In response to the finding that the ‘old’ Directives, Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, do not offer sufficient flexibility with certain particularly complex projects due to the fact that the use of negotiated procedures with publication of a contract note is limited solely to the cases exhaustively listed in those Directives, a new award procedure, the competitive dialogue, was introduced in the new Directive 2004/18/EC (hereinafter referred to as the ‘Directive’ or the ‘Classic Directive’).

As set out in recital 31, the legislation has therefore set itself the objective of providing for “a flexible procedure ... which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate.” However, it should be noted that the competitive dialogue is a procedure which can only be used in the specific circumstances expressly provided for in Article 29.

FIELD OF APPLICATION – UNDER WHAT CIRCUMSTANCES CAN THE COMPETITIVE DIALOGUE BE USED?

Complexity and objective impossibility

The first condition is that the market in question should be ‘particularly complex’. The second paragraph of Article 1(11)(c) envisages two types of markets that are regarded as being particularly complex, specifically “where the contracting authorities are not objectively able to define the technical means... capable of satisfying their needs or objectives and/or are not objectively able to specify the legal and/or financial make-up of a project.”

These provisions should be read in the light of the first part of recital 31: “Contracting authorities which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing the financial and legal make-up of which cannot be defined in advance.”

In view of the fact that this is a special procedure whose use is regulated, it is necessary to examine on a case by case basis the nature of the market in question, taking account of the capacity of the contracting authority concerned to verify whether use of the competitive dialogue would be justified. This is because the concept of objective impossibility is not an abstract concept; it is mitigated by the preciseness of the recital under which the contracting authorities concerned find themselves in this situation “without this being due to any fault on their part”. In other words, the contracting authority has an obligation of diligence – if it is in a position to define the technical resources necessary or establish the legal and financial framework, the use of the competitive dialogue is not possible.

It should be noted that amendments had been proposed during the legislative procedure aimed at limiting the use of competitive dialogue solely to cases where the prior organisation of a contest or the prior conclusion of a contract for the procurement of services (the completion of a study) would not have permitted the contracting authority to conclude the main contract (relating to the construction of a particularly complex project) through the use of an open or restricted procedure. This obligation has not been adopted by the legislation. The reason for
this is that imposing it could present problems in certain cases, either as a result of the time required to conduct two award procedures and for the execution of the first contract or because of the risk that the first procedure could prove unproductive or the competition for the main contract would be insufficient if the service provider; the subject of the first contract, were to be excluded from participation in the second one in order to observe the principal of equality of treatment and/or the rule concerning the technical dialogue (recital 8).

**Technical complexity**

According to the wording of recital 31, technical complexity exists where the contracting authority is not able to define the means of satisfying its needs and/or able to achieve its objectives. Two cases may arise: either that the contracting authority would not be able to define the technical means to be used in order to achieve the prescribed solution; this should be fairly rare given the possibilities of establishing technical specifications – totally or partially – in terms of functionality or performance; or – which would occur more often – that the contracting authority would not be able to determine which of several possible solutions would be best suited to satisfying its needs. In both cases, the contract in question would have to be considered as being particularly complex.

Let us take the example of a contracting authority wanting to create a connection between the shores of a river – it might well be that the contracting authority cannot determine whether the best solution would be a bridge or a tunnel, even though it would be able to establish the specifications for the bridge (suspended, metal, in pre-stressed concrete, etc) or the tunnel (with one or more tubes, to be constructed under or on the riverbed, etc). In this case, use of a competitive dialogue would also be justified.

As recalled by recital 31 – and to the extent they are not configured as concessions contracts – technical complexity could be present in the case of certain projects relating to the construction of major integrated transport infrastructure projects or the construction of major computer networks (although such cases are also likely to present legal or financial complexities).

**Legal or financial complexity**

Recital 31 states that a financial or legal complexity “may arise in particular … with the implementation of … projects involving complex and structured financing the financial and legal make-up of which cannot be defined in advance.” Obviously, such issues arise very, very often in connection with projects of Public Private Partnerships.

One possible example of legal or financial complexity might be a situation in which the contracting authorities cannot foresee whether the economic operators will be prepared to accept such an economic risk that the contract will be a concession contract or whether ultimately it will end up being a ‘traditional’ public contract. In this situation a contracting authority considering it most likely that the contract will be a concession and consequently applying a procedure other than as laid down for public contracts would find itself faced with difficult choices if it were to turn out at the end of the procedure that the contract would after all be a public contract and not a concessions contract. This is because the contracting authority could either conclude the contract and commit an infringement of Community law, or partially – in terms of functionality or performance; or – which would occur more often – that the contracting authority would not be able to determine which of several possible solutions would be best suited to satisfying its needs. In both cases, the contract in question would have to be considered as being particularly complex.

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for obvious reasons of equal treatment; in fact, any changes to the award criteria after this stage in the procedure would be introduced at a time when the contracting authority could have obtained knowledge of the solutions that are proposed by the different participants. The possibilities of ‘steering’ the procedure in favour of one or other participants would be all too obvious, and even more so in those cases where these same award criteria were used to gradually reduce the number of solutions to be examined.

After the expiry of the time for submission of applications to participate and after having made their selection, the contracting authorities send an invitation to participate in the dialogue to the candidates selected. This invitation must be in accordance with the provisions of Article 40.

The dialogue stage

Under Article 29(3), “contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 44 to 52, 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.” This latter provision should be underlined: the dialogue may therefore relate not only to ‘technical’ aspects, but also to economic aspects (prices, costs, revenues, etc) or legal aspects (distribution and limitation of risks, guarantees, possible creation of special purpose vehicles, etc).

The Directive does not regulate the conduct of the dialogue in detail; it limits itself to placing it within the framework of the provisions of the second and third subparagraphs of Article 29(3). Under this latter provision, the starting point is that the dialogue should be carried out individually with each of the participants on the basis of the ideas and solutions of the economic operator concerned. Except with the consent of the parties concerned, there is therefore no danger of ‘cherry-picking’ – i.e., the use of the ideas and solutions of one of the participants by another one – and confidentiality is further protected by a general provision on the subject, Article 6. Moreover, participants may also, as appropriate, benefit from the protection laid down by – Community or national – legislation on intangible property. It should therefore be noted that the competitive dialogue is the only award procedure laid down by the Directive providing protection for ideas not subject to intangible property rights – in particular, no provision comparable to that in the third subparagraph of Article 29(3) exists for the negotiated procedure.

During the course of the dialogue, contracting authorities may ask the participants to specify their proposals in writing, possibly in the form of progressively completed/refined tenders, as implicitly assumed in Article 29(5). Aware of the fact that this may require considerable investment for the economic operators concerned, the Community legislation wished to indicate that it may be particularly appropriate in the case of the competitive dialogue to specify “prices or payments to the participants in the dialogue”.

Gradual limitation of the number of solutions to be examined

Under Article 29(4), contracting authorities may “provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria …”. The very complexity of the contract, coupled with the necessity for the contracting authorities of comparing several solutions and being able to take decisions which can subsequently be justified, requires that the application of the award criterion be based on written documents. Whether these documents are qualified as ‘outline solutions’, ‘project proposals’, ‘tenders’ or other is not specified in the Directive – it is in any case clear that even if considered to be ‘tenders’, they cannot be required to contain “all the elements required and necessary for the performance of the project” given that this requirement only applies to tenders that are submitted in the final stage of the competitive dialogue (cf Article 29(6)). It should be noted that it is the number of solutions to be discussed which is directly referred to by gradual reduction. However, the reduction in the number of solutions must remain within the limits laid down in the last sentence of Article 44(4): “In the final stage, the number arrived at shall make for genuine competition …”. The Directive specifies that this rule only applies “insofar as there are enough solutions or suitable candidates.”

Reduction by application of the award criteria might therefore show that there is only one appropriate candidate or solution, which does not prevent the contracting authorities from continuing with the procedure.

End of the dialogue, final tenders and award of the contract

At the appropriate time, the awarding authority declares the dialogue concluded and informs the participants of this. It asks them to submit their “final tenders on the basis of the solution or solutions presented and specified during the dialogue.” Generally speaking, these final tenders are based on the solution (or possibly solutions) of each of their participants – it is only in the scenario of an agreement referred to in the third subparagraph of Article 29(3) on the part of the economic operator or operators concerned that the contracting authority could ask the participants to base their final tender on a solution common to all. Normally, there is not therefore a new set of specifications or descriptive document at the end of the dialogue. The Directive provides that “these tenders shall contain all the elements required and necessary for the performance of the project” – they are therefore complete tenders.

Once these final tenders have been received, the contracting authority may, under the second subparagraph of Article 29(6), ask for them to be “clarified, specified and fine-tuned …” 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.” The wording of this provision – like that of the second subparagraph of paragraph 7 – was based largely on a statement by the Council: “The Council and the Commission state that in open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders of the requirements of the contracting authorities and provided this does not involve discrimination.” In the light of the precise wording of the last sentence of recital 31, it may therefore be considered that the room for manoeuvre that contracting authorities have after the submission of the final tenders is fairly limited.

Under the first subparagraph of Article 29(7), the final tenders are then assessed on the basis of the award criteria and the most economically advantageous tender is identified.

Where necessary and at the request of the contracting authority, the tenderer identified as 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 risk distorting competition or causing discrimination.”

It must be emphasised that this does not entail any negotiations solely with this economic operator – amendments aimed at authorising such negotiations were proposed and rejected by the Community legislative process. It relates to something much more limited, specifically ‘clarification’ or ‘confirmation’ of undertakings already appearing in the final tender itself. This provision should also be interpreted in the light of the last sentence of recital 31.

In conclusion, the competitive dialogue may be summarised, by way of simplification, as a particular procedure which has features in common with both the restricted procedure and the negotiated procedure with the publication of a contract notice. The dialogue mainly distinguishes itself from the restricted procedure by the fact that negotiations concerning every aspect of the contract are authorised and from the negotiated procedure by the fact that, essentially, negotiations are concentrated within a particular phase in the procedure.

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