outlines the methods adopted by the author to pursue answers for the stated research question.

As mentioned in section 2 above, the research undertaken by the author has an exploratory nature. It was set to investigate in depth a specific phenomenon, which is the implementation of the competitive dialogue in Portugal and Spain, where no previous research had been conducted.

To achieve the stated aim of analysing the implementation of the competitive dialogue in the target countries, the research could not be focused only on a legal analysis of the "law in the books".[2] However, further methods are needed to provide a more complete picture of the procedure. The author has adopted both qualitative and comparative methods as the most appropriate ones to undertake the current research.

2 In Portugal, in particular, where the legislator opted to include a number of differences related to the way the procedure was included in the Directive 2004/18, the legal analysis conduct was extremely important.

On an exploratory project, research is concerned with the depth of the investigation[3] and not its breadth. This balance between depth and breadth of research is a critical trade-off between what methods to adopt in research.[4] To achieve such objective it is more appropriate to use qualitative methods rather than quantitative ones.[5] Qualitative research allows for individual experiences to be harvested and subsequently processed.[6] As this is an exploratory project, it is more important to understand correctly the issues raised during the investigation than to find averages or patterns. Although numbers still play a part in this project, as it is relevant to assess, for instance, the total number of procedures that happened in the target countries, they are not its primary focus.[7]

In this research, the author will conduct qualitative or empirical research by means of semi-structured interviews[8] with the direct participants (contracting authorities, lawyers and private firms[9]) in the procedure in the target countries. It is expected that, from the analysis of the data emerging categories can be found and the data collection phase refined as such to allow for theories to gradually develop grounded in the data.[10] Sampling of subjects, if needed, will theoretical or purposeful, that is, will be geared to identify the persons that most probably can yield important information.

Although it was not foreseen at the start of the research, the author interviewed in March 2009 four persons directly involved in the legal transposition of the competitive dialogue in Portugal. These interviews

---

3 **Patton and Patton, *Qualitative Evaluation and Research Methods*, p. 165-166.**

4 **Ibid.**, p. 162-163.

5 Quantitative methods are primarily concerned with the measurement of a wide range of phenomena and noting its frequencies or patern distribution accross the data. It is also more interested in numbers and averages than words, aiming to generate statistical data. On quantitative research please see, Denscombe, *The Good Research Guide.*

6 On qualitative research please see, for all, **Mason, *Qualitative Researching*, Bryman, *Social Research Methods.***

7 This exploratory research may, however, lead to the conclusion that a quantitative analysis of the subject is an avenue of research to conduct afterwards.

8 Although there are three major types of interviews considered as available to empirical researchers (structured, semi-structured, unstructured), semi-structured ones are deemed to be the most appropriate for research projects with an exploratory nature. There is no strict questionnaire to be followed as in structured interviews, but the interview guide that needs to be developed allows for the points which the researcher considers essential to be raised during the interview leaving, however, sufficient leeway for adapting them to changing circumstances and also for the interviewee to raise potentially relevant issues on his own. Unstructured interviews tend to be too much open-ended with no prior focus on points deemed as important and are considered more appropriate to psychoanalysis.

9 In Spain the interviews will include also the national and regional Public Procurement Advisory Bodies.

10 This means the approach adopted by the author is close to some of the key tennets of grounded theory, such as the theory to be developed through empirical data analysis (and not purely doctrinal legal research), the key issues of research being allowed to evolve during the research phase according to the data collected, and the data collection process to be concluded only when data saturation is achieved, that is, the new data recently collected is not yielding new information. As such, it is impossible to foretell the exact number of interviews that will be conducted. On grounded theory please see, for all, **Glaser and Strauss, *The Discovery of Grounded Theory*, Strauss and Corbin, *Basics of Qualitative Research : Techniques and Procedures for Developing Grounded Theory***, and **Charmaz, *Constructing Grounded Theory .***

yielded relevant information to explain many of the differences on the procedure found during legal analysis between the Portuguese law and the Directive 2004/18.

To close the circle of analysis, as two countries are being researched and there is an EC model of the procedure involved as well, it was necessary to include a comparative perspective. Comparative law research is undertaken to improve knowledge of the law and also to understand the law in context.[11] This perspective allows for the demonstration of the similarities and differences between each country and the EC and the same between the countries themselves.[12]

4. Competitive dialogue in Portugal

(a) Introduction

In this section we will analyse the competitive dialogue implementation in Portugal, in particular the key issues found so far with the legal analysis and the interviews to the persons involved in the drafting of the Public Contracts Code. After the introduction, subsection b) will briefly overview the flow of the procedure how it is conceived in the country. Subsection c) and onwards deal with each key issue in detail.

Portugal has a long tradition in public procurement, dating back to the middle of the 19th century and leading to the progressive development of a national public procurement framework during the 20th century.[13] After acceding to the EC in 1986, Portugal kept improving and updating its existing procurement framework in accordance with the successive rounds of procurement Directives. As there were already in place national rules regulating public procurement, this country opted to transpose the relevant Directives following the method of detailed implementation.[14]

In 2008, after a long drafting process, the Public Contracts Code (Decree-Law no 18/2008, January 29) was published and came into force, transposing the Directives 2004/17 and 2004/18 to national law. This law regulates public procurement in Portugal, including the competitive dialogue procedure.[15] The

---

11 **Örücü, "Developing Comparative Law", p. 53.**

12 On comparative law, for all, please see **Zweigert and Kötz, *Introduction to Comparative Law*** and **Bogdan, *Comparative Law.***

13 On the Portuguese procurement history, please see for all Olazabal Cabral, *O Concurso Público Nos Contratos Administrativos.*, Gonçalves, *O Contrato Administrativo.*, Maria João Estorninho, *Direito Europeu Dos Contratos Públicos - Um Olhar Português.* and Cordeiro, *Contratos Públicos.*

14 For a detailed comparison of the methods of transposition, please see Arrowsmith, "Legal Techniques for Implementing Directives: A Case Study of Public Procurement."

15 Portugal does not use guidance or government issued regulations to complement or explain its laws

implementation adopted by this country markedly strays from the version of the Directive 2004/18, arguably to fit the procedure within the culture of procurement in the country. This has lead to a number of potential issues which will be highlighted hereunder.

The rules on the competitive dialogue are divided into three different sections of the Public Contracts Code. In Part II, Title I, Chapter III (articles 30 and 33(1)(2) of the Public Contracts Code) the grounds for its use are to be found, in parallel with the special circumstances in which other procedures can also be adopted.[16] In Part II, Title III, Chapter V (articles 214 to 218 of the Public Contracts Code) the general rules on the use of the procedure are defined. In addition, since article 204 of the Public Contracts Code states the subsidiary application of the restricted procedure rules, Chapter III, articles 162 to 192 of the Public Contracts Code on this procedure has to be taken into account. Finally, some articles from the rules regulating the open procedure are also applicable, such as articles 92, 93 and 99 of the Public Contracts Code on negotiations after the tender stage and confirmation of commitments.

(b) Flow of the procedure

Before analysing the key issues related to the competitive dialogue in Portugal, this section will cover in brief the flow of the procedure.[17]

The competitive dialogue in the Portuguese Public Contracts Code is divided in three different phases. The first phase covers the presentation of candidates and their verification of suitability, whereas the second covers the proposal of solutions and the dialogue itself and the third the analysis of tenders and the award of the contract.

The procedure starts with the publication of the notice in the official journals and the presentation of the potential candidates, who will then have their suitability verified. The verification of suitability shall follow either a simple or a complex system.

---

and the Public Contracts Code is no exception to the rule. All the legally relevant matters are included either in decree-laws or laws, both of these instruments sharing the same value level in the pyramid of Portuguese rules. Nonetheless, there are rules in the Portuguese legal system of inferior value to laws, such as government decrees or ministerial orders approved by specific ministries. They aim to complement technical aspects of laws and decree-laws.

16 The general rules on defining the appropriate procedure for each contract are on Chapter II and they depend essentially on the value of the contract.

17 A fluxogram of the procedure can be found in the following website: http://www.base.gov.pt/procedimentos/Paginas/default.aspx. Unfortunately, it is only available in Portuguese. In addition, at the time of writing of the present papers, no foreign language version of the Public Contracts Code had been published.

After the candidates have been evaluated, and before the start of the dialogue itself, they are invited to submit a single preliminary solution. The contracting authority will then analyse each candidate's solution and eliminate - before the dialogue starts - the candidates whose solution is not adequate to fulfill its needs. Dialogue then ensues with the qualified candidates who had their solutions accepted, with the aim of discussing all the issues related with the execution of the contract and that allow the elaboration of the technical specifications.

The dialogue with the qualified candidates will last until the solution that best meets the needs of the contracting authority is identified or all are considered as non-adequate to that purpose. Then the contracting authority notifies the candidates of its decision. If a solution has been found, it will be used as a basis for the technical specifications under which all candidates will tender. As the Public Contracts Code is drafted *all* the candidates present in the dialogue phase are to tender based not on their own solutions but on a common set of specifications.

The candidates are invited to submit their tenders and the contract awarded to most economical advantageous tender. Contrary to what is mentioned in the Directive 2004/18 (article 29(6) and (7)), there is an arguably more limited scope for confirmations of commitments and amendments to the preferred bidder tender.

(c) Grounds for use

Regarding the grounds for use of the procedure, some relevant differences can be seen between the drafting of the Public Contracts Code and the text of the Directive 2004/18. The draft adopted by the Portuguese law appears to be more restrictive than the draft from the EC Directive, thus hinting to a limitation of the prospective scope of this procudere in the country.

According to the Directive 2004/18, the competitive dialogue procedure may be used for the award of particularly complex contracts, when the contracting authority *considers* that the use of the open or restricted procedures will not allow for the award of the contract.[18] For the Directive, contracts are deemed as particularly complex if the contracting authority is unable to define the technical, legal and/or financial make-up of a project.[19]

---

18 Article 29 (1) of the Directive 2004/18.

19 Article 1(11)(c) of the Directive 2004/18. Recital 31 of the same directive sheds some extra light on the concept of "particularly complex contract" while adding at the same time an extra layer of complexity. It

In Portugal, as abovementioned, the grounds for use seem to have been drafted on a more limited way.[20] Firstly, the *impossibility* of using the open or restricted procedures appears to have to be absolute and not relative. As such, it is not enough for the contracting authority to just consider those procedures as inadequate or not as adequate as the competitive dialogue.[21] Further, to this point, one of the members of the legislative drafting team, made it clear that the competitive dialogue should be used in Portugal only if the contracting authorities are unable to draft the technical specifications for the contract, that is, in what such person considers as the situations where the open or restricted procedures could not be used at all.

Secondly, according to article 30(2)(b) of the Public Contracts Code if the contracting authority wants to use the procedure due to its inability to define technical means adequate to pursue its needs, this ground for use will only be considered as fulfilled if the contracting authority is unable to draft the technical specifications even by means of simply referring to the performance or functional needs it has.[22] That is, if the contracting authority is capable of referring to the performance or functional needs it wants to achieve or cover, as for instance, would be if it wanted to develop a waste treatment facility knowing the output wanted, then it could not use the competitive dialogue.

(d) Foreclosure of a proper negotiation phase

The second paragraph of article 204 is an innovation by the Portuguese legislator and includes a relevant limitation on the use of the procedure. According to this article, contracting authorities are not allowed to use a negotiation phase with the tenderers, identical to the one established in article 149 of the Public Contracts Code for the open procedure with a negotiation phase.[23]

---

states that the contracting authority's impossibility of defining the technical means of Article 23, legal make-up and financial make-up has to be objective and the conduct of the contracting authority faultless. On the other hand, Recital 31 also adds some examples of what can or can sometimes be considered as particularly complex contracts, namely important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing in which the legal/financial make-up cannot be defined in advance. On this issue at EC level, Arrowsmith, *The Law of Public and Utilities Procurement.*, p.632-635, Treumer, "The Field of Application of the Competitive Dialogue.", p.307 and Trepte, *Public Procurement in the European Union.* p.446.

20 There is another limitation to the potential scope of the competitive dialogue in the country but they remain outside the Directive 2004/18. The first one is a clear exclusion of the use of the procedure to award contracts on the utilities sector tendered by some contracting authorities. However, it can also be argued that the Portuguese law allows the use of the procedure for the award of contracts with a value inferior to the EC thresholds, as long as they comply with all the substantive requisites.

21 Article 30(1) of the Public Contracts Code. According to the people involved in the drafting of the Public Contracts Code interviewed by the author that was the idea behind the exact choice of words, as a signal to contracting authorities not to over use the procedure.

22 Article 49(2)(c) and (d) of the Public Contracts Code. According to the people interviewed, this decision was based on the interpretation they made on how the rules of the Directive on technical specifications should be read.

23 The persons involved in the drafting of the Public Contracts Code explained that this limitation was an

(e) Verification of suitability of candidates

The verification of suitability of candidates is done in accordance with either the "complex" or "simple" methods.[24] These methods share most of the provisions, as the formalities of the process.[25] Whereas the complex model allows for the selection of a pre-define number of candidates, the simple model implies that all the candidates fulfilling the required criteria have to be invited for the next phase of the procedure.[26]

The complex system is based on a selection model founded on the criteria of best technical and financial ability (article 181(1)(2) of the Public Contracts Code). At the beginning of the competitive dialogue procedure, according to articles 164(1)(m)(ii) and 206(2) of the Public Contracts Code the contracting authority must state the number of candidates that it will qualify, which cannot be less than three. At this stage, the criteria for evaluating the candidates has to be disclosed. This will lead to the application of a demanding evaluation model similar to the one used to assess tenders. Applying the criteria will lead to the candidates whom have achieved the minimum standard set forth to be ranked according to their score. Subsequently, the contracting authority is bound to select the higher ranked candidates until the number pre-defined[27] in the descriptive document.[28] It can, however, carry on with the procedure if only an inferior number of candidates has been deemed as suitable.

The simple system of verification of suitability of article 179 of the Public Contracts Code states that *all* candidates with the necessary technical and financial ability are deemed as suitable and therefore qualified to participate in the procedure. Candidates are considered as financially suitable simply if a bank statement is produced in accordance with the model supplied in Annex VI of the Public Contracts Code. No rules are present on how to evaluate the

---

explicit decision taken by the European Commission when discussions on the law's project were carried. The European Commission refused to accept negotiations except for the ones to be held either in the negotiatied procedure or in the open procedure with a negotiation phase.

24 The respective rules can be found from articles 168 through 189 of the Public Contracts Code.

25 These are present, namely, in artices 167 through 178 and 182 through 188 of the Public Contracts Code. The specific rules on the complex method are stated in articles 181 and 184(3) and the ones on the simple method are included in articles 179 and 180. The Directive 2004/18 in articles 44, 47 and 48 does not have any details on which method to adopt if more than one is available to the contracting authority.

26 As per article 204(1) of the Public Contracts Code, the competitive dialogue procedure follows the rules of the restricted procedure with prior verification of suitability with the necessary adaptations, whenever no specific rules on the competitive dialogue are to be found. This means that the verification of suitability of the candidates, for example, will be done according to the rules established in articles 167 through 188 of the Public Contracts Code

27 The "hard" pre-determination of the number of canidates to be carried may lead to the issue of not being appropriate to use in a procedure where not a lot of detail about the project can be provided upfront. This may lead to the contracting authority to pick the best three candidates for a certain scenario it has forecasted that then does not pan out as such during the dialogue stage.

28 Article 181(3) of the Public Contracts Code.

necessary technical ability, thus leaving a margin of discretion to the contracting authority to fill in. This simple system, albeit an option to be considered for the competitive dialogue, may lead to unforeseen issues further down the procedure. It is so because, since all the candidates have to participate in the dialogue and there is no provision in the Portuguese law allowing for successive elimination stages to be carried.[29] As so, whatever the number of suitable candidates, the contracting authority will have to keep them in the procedure until the end, with all the associated problems such as increased discussion time and costs.[30] In addition to the already mentioned shortcoming, one could argue that the simple system was developed and geared to facilitate and speed up the tender of straightforward projects, and not particularly complex contracts.

(f) Limitation to a single solution

After the contracting authority as verified the suitability of the candidates, the candidates deemed as suitable are then simultaneously invited to present their solution.[31] Each candidate is limited to present a single solution at the beginning of the dialogue phase.[32] On the one hand, this may reduce the scope of possible solutions to be found during this procedure. On the other hand, it will focus the candidates' efforts on what they consider their best solution for the need of the contracting authority and on improving such solution.[33]

(g) Evaluation of preliminary solutions

After receiving each candidate's solution, the jury will then produce a preliminary report where it will justify their admission or exclusion. It should be noted that the grounds for exclusion are limited to the ones mentioned in article 212(2) of the Public Contracts Code and general principles applicable. From the four grounds of exclusion only one can be considered material,[34]

---

29 Contrary to what is allowed by article 29(4) of the Directive 2004/18.

30 With the exception of an elimination stage when evaluating preliminary solutions.

31 Article 209(1), (2) of the Public Contracts Code. The invitation has to comply with some formalities, namely by providing the invitees with the identification of the procedure (including the number given to it by the national and European Official Journals), the deadline to submit solutions and what foreign languages are to be admitted in the dialogue if any. Although some of the documents may be delivered in a different language if allowed by the invitation, article 211 of the Public Contracts Code, the solution has to be drafted in Portuguese following the rules stated by article 58 of the Public Contracts Code.

32 Article 210(2) of the Public Contracts Code. There is no provision on the possibility of the candidates presenting new or different solutions during the dialogue itself. Further to the issue of the single solution limitation, it should be added that the Public Contracts Code also disallows the possibility of the contracting authority side-stepping the mentioned limitation by means of admitting variant proposals (articles 210(2) and 59(7) of the Public Contracts Code).

33 It may also keep the costs of the procedure down since each candidate can only put resources into developing one solution.

34 Aritcle 212(2)(d), the contracting authority may exclude a candidate when its solution is "manifestly inadequate", without further explanation.

that is, offering the contracting authority some margin of discretion to exclude a candidate, whereas the remaining three are formal conditions.[35]

(h) Impossibility of eliminating candidates during the dialogue stage

On this point the Portuguese solution seems to have followed a different path from what is in the Directive 2004/18, as such elimination is allowed in the Directive.[36] The author queried exensively the persons involved in the drafting of the Public Contracts Code and was told that they had considered the solution set forth in article 29(4) of the Directive for the elimination of candidates - the use of the criteria set forth in the descriptive document - made no sense to apply the award criteria to the elimination of candidates[37] and they were unable to develop an alternative criteria.

The consequence of this impossibility that we may have dialogue stages which start and end with an unexpected large number of candidates with the contracting authority having to discuss in parallel the merits of way too many solutions. As a way out, one could argue that the contracting authority and the candidate may agree to stop discussing or developing the inadequate solution. This seems reasonable, especially bearing in mind that at the end of the dialogue a common set of specifications will be developed.

(i) Confidentiality and its implications

On the ban on confidential information, the Public Contracts Code states in its article 214(3) that confidentiality must be assured to all solutions[38] or other information which has been marked as confidential by the candidate during the dialogue. Although the Portuguese law is very detailed in its regulation in other parts of the procedure, it does not address already identified issues with confidentiality at the EC level.[39]

It should be added to the previous paragraph that the way commas are positioned in the Portuguese text may lead to two different interpretations of

---

35 This possibility is of paramount importance, as during the dialogue itself the contracting authority may not exclude a candidate.

36 Article 29(4) of the Directive.

37 However, in the Public Contracts Code, as we have seen, allows the use of the award criteria for other purposes than to choose the best tender. For instance, in a competitive dialogue with verification of suitability by means of the complex method, the contracting authority as to decide which are the best candidates based on the prospective award criteria. Furthermore, as we have seen in subsection b), at the beginning of the dialogue there is some discretion for the contracting authority to eliminate solutions that are in its view inadequate.

38 It is unclear if it covers the preliminary solution developed by the candidates as, technically, it is presented and evaluated before the start of the actual dialogue.

39 The author asked the persons involved in the drafting of the Public Contracts Code and was told not a lot of thought was given to the confidentiality issue. On this topic, Treumer, "Competitive Dialogue.", p. 181-183 and Rubach-Larsen, "Competitive Dialogue.", p. 76.

its scope. Under the first interpretation, the content of this rules is identical to the ban established by the article 29(3) of the Directive 2004/18,[40] with its syntax adapted to render it easier to understand in Portuguese. Under the second interpretation, however, it may be considered that the ban covers only information transmitted as confidential. This is so, as the Public Contracts Code requires that the information has to be qualified by the candidate as confidential to be considered as protected. If this second interpretation proves to be correct, it rests to be seen what happens when candidates transmit information that is clearly in the public domain and classify it as confidential for whatever reasons they may have. As examples one could mention, for instance information on a solution that has been leaked to the press and therefore made public or information already public before the start of the procedure. The second interpretation would also explain why the Portuguese law steered clear of outlining what should be considered as confidential, for instance, information protected by intellectual property or patent laws. In addition to the above, irrespective of the interpretation of the law, information that is considered as confidential can only have such condition lifted if the candidate expressly and in written allows so.[41]

This issue might have been sorted had the Portuguese legislator opted to extend the secrecy rules set in place for tenders to the solutions.[42] According to article 66(1) of the Public Contracts Code, the tenderer may request that the tender or parts of it may be classified as secret for reasons of commercial, industrial, military or other types of secrets "in the terms of the law". That is, the tenderer has to be very specific on what he requests protection for and his request must be founded on substantial laws which protect, for instance, trade secrets. In addition, the contracting authority ultimately decides to grant or withhold the request. However, the secrecy rules herewith described - or an adaptation of those - are not applicable since article 214(3) of the Public Contracts Code clearly states that confidentiality functions automatically.

Confidentiality raises another major problem specific to the way the competitive dialogue procedure is conceived in the Portuguese law. As the dialogue stage leads to the development of a common set of specifications and not to tenders based on each candidate's solution, what should happen if confidentiality was raised by the candidate whose solution was considered as

40 Article 29(3) of the Directive 2004/18 states that *"[c]ontracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement."*

41 Article 214(3) of the Public Contracts Code.

the most appropriate? How can that "confidential" solution be used as basis for technical specifications for all candidates to tender on? When faced with this unintended consequence, one of the persons involved in drafting the law replied saying that if confidentiality had been raised during the dialogue and the candidate was not available to reconsider it at the end of the dialogue, then it was not an appropriate solution and, thus, should be excluded. In face of the law, the author does not expouse this view for two major reasons. One, it would make confidentiality a dead letter protection. Two, the Public Contracts Code does not allow solutions to be excluded after the dialogue has started. A potential way out might be that confidentiality is only applicable to the *solutions* and that, arguably, the *technical specifications* are no longer a solution and by their own accord need to be public. This, however, seems once more as an ingenious way of rendering the protection given by confidentiality as useless and is a consequence of the lack of foresight in the way the procedure was drafted.[43]

(j) Common specification developed at the end of the dialogue

The dialogue ends with a single solution found as the most appropriate and a common set of specifications drafted afterwards for the tenders to be based on. This is probably the major innovation in the Portuguese law[44] and is also a catalyst for other issues.[45]

One can see the merits of this option taken by the Portuguese legislator. It makes work easier for the contracting authority as all the other solutions developed by candidates are discarded. It also makes comparison between tenders easier and more transparent, facilitating external control, since they are based in the same set of specifications, just as they would be in an open or restricted procedure. And more fundamentally, it makes possible to apply the award criteria evaluation model set forth in the Public Contracts Code for the open procedure.

From a different perspective, however, the option to identify a single solution and develop common specifications leads to other problems. Firstly, it makes all candidates tender based on a solution which is not theirs, thus creating an imbalanced field of competition.[46] Secondly, it leads to the scrap

---

42 These rules were first noted to the author by one of the persons interviewed.

43 It may also be argued that confidentiality leads to a final issue in Portugal related with judicial review, as in this country contracting authorities when their decisions are challenged by a court, have to surrender all relevant documents to the court and the other party.

44 Although the Directive does not clearly forbid this scenario, it implies candidates whose solutions are still standing at the end of the dialogue will tender based on those same solutions.

45 Such as part of the issues already mentioned about confidentiality.

46 One can argue, however, that the rules are clear from the start of the procedure and is fair

of all the development work done with the non-winning candidates during the dialogue. Thirdly, it may lead also to a reduce field of competition in the later stages of the procedure as the candidates with the non-winning solution faced with the costs of preparing a tender from scratch may simply decide not to do so. As such, one can say it will significantly increase the costs of the remaining candidates. Fourthly, as we have seen above when discussing the ban on confidential information it is hard to render compatible the protection of confidentiality with a public set of specifications. Fiftly, since cherry picking is not forbidden and a common set of specifications is to be developed, it seems the contracting authority may create those picking parts of different solutions developed by the candidates. According to the Public Contracts Code, the contracting authority is obliged to find a solution at the end of the dialogue not to develop the subsequent technical specifications based exclusively on it.

The option adopted by the Portuguese legislator raises two more questions. As we have seen above the candidates carried to the dialogue are dependant on the merits of the preliminary solution they have developed and not their own ability to execute a set of specifications. This may lead to situations where candidates who were capable and interested in submitting a tender based on the specifications that get drafted at the end of the dialogue, but has they were not carried to the dialogue due to shortcomings on their own preliminary solution will not be invited to participate. This is so as the Public Contracts Code is clear in stating that only candidates who had solutions admitted may be invited to participate at the tender stage. One must ask then what is the difference between having the solution excluded at the beginning or the end of the dialogue if the actual tender will not be based on those solutions? From a competition point of view it also makes no sense, since the Public Contracts Code is reducing the level of competition at the tendering stage. on the flip side, this may be construed as allowing candidates which had dropped of the dialogue stage for whatever reason to come back. This may increase competition but also increases the risk of one or more candidates with admitted solutions refusing to develop them to save costs and resource committment thus offloading the development cost over to the remaining candidates.

Finally, if the objective of the dialogue is to develop a common set of specifications just as in the open or restricted procedure, why not allow any

---

commercial advantage that whomever develops the solution reaps the benefits of preparing a tender based on its own work.

potentially able company to tender based on those specifications and limit the common set of specifications to the participants in the dialogue stage?

(k) Evaluation of tenders

To conclude the procedure, the contracting authority will then have to evaluate the tenders received and award the contract, and will do so following the general rules set forth in the Public Contracts Code for the open procedure, as it contains no specific rules for the competitive dialogue. Article 139 of the Public Contracts Code establishes the rules on tender evaluation, namely the contents of the evaluation model and in particular the requirements to draft an appropriate model to find the most economically advantageous tender.[47] As before, after the tenders have been received, a preliminary report must be issued and the tenderers are invited to present their views on the proposed decision,[48] followed by the final decision.

(l) Lack of a fine-tuning stage before the preferred bidder has been selected

Article 29(6) of the Directive 2004/18 allows for a fine-tuning phase before the choosing of a preferred bidder when, with some limitations, amendments can be made to the tenders presented by the candidates.[49] Under this article, it may be possible to, for instance, ask for minor amendments or improvements to the tenders - as long as the principle of equal treatment is not violated and the basic features remain untouched - like improvements to the cost structure of a part of the contract, bringing non-compliant tenders into compliance or to seek further information to be supplied by the tenderers.[50]

In the rules specifically pertaining to the competitive dialogue, the Public Contracts Code does not seem to allow for small changes as those to be made. However, article 99 of the Public Contracts Code, again a general provision allows for the possibility of fine-tuning after the tender stage is applicable. This article may be more limited in scope than article 29(6) of the Directive, as it depends on public interest and cannot lead to a different final classification.[51] Notwithstanding the opinion of the interviewees, the author

---

47 Mathematical formulas should be used when possible and no data may be dependent on the tenders to be submitted by the other tenderers, thus ruling out relative qualification schemes.

48 Articles 146 and 147 of the Public Contracts Code.

49 On this topic see, Treumer, "Competitive Dialogue.", p. 184, Arrowsmith, *The Law of Public and Utilities Procurement.*, p.655-660 and Verschuur, "Competitive Dialogue and the Scope for Discussion After Tenders and Before Selecting the Preferred Bidder - What Is Fine-Tuning Etc?".

50 Arrowsmith, *The Law of Public and Utilities Procurement.*, p. 655-657.

51 As was argued by the persons involved in the drafting of the Public Contracts Code interviewed by the author.

begs to differ, as in reality article 99 (and also article 94 on the confirmation of committments) of the Public Contracts Code are not a direct replacemente for the lack of a fine-tuning phase as the faculties of those are to be exercised *after* a bidder has been chosen and not *before* as allowed by article 29(6).

Therefore, in face of the previous paragraph, one can argue that this may lead to a reduced usefulness of the procedure, as it will be more stringent and less flexible than intended by the Directive 2004/18, rendering it not as well adapted to cope with the demands of particularly complex contracts.[52]

As the competitive dialogue in the Public Contracts Code is more tightly regulated than in Directive 2004/18, including in respect of the details surrounding the transifion from the dialogue to the final phase and the impossibility of making small changes as allowed by article 29(6) of this Directive, it seems that bigger changes not falling under its scope are also overruled. For example, after the final tendering stage, the contracting authority might have decided to make some changes to the specifications[53] like risk allocation or the aims and objectives of an IT contract, as to maximize the benefits from the procurement procedure. The Public Contracts Code is silent regarding such possibility[54] and as it does not allow for smaller changes it seems that accepting theses changes without restarting the procedure is precluded.

(m) Apparent lack of a final phase of amendments and discussions

Article 29(7) Directive 2004/18 also allows for a final phase of amendments and discussions with the preferred bidder[55] to take place after he has been selected, allowing for some flexibility in finishing the details and clarifying the legal obligations of both parties, although in face of the ambiguous wording of the Directive, the exact scope of what is allowed or not is convoluted.[56] As examples of what could be allowed, one could mention changes needed to be carried due to external changes of circumstances like

---

52 In addition, if competition is deemed as a key principle of the Directive 2004/18 this omission can be interpreted as an error in the transposition, since the lack of a fine-tune phase can be construed as reducing the theoretical competition benefits the contracting authority would be able to extract, ending with a solution which is not as good as it might be if such a phase existed.

53 Ibid, p. 658-660.

54 In the conclusion of the interview, Leg#2 again referring to the lack of negotiation culture in the country, said Portuguese public administration is used to lead not to negotiate. Leg#3, also mentioned the different cultural traditions from the UK and the napoleonic public administration.

55 On this topic see, Treumer, "Competitive Dialogue", p.183-185, Arrowsmith, *The Law of Public and Utilities Procurement*, p.650-652 and 660-663, Kennedy-Loest, "What Can Be Done at the Preferred Bidder Stage in Competitive Dialogue".

56 Arrowsmith, *The Law of Public and Utilities Procurement,* p. 660-663.

modifications demanded by the planning authority during the application for a planning permission.[57] Recalling what was mentioned above the Public Contracts Code includes for the open procedure two possibilities of amendments and discussions in articles 92, 93 and 99 which, albeit more limited than what allowed by article 29(7) of the Directive, leave room to accomodate some changes needed to the contract.

5. Concluding remarks

As we have seen in the previous section, the research so far has already produced a number of potential key issues that may impact the use and usefulness of the procedure. As concluding remarks the author would like to point out, that at this moment, three issues seem to stand out. The impossibility of eliminating candidates during the dialogue stage (connected with the verification of suitability), the devise of the procedure as to end the dialogue stage with a common set of specifications and the issues arising from confidentiality as the most probable causes of contention in practice.

57 Ibid, p. 662.