

THÈMES - DIALOGUE

- ✓ GOUVERNANCE → Réflex à tous
- ✓ Stratégie profondément ← Risque Just. Changements
- ✓ Centre expertise ← ?
- ✓ Qualité expertisée de l'interactions
- ✓ Méthode de travail... AGILE ← Modèle SAAJ.
- ✓ couverture fonctionnelle ← polyne → Mitigation
risque.
- ✓ conculture technologique
- ✓ Commercial → # contrat ← en pour
→ garantie
→ classes négociables
→ Analyse (niveau de risque) ←
→ pot(s) ?

et de se lancer dans la conception d'un logiciel sur mesure plutôt que d'adopter une solution clef en main.

Lors d'une audience en septembre 2006 à la Commission de l'administration publique, la curatrice à la retraite, Nicole Malo, fait la déclaration suivante qui résume bien le problème qu'a posé la sous-traitance dans la réalisation du contrat avec LGS.

Le premier enjeu, c'est que, dès le début des travaux, au moment où les équipes sont sur le terrain et qu'ils s'échangent, commencent à se comprendre, c'est là que d'une part la firme a réalisé la particularité, la complexité du Curateur public.

Vous savez, quand on n'est pas dedans, ça paraît beaucoup plus simple que quand on est dedans. Et, quand ils ont commencé à voir ce que voulait dire et ce que nous souhaitions avoir comme mode de système, là sont apparues certaines difficultés dans les capacités des progiciels, qu'ils n'avaient pas vues quand ils ont fait leur appel d'offres et que, nous, on ne pouvait pas voir à la lecture de leur proposition, parce que, dans leur proposition, ils nous disaient : On peut faire ci, on peut faire ci, on peut faire ci, on peut faire ça. Il y avait 600 critères, et dans la majorité ils satisfaisaient. Et, quand nos équipes se sont mises à travailler pour dire : Bon, tel critère, voilà ce que ça veut dire puis voilà comment, mais ils ont dit : Non, là, ça ne se peut pas. Et finalement, de leur évaluation à 80, on me dit, peut-être 90, mais en tout cas, à la fin, au mois de mars, on arrivait avec un potentiel de 40 % de ce que les progiciels pouvaient faire par rapport à ce qu'on demandait⁷².

Selon les calculs du Syndicat de la fonction publique et parapublique du Québec (SFPQ), à partir d'un budget de 17,5 M\$ attribués pendant cette période, 12,2 M\$ ont été attribués à DMR et 500 000 \$ à LGS⁷³; c'est dire que 73 % du budget total a été accordé à des sous-traitants.

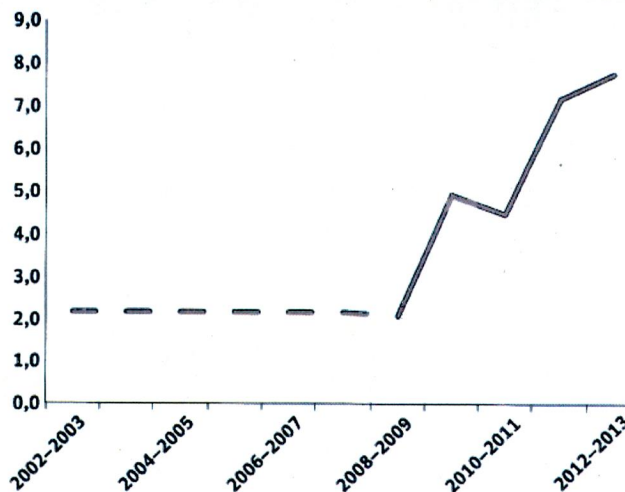
En mai 2008, le Conseil du Trésor a accepté le nouveau plan du Curateur pour une nouvelle refonte de ses systèmes informatiques au coût de 21 M\$.

Comme le montre le graphique 7, c'est à partir de cette décision que les dépenses les plus importantes sont faites.

De 2002 à 2008, 13,1 M\$ seront investis dans la première mouture du projet. De 2008 à 2012, 26,5 M\$ seront investis dans la deuxième version du projet. Il s'agit d'un dépassement de 126 % du montant prévu à l'origine. De ce coût total de 39,6 M\$, les deux tiers (26 M\$) ont été accordés en contrat de sous-traitance, et de ces contrats en sous-traitance, une seule entreprise, soit Fujitsu Conseil, en a reçu 58 % (15,4 M\$). Fujitsu aurait été la seule entreprise à répondre à l'appel d'offres du curateur⁷⁴.

Quels sont les résultats de cette deuxième période de développement, largement confiée à des sous-traitants? Le projet n'est pas livré et devrait l'être pour 2014, soit deux ans après les échéances prévues. Pour l'instant, il a dépassé de 20 % le budget de 21 M\$ prévu, mais les deux prochaines années ajouteront à ce dépassement de coûts. Non seulement la tentative de mise en place a échoué, mais le projet accuse de surcroît des pertes sèches (soit des dépenses qui n'auront eu aucune utilité) d'au moins 3,4 M\$⁷⁵.

GRAPHIQUE 8 Dépenses pour le Programme de planification stratégique des technologies de l'information, 2002 à 2012 (en M\$ constants de 2012)



Source : Curateur public, réponse à une demande d'accès à l'information numérotée N/D 2012-06-3001.

3.2 Le Système intégré d'information de justice (SIJ)

Le Système intégré d'information de justice est un projet du ministère de la Justice (MJQ) dans lequel ont aussi été impliqués la Direction des poursuites criminelles et pénales (DPCP) et le ministère de la Sécurité publique. Il a été entamé en mars 1999 et le gouvernement y a mis fin 13 ans plus tard, en février 2012, sans que le projet ait été mis en place.

Selon le Ministère :

Le système intégré d'information de justice (SIJ) [devait permettre], en tout temps, la production et l'échange électronique d'informations fiables entre les acteurs de l'administration de la justice, en matière criminelle et pénale, civile et jeunesse sur l'ensemble du territoire québécois. S'inscrivant dans la volonté gouvernementale de moderniser l'État, le projet SIJ [devait remplacer] les systèmes technologiques désuets reliés à l'administration de la justice et [contribuer] à accroître la sécurité du public en assurant une meilleure circulation des informations entre les intervenants⁷⁶.

Il ne s'agira pas ici de vérifier si la sous-traitance a bénéficié ou non aux utilisateurs du système de justice ou si le Ministère en a eu pour son argent. Le SIJ n'ayant jamais été mené à bien, il est évident que non. Cependant, nous tenterons de déterminer ici quel rôle la sous-traitance de ce contrat a pu avoir dans ses insuccès.

Pour ce faire, nous tracerons un rapide historique du projet SIJ, pour ensuite tenter d'identifier si la sous-traitance de certains aspects du projet a aidé le projet ou a contribué à ses résultats décevants.

PENSE-BÊTE

1) Veille et balisage :

- Avec qui :
Avocate française
SQI : Josée Nauraud
MTQ : M. Cantin

Il en ressort :

- Le dialogue = discussion
- Le dialogue n'est pas le moment d'évaluer les propositions, c'est plutôt le temps de préciser les besoins, de comprendre les soumissions reçues et constater les zones de faiblesses des soumissions initiales.
- Les besoins, critères et pondération ne peuvent être changés, sinon à la marge ou en cas d'oubli critique pour le succès du projet.
- 1^{ère} rencontre = mode de fonctionnement à convenir simultanément avec les 2 alliances
- **Qui est au dialogue ?** Personne de haut niveau et chargé de projet
- Le dialogue = faire évoluer les solutions proposées
- Pas d'appel d'offres amendés à moins de changements aux besoins, juste des soumissions amendées
- Les vérificateurs externes sont présents à toutes les rencontres et peuvent intervenir live en cas de besoin
- Durée globale du dialogue identique pour les 2 alliances finalistes
- Tenir les membres du comité de sélection en dehors de ce processus, de même pour les secrétaires de comité (séparation de l'évaluation et du dialogue). Ces derniers soutiendront le RORC et le comité de direction, au besoin.
- Très peu de contestation se retrouvant devant les tribunaux

Enjeux :

- C'est sur les moyens qu'on travaille, c'est eux qui devraient évoluer pas les besoins
- **Collusion : UPAC???**
 - ✓ Un qualifié n'ayant pas déposé de soumissions est devenu un sous-traitant d'une l'alliance
 - ✓ Une firme pourrait faire partie des deux alliances finalistes
- ✓ Ne pas se prononcer sur les offres à venir mais se concentrer sur le questionnement de ce qui a été déposé au mois d'avril et les questions des alliances.

A) →

PENSE BÊTE

2) Gouvernance du dialogue compétitif :

Portée du dialogue :

- Les faiblesses identifiées par le comité de sélection (évaluation des soumissions en fonction des besoins exprimés à l'appel d'offres)
- Les questionnements soulevés par le comité de sélection (éclaircissements requis à l'égard des propositions reçues)
- Les préoccupations du comité de sélection (ont-ils bien compris le besoin?)
- Les préoccupations et questionnements des alliances
- Les clauses contractuelles négociables (énoncées à l'appel d'offres)
 - ✓ Autorisation du changement de ressources
 - ✓ Sous-contrat
 - ✓ Cession de contrat
 - ✓ Responsabilité de l'alliance
 - ✓ Résiliation
 - ✓ Propriété matérielle et droits d'auteur
 - ✓ Modalités de paiement
- Toutes nouvelles clauses requises et non publiées à l'appel d'offres

Enjeux :

- Qui seront les représentants au dialogue ✓
 - ✓ Karl? (OK selon le balisage, même semble privilégié par les entités vu du Québec)
 - ✓ Clients?
 - ✓ Les responsables des ateliers de préparation?
 - ✓ Qui sont les experts au dossier? Risques identifiés par Malette
- L'analyse de risque conjointe = processus à être analysé par le RORC *au prochain comité aisé*
 - ✓ L'A/O écrite alors qu'on ne connaissait pas réellement le déroulement et les objectifs du dialogue
 - ✓ L'identification des mesures de mitigation à mettre en place ne pourra pas être évaluée pendant le dialogue, les mesures de mitigation seront évaluées par le comité de sélection. On devrait essayer d'éviter sinon on se positionne déjà en mode évaluation des mesures proposées. (écart avec ce qui est inscrit à l'A/O (3.2))
 - ✓ La contingence ne sera pas déterminée à la fin du dialogue compétitif, mais les alliances auront les informations requises pour terminer leur proposition. Sinon, on devrait déjà juger leurs mesures de mitigation et connaître le contenu des enveloppes de prix. (A/O 2.11.8)
 - ✓ Comment l'analyse de risque sera récupérée par le comité de sélection
 - ✓ L'analyse de risque est confiée à deux externes de R3D, en signature présentement d'une déclaration d'intérêt
 - ✓ Le conseiller en éthique considère qu'une ressource interne devrait être jumelée pour assurer de contrôler les risques de collusion ou d'impartialité
- Le RORC devra s'assurer que les éléments identifiés par le comité de sélection constituent le plan de travail du responsable du dialogue
- S'assurer qu'il n'y aura pas de négociations après l'adjudication.

- Lot 0, clarifiez son but?

Opport.

PENSE BÊTE

Autres enjeux au dossier :

- Nos besoins sont-ils suffisamment clairs pour éviter qu'à la réalisation on cumule les demandes de changements = augmentation de coût?
- La couverture représentée par la citrouille a-t-elle changée?
- Comment s'assure-t-on que le périmètre de Céline est bien compris?
- Les Kaizen remettent-ils en question les besoins identifiés?
- Méthode Agile à clarifier et à quel point la SAAQ veut et peut être en mode Agile?
- Partage de risque permet-il réellement de réduire nos risques que les livrables ne font pas ce qui est attendu? Important de bien définir les indicateurs de performance qui permettra d'approuver les lots et d'appliquer le partage de risque
- Devrait-on inviter l'UPAC au dialogue ou du moins l'inviter à indiquer qu'il surveille?
- Besoin de temps pour valider l'écart entre les propositions du responsable du dialogue et les constats du comité de sélection (RORC).
- Délai entre la fin de E (21 octobre) et le début du dialogue (24 octobre)
- Le calendrier dans la plaquette est ambitieux et devra être approuvé après avoir été discuté aux comités aviseurs et au CD du 4 octobre

**1*

De: Carrier, Denis
Envoyé: 22 septembre 2016 14:55
À: Huard, Jean-Francois; Lapierre, Martin; Pelletier, Daniel
Objet: Par rapport au dialogue compétitif

Voici quelques risques relevés par Sandrine Serpentier Linarès, avocate française spécialiste en droit public.

- Risque induit par une adaptation du besoin à la solution proposée ou de la solution proposée à l'évolution du besoin qui peut favoriser un des fournisseurs

Cela concerne notamment le comportement « suspicieux » de l'acheteur public qui use des spécificités propres à la procédure de dialogue compétitif – à savoir l'évolution du besoin et de l'offre au cours de la procédure – pour avantager une entreprise, sans considération du besoin initial. Cette solution pourrait conduire à un encadrement strict de l'évolution du besoin et de celle des spécificités techniques, du programme fonctionnel..., ce qui tendrait à limiter quelque peu l'intérêt du recours à la procédure de dialogue compétitif.

- Risque lié à la méconnaissance de l'obligation de confidentialité

On traite ici de la violation de cette obligation qui fausse ainsi l'application des règles de concurrence et d'égalité des candidats qui s'imposent à l'acheteur. L'obligation de confidentialité constitue une garantie substantielle qui s'impose au contenu des négociations relatives aux offres des candidats, quel que soit leur objet, ainsi qu'à l'identité des soumissionnaires.

- Risque lié à la « régularisation » de l'offre finale

Seuls des précisions, clarifications, perfectionnements ou compléments peuvent être demandés aux candidats sur leur offre finale. Cependant, ces demandes ne peuvent avoir pour effet de modifier des éléments fondamentaux de l'offre finale, dont la variation est susceptible de fausser la concurrence ou d'avoir un effet discriminatoire.

D'autre part, dans le cadre d'une procédure de dialogue compétitif, le pouvoir adjudicateur qui constate une incohérence dans l'offre finale d'un candidat ne peut, de son fait, corriger ladite offre finale irrégulière. Il ne manque pas à ses obligations de publicité et de mise en concurrence en éliminant cette offre irrégulière, faute d'inclure tous les éléments nécessaires à l'exécution du contrat.

- Risque lié au défaut d'impartialité

Le principe d'impartialité s'applique au pouvoir adjudicateur, ainsi qu'aux personnes et autorités extérieures dont il s'adjoint les conseils en vue de la passation d'un marché. D'autre part, le manquement à l'impartialité ne peut être constitué du seul fait d'avoir eu recours à l'assistance technique de sociétés qui étaient des filiales d'un groupe ayant collaboré ponctuellement avec la société qui a obtenu le contrat. Ce fait ne saurait, à lui seul, caractériser un manquement à l'impartialité de la part de ces conseils extérieurs dans le cadre de la procédure de dialogue compétitif.

Elle termine en mentionnant que l'accroissement des possibilités de négociation au travers du recours à la procédure de dialogue compétitif devra s'accompagner d'une forte moralisation de l'achat public afin de concilier le respect des principes fondamentaux de la commande publique – transparence, égalité de traitement et liberté d'accès à la commande publique – avec la performance de la gestion publique par l'optimisation de l'achat public.

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Code des marchés publics (édition 2006)

▶ TROISIÈME PARTIE : DISPOSITIONS APPLICABLES AUX MARCHÉS DE DÉFENSE OU DE SÉCURITÉ.

▶ TITRE III : PASSATION DES MARCHÉS

▶ Chapitre III : Définition et déroulement des différentes procédures de marchés publics

Section 3 : Procédure de dialogue compétitif**Article 245 (abrogé au 1 avril 2016)**

Créé par Décret n°2011-1104 du 14 septembre 2011 - art. 11

La procédure de dialogue compétitif est organisée conformément aux dispositions suivantes.

I. — Un avis d'appel public à la concurrence est publié dans les conditions prévues à l'article 212. Les besoins et exigences sont définis par la personne soumise à la présente partie dans cet avis et, le cas échéant, dans un projet partiellement défini ou dans un programme fonctionnel.

Les modalités du dialogue sont définies dans l'avis d'appel public à la concurrence ou dans les documents de la consultation.

La personne soumise à la présente partie peut décider de limiter le nombre de candidats qui seront admis à participer au dialogue. Elle mentionne cette décision dans l'avis d'appel public à la concurrence. Elle fixe dans cet avis un nombre minimum de candidats admis à présenter une offre et peut également fixer un nombre maximum. Ce nombre minimum ne peut être inférieur à trois.

Lorsque le nombre de candidats satisfaisant aux critères de sélection des candidatures est inférieur au nombre minimum, la personne soumise à la présente partie peut continuer la procédure avec les seuls candidats sélectionnés.

II. — Le délai minimal de réception des candidatures, en réponse à un avis d'appel public à la concurrence, est de trente-sept jours à compter de la date d'envoi de l'avis, ou de trente jours si l'avis a été envoyé par voie électronique.

III. — Les candidatures sont transmises par tout moyen permettant de déterminer de façon certaine la date et l'heure de leur réception et d'en garantir la confidentialité.

IV. — L'ouverture des plis n'est pas publique ; les candidats n'y sont pas admis.

Seuls peuvent être ouverts les plis qui ont été reçus au plus tard à la date et l'heure limites qui ont été annoncées dans l'avis d'appel public à la concurrence.

Avant de procéder à l'examen des candidatures, la personne soumise à la présente partie, qui constate que des pièces dont la production était réclamée sont absentes ou incomplètes, peut demander aux candidats de compléter leur dossier conformément aux dispositions du I de l'article 233.

Au vu des seuls renseignements relatifs aux candidatures, la liste des candidats invités à dialoguer est établie en application des dispositions de l'article 233.

Les candidats non retenus en sont informés conformément au I de l'article 253.

V. — Les candidats sélectionnés sont simultanément invités, par écrit, à participer au dialogue.

L'invitation à participer au dialogue comporte au moins :

1° Les documents de la consultation ou, s'ils ne sont pas détenus par la personne soumise à la présente partie, l'adresse du service auprès duquel les documents de la consultation peuvent être immédiatement obtenus sur

demande et la date limite pour présenter cette demande, ou encore les conditions d'accès à ces documents s'ils sont mis à disposition directe par voie électronique ;

2° Les références de l'avis d'appel public à la concurrence ;

3° La date et le lieu de déroulement du dialogue, ainsi que l'obligation d'utiliser la langue française ;

4° Le cas échéant, la date limite pour demander des renseignements complémentaires ;

5° La liste des documents à fournir.

VI. — Le dialogue s'ouvre avec les candidats sélectionnés.

L'objet du dialogue est l'identification et la définition des moyens propres à satisfaire au mieux les besoins. Tous les aspects du marché peuvent être discutés avec les candidats sélectionnés.

La procédure peut se dérouler en phases successives de manière à réduire le nombre de solutions à discuter pendant la phase du dialogue en appliquant les critères de sélection des offres, indiqués dans l'avis d'appel public à la concurrence ou dans les documents de la consultation. Le recours à cette faculté est indiqué dans l'avis d'appel public à la concurrence ou dans les documents de la consultation.

Le dialogue se poursuit jusqu'à ce que soient identifiées, éventuellement après les avoir comparées, la ou les solutions qui sont susceptibles de répondre aux besoins, pour autant qu'il y ait un nombre suffisant de solutions appropriées.

Au cours du dialogue, chaque candidat est entendu dans des conditions d'égalité. La personne soumise à la présente partie ne peut donner à certains candidats des informations susceptibles de les avantager par rapport à d'autres. Elle ne peut révéler aux autres candidats des solutions proposées ou des informations confidentielles communiquées par un candidat dans le cadre de la discussion sans l'accord de celui-ci.

VII. — Lorsqu'elle estime que la discussion est arrivée à son terme, la personne soumise à la présente partie en informe les candidats qui ont participé à toutes les phases de la consultation. Elle les invite à remettre leur offre finale sur la base de la ou des solutions qu'ils ont présentées et spécifiées au cours du dialogue, dans un délai qui ne peut être inférieur à quinze jours. L'invitation à remettre leur offre finale comporte au moins la date et l'heure limites de réception de ces offres, l'adresse à laquelle elles seront transmises et l'indication de l'obligation de les rédiger en langue française. Ces offres comprennent tous les éléments requis et nécessaires pour la réalisation du marché.

Les renseignements complémentaires sur le programme fonctionnel ou le projet partiellement défini sont envoyés aux opérateurs économiques qui les demandent en temps utile, six jours au plus tard avant la date limite fixée pour la réception des offres finales.

Des précisions, clarifications, perfectionnements ou compléments peuvent être demandés aux candidats sur leur offre finale. Cependant, ces demandes ne peuvent avoir pour effet de modifier des éléments fondamentaux de l'offre finale, dont la variation est susceptible de fausser la concurrence ou d'avoir un effet discriminatoire.

VIII. — Après classement des offres finales conformément au III de l'article 53, l'offre économiquement la plus avantageuse est choisie en application du ou des critères annoncés dans l'avis d'appel public à la concurrence ou dans le règlement de la consultation.

Il peut être demandé au candidat retenu de clarifier des aspects de son offre ou de confirmer les engagements figurant dans celle-ci, à condition que ceci n'ait pas pour effet de modifier des éléments substantiels de l'offre, de fausser la concurrence ou d'entraîner des discriminations.

Si le candidat dont l'offre a été retenue ne peut produire les attestations et certificats mentionnés aux I et II de l'article 224, son offre est rejetée et il est procédé conformément au III du même article.

Lorsque le candidat dont l'offre a été retenue produit les attestations et certificats mentionnés à l'alinéa précédent, les candidats dont l'offre n'a pas été retenue sont informés du rejet de celle-ci conformément au I de l'article 253.

Le marché est notifié et un avis d'attribution est publié.

IX. — Lorsque aucune candidature ou aucune offre n'a été remise ou lorsqu'il n'a été proposé que des offres inappropriées au sens du 1° du II de l'article 208 ou des offres irrégulières ou inacceptables au sens du I de l'article 208, le dialogue compétitif est déclaré sans suite ou infructueux. Les candidats qui ont remis un dossier à la personne soumise à la présente partie en sont informés.

Lorsque le dialogue compétitif est déclaré infructueux, il est possible de mettre en œuvre :

1° Soit un nouveau dialogue compétitif ou une procédure négociée avec publicité préalable et mise en concurrence ou un appel d'offres ;

2° Soit, si les conditions initiales du marché ne sont pas substantiellement modifiées, un marché négocié sans publicité préalable dans les conditions prévues au I de l'article 208, dans le cas d'offres inacceptables ou irrégulières, ou sans publicité préalable et sans mise en concurrence dans les conditions prévues au 1° du II de l'article 208 dans le cas d'offres inappropriées ou lorsque aucune candidature ou aucune offre n'a été remise ;

3° Soit, s'il s'agit d'un lot qui remplit les conditions mentionnées au III de l'article 202, une procédure adaptée.

X. — Il peut être prévu dans le règlement de la consultation ou dans l'avis d'appel public à la concurrence qu'une prime sera allouée à tous les participants au dialogue ou à ceux dont les propositions ont fait l'objet de la discussion ou encore à ceux dont les offres ont été les mieux classées.

La rémunération de l'attributaire du marché tient compte de la prime qui lui a été éventuellement versée en application de l'alinéa précédent.

XI. — A tout moment, la procédure peut être déclarée sans suite pour des motifs d'intérêt général. Les candidats en sont informés.



Rijksoverheid

The competitive dialogue

A guide based on the current experience
of the Rijksgebouwendienst, Rijkswaterstaat
and the Ministry of Defence

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The competitive dialogue

A guide based on the current experience
of the Rijksgebouwendienst, Rijkswaterstaat
and the Ministry of Defence

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1 Introduction

1.1 Why this guide?

As the contracting authority you may implement the competitive dialogue for the tendering of particularly complex projects for which you are unable to make an objective determination of the means that satisfy your needs or a specification of the legal and financial conditions. However, the *Besluit Aanbestedingsregeling overheidsopdrachten* ('Public Procurement (Tendering Rules) Decree', BAO) does not specify the details of this procedure and little information about conducting a competitive dialogue is available in other publications.

The competitive dialogue differs fundamentally from the 'ordinary' public and restricted procedures: the greatest difference lies in the manner in which the request is made. The competitive dialogue begins with a question for which there is no known (unequivocal) answer. The contracting authority uses the solutions submitted by the candidates to conduct a dialogue that results in an optimisation of the request and offer. When the dialogue is conducted in the appropriate manner the contracting authority receives tenders offering an optimum solution at a reasonable price and the party submitting the tender is offered an attractive contract with sufficient economic prospects.

Consequently, an optimum solution depends on the quality of the dialogue between the contracting authority and the parties submitting the tenders. However, how should an appropriate dialogue be organised? How do you ensure that all parties – both the tenderers and your internal clients – are heard? This is the subject of this guide, which is based on recent experiences of the Rijkswaterstaat and Ministry of Defence with the use of the competitive dialogue in the tendering of a number of integral DBFM(O) projects.

The authors have written this brochure to share the experience they have acquired with all those wishing to make use of this procedure.

1.2 The contents of this guide

The layout of this guide follows the phases of the tender process. Chapter 2 reviews the initial design of the project and discusses the most important decisions that need to be made before the competitive dialogue can begin. Chapter 3 examines the steps to be worked through before the announcement of the project, and Chapter 4 the selection of the candidates. The authors then discuss the dialogue phase in detail in Chapter 5, with a review of the determination of the objective, the process and the content. Chapter 6, the last chapter of the guide, concludes with the final phase of the procedure: the assessment of the final tenders, the award of the contract and the rejection of tenders.

The authors have limited the length of Chapter 1 by discussing a number of elements in the phases in which they will certainly be an issue. Readers will find it worthwhile to begin by reading through the guide to obtain an insight into the overall process.¹

¹ Directive 2004/18/EC, 'whereas' number 31 in conjunction with Article 29, BAO Article 29 and ARW (Tender Regulations for Works) 2005, 4.2.

This brochure is an experiential document: it is not a legal treatise. The authors have included any relevant comments in the text. This guide is restricted to a limited review of the contents of DBFM(O) agreements and the output specifications. In addition, the guide assumes that the reader has a general knowledge of project management. Where appropriate, the guide either mentions the necessary issues or makes references to the relevant literature. This guide does not include specific information about the policy of the various construction ministries. The authors' text weighs the pros and cons. The readers are in the best position to assess whether the advice and practical experience contained in this brochure is compatible with their contracting authority's policy.

1.3 Acknowledgements

The authors would like to express their gratitude to the following persons who contributed to the preparation of this guide.

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2 Initial design of the project

2.1 Introduction

This publication assumes that the value and necessity of the project have been established and that it has been decided to conclude a DBFM(O) agreement. This decision will be based on the business case prepared for the project.

This Chapter devotes attention to a number of important, recurrent issues. These issues will require careful consideration and the requisite decisions will need to be made before the competitive dialogue can begin. These issues constitute, as it were, the conditions to be met for the successful completion of the project. The Chapter begins with a review of the issues of importance to the project's settings (Section 2.2) and continues with a discussion of the elements of primary relevance to the project team (Section 2.3).

2.2 The project's context

2.2.1 Scope

The scope refers to the nature, extent and demarcations of a project. Determining the scope is equivalent to answering the question "what is part of the project, and what is *not* part of the project?" Make sure that the scope includes sufficient elements (for example, for offices the design, construction, catering, cleaning, security) for the provision of an integral solution.

2.2.2 Critical Success Factors (CSFs)

It must be possible to derive the critical success factors for a project from the policy and the project's objectives (or, in other words, will the problem be solved on the completion of the project?). When the critical success factors of a project cannot be derived from the policy and project's objective then the taxpayers' funds have not been allocated in the appropriate manner.

The project manager shall either need to entice the client to determine the critical success factors or determine them in collaboration with the project team and submit them to the client for ratification. Do not begin work until the critical success factors have been formulated clearly: the time that may be involved will more than be recouped later in the process.

All measurements made later in the process – including the preparations for the project and the subsequent development and operation – will be assessed in terms of these critical success factors.

Example 1

Excerpt from the foreword written by Ed Visser (Project Director) to the tendering instructions for the Kromhoutkazerne barracks project in Utrecht (translated from the original Dutch):

"We must ensure that we always bear the ultimate objective in mind during all the steps in the project and the preparation of all Tender Products. The ultimate objective is: the development of high-quality and financially beneficial accommodation for the Royal Netherlands Army Command and other staffs on the site of the Kromhout barracks. I have summarised this objective in terms of five critical success factors:

- 1 An optimum layout of the project site;
- 2 A recognisable, efficient and flexible complex;
- 3 A coherent package of services;
- 4 Attention for the facility staff currently employed by the Ministry of Defence;
- 5 Timely and affordable"

The critical success factors are used to determine the minimum requirements² (what will at least be necessary) and the elements for which a tenderer could create added value and that will serve as award criteria. The tender documents unravel the elements of an award criterion to an extent required to assess the submitted tenders and classify them on the basis of their price-quality ratio³.

Example 2

One of the critical success factors identified for the Kromhoutkazerne project stipulated a flexible layout of the buildings. Pursuant to this factor the client must be able to make rapid and efficient rearrangements of the layout of the new (office) premises to meet changing needs. This CSF has been included as a requirement for the candidates and in the tender documents, i.e. the output specifications and the award criteria. The candidates have submitted tenders on the basis of these requirements. The solutions given in the tenders for this factor are assessed as a quality criterion.

Example 3

A15 motorway, Maasvlakte-Vaanplein:

- 1 Critical success factors with an influence on the success of the project:
 - a prevention or reduction of traffic disruptions during the development phase;
 - b prevention or reduction of traffic disruption during the maintenance phase (the Maintain component of the DBFM agreement);
 - c demonstration of the detailing of the future collaboration after the award of the contract in the form of an (outline) design of the contractor's management plan that will be worked out in detail during the further dialogue and, where relevant, after the award of the contract.
- 2 The candidates' commitment to remain within the limits specified by the tender documents, such as a ceiling price or maximum budget.

2.3.3 Context analysis

The objective of the context analysis is to determine which (internal and external) parties exert an influence on the result of the project. These parties are also referred to as the project's 'stakeholders'. A distinction is made between legal persons whose interests will be impacted by the project in some manner and the supporters and opponents of the project. The impact is reviewed to assess whether the project will be beneficial or detrimental to each (legal) person. The project is also examined to assess the need for compensatory measures or opportunities for its adaptation in a manner that transforms a disadvantage into a benefit. The context analysis also provides an insight into the opportunities and threats facing the project. Adopting this approach provides an indication of the probability of achieving the intended results - a probability that can be increased by implementing appropriate measures.

It is necessary to assess the importance of the various stakeholders to the success of the project and the measures that will be required to overcome any objections from these parties. Which costs or efforts will this involve, and can the contracting authority be encouraged to cooperate? To what extent could the relevant stakeholders be able to obstruct the success of the project?

² See also Section 3.3 (Output specifications).

³ In practice, also referred to as 'ranking' or 'classifying' tenders

2.3.4 Risk analysis

Risk management should be taken seriously. A thorough study is needed to obtain an appropriate insight into the risks, their magnitude and the probability of their materialisation. Take account of the changing types and combinations, magnitude and probability of the materialisation of the risks during the course of the preparations and implementation of the project: the risk control measures will need to be adapted accordingly. The measures that will be required - and their control - can be estimated only when a distinction is made between project risks and contract risks.

Project risks are risks that influence the course of the project. They relate to the preparatory phase and tender phases of the process, as well as to the contracting authority's contract management during the development and operational phases.

Contract risks relate to the development and operational phase: they are risks that can be divided between the contracting authority and contractor.

Example 4

Project risks: political support, the continuity of the project, leakages of information, "user" satisfaction and public decision-making.

Example 5

Contract risks: Liability, fire, acquisition of permits and soil pollution.

2.2.5 Government house in order

An effective dialogue can begin only once it is clear how the authorities will make use of their powers (such as the issue of permits) and their individual interests in the project are known⁴. It may prove worthwhile to ensure that the government house is in order by concluding a covenant or an administrative agreement before beginning the dialogue with the market parties. The market parties benefit from authorities that speak with one voice: the authorities benefit from their ability to submit a consistent request to the market. In addition, it may be worthwhile to conclude an agreement between, for example, the user and Rijksgebouwendienst or between the various RWS divisions to ensure that the internal responsibilities are specified and that the various agencies adopt a consistent approach to the market.

2.2.6 Budget / PPC / PSC

In general, the decision to proceed to put out an DBFM(O) agreement to tender is based on what is referred to as the 'PPC' (Public Private Comparator). The PPC is used to compare the implementation of a project via an DBFM(O) agreement with its implementation by the public sector. If the PPC reveals that the market's performance of the work will create added value then it will be decided to adopt a PPP approach such as a DBFM(O) agreement.

Make sure that sufficient budget is available. The next stage is to prepare a PSC (Public Sector Comparator)⁵ during the tender procedure. The PSC has two objectives:

- 1 To obtain an insight into the total costs during the lifecycle of the project.
- 2 To serve as a benchmark for a comparison with the final tenders. The results from the comparison reveal whether the tenders are financially more advantageous than having the work carried out by the public sector.

The first step in the preparation of the PSC is to determine the scope, allocation of the risks, output specifications and the definition of the variant in which the work is carried out by the public sector. The PPC will usually already contain much of this information. The PSC (the benchmark) will be refined or amended later in the tender process when information obtained from the dialogue indicates the need to adjust the risk allocation or output specifications.

⁴ See also Section 2.2.3 (Context analysis).

⁵ The public alternative to private tenders.

The PSC is also used to determine the ceiling price⁶ for the tenderers (in general, this is obtained by deducting a specific percentage from the result obtained from the PSC). The definitive PSC/benchmark can be specified on the basis of the invitation to submit the final tender. This also provides for a comparison of the tenders with the benchmark to assess whether PPP will result in financial added value. When no ceiling price is specified the PSC can, in the event of unacceptably high tenders, serve as the contracting authority's prudent estimate as referred to in Article 4.29.5 of the ARW 2005⁷.

2.2.7 Mandate

The project can be carried out in an appropriate manner only when the members of the project organisation are released from their other duties and an unequivocal accountability structure⁸ has been implemented to report to the contracting authority.

Specify the project manager's decision-making margins in consultations between the project manager and the contracting authority. Make sure that the lines in the decision-making process are clear and, preferably, short. In addition, make sure that the identity of the contracting authority is unequivocal and that the mandate granted by the contracting authority offers sufficient scope for an effective and decisive response to proposals submitted by the candidates during the dialogue.

2.3 Project team

2.3.1 Project manager⁹

Each project is managed by a project manager (occasionally referred to as a 'project director' or 'process manager'). This officer manages the project team. The project manager is also responsible for the project planning and the controlled implementation of the project. The project manager plays an important role in the enhancement of team spirit and mutual coordination within the team.

2.3.2 Various organisations of project teams

A number of roles can be distinguished within projects, where the roles that are required will depend on the specific project. The following roles will in any case need to be fulfilled in all projects, although in some cases they can be combined in one team or person:

- 1 Technical: output specifications.
- 2 Financial: PPC and PSC, payment mechanism.
- 3 Legal: tender procedure and content of agreement.
- 4 Context: contact with public and private stakeholders.
- 5 Contract management during the implementation.
- 6 Process management / project management.

The following are two examples of the possible organisation of project teams, one for the "Tweede Coentunnel" project (IPM¹⁰-model, Rijkswaterstaat) and one for the Kromhoutkazerne project.

⁶ The maximum amount that may not be exceeded by the candidates' (final) tender. If the tender price exceeds the ceiling price then the tender is deemed to be invalid.

⁷ Aanbestedingsreglement Werken ('Tendering Regulations for Public Works', ARW) 2005.

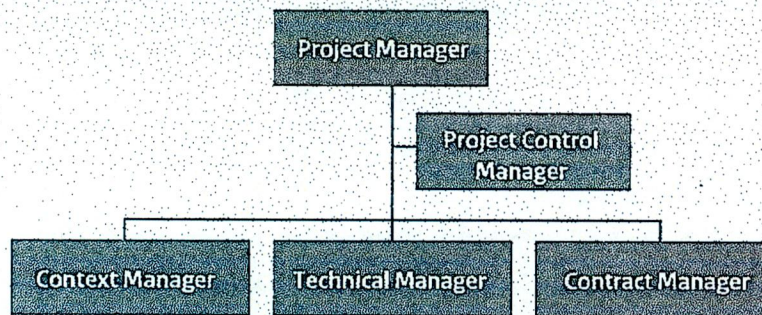
⁸ See also Section 5.3.1 (Decision-making during the tender procedure).

⁹ More detailed information is available in the Werkwijzer aanleg ('Construction Approach'), RWS, deel 2 kaders per IPM-proces ('Part 2, framework for each IPM process').

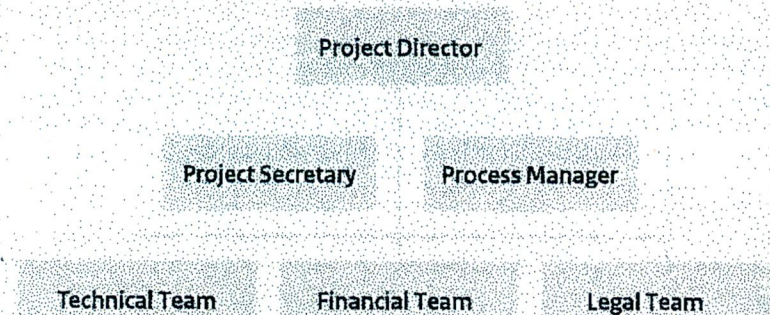
¹⁰ IPM is the abbreviation of Integral Project Management.

Example 6

Role division model, PPS Kromhoutkazeme project, Ministry of Defence



Role division in RWS IPM model



2.3.3 Extra risk: changing of the guard

Make sure that the project team is sufficiently staffed, both in terms of the quantity and quality of the various team members. Continuity in the staffing of the project is essential, especially during the tender procedure. In practice, it will be difficult to provide for permanent staffing of the project. Often there will be little time available to record and transfer (any remaining) information before the departure of a member of the team. Preference is given – when possible – to supplement the maintenance of structural records of the relevant information¹¹ with a several-week induction period for a new member of the team provided by the member who will leave the team. It is desirable that the contract manager assigned to the development phase is also involved in the tender procedure for the project. This will promote the successful completion of the tender, development and operational phases of the project: the contract manager will then gain an insight into the in and outs of the contract and the tenders that are submitted, thereby guaranteeing that after the contract and financial close the transition from tender phase to contract management in the development and operational phases will take place as smoothly as possible

2.3.4 Entanglements of interests

Entanglements of interests relating to tender procedures can arise when a market party submitting a tender possesses more (project) information than the competition, for example because the party was or is involved in the preparations for the project, the tender procedure, or the assessment of the tenders. Entanglements of interests can result in distorted competition due to *submitting tenders with inside information or rigging the contract, the tender procedure or the award of the contract*.

¹¹ See Section 2.3.9 (Archiving).

² Initial design of the project

Entanglements of interests can, in particular, occur when consultancies or engineering consultancies are involved: with the growing use of integral contracts these consultancies increasingly find themselves in a situation in which they serve both the contracting authority and the candidates / tenderers. Entanglements of interests can also arise when the authorities collaborate with private parties in area development who are both a partner to a collaborative arrangement *and* wish to gain public works contracts from that collaborative arrangement in a tender procedure.

Pursuant to the judgement of the Court of Justice of the EU in Case C-213/07, *Michaniki versus ESR*, parties can be excluded from tender procedures when an entanglement of interest could place the principle of equal treatment in jeopardy.

The Ministry of Transport, Public Works and Water Management, Ministry of Housing, Spatial Planning and the Environment and Ministry of Defence have formulated their *policy to avoid entanglements of interests in procurement* in a jointly-prepared "Scheiding van belang"¹² ("Segregation of Interests") document.

2.3.5 Teambuilding

The dialogue can be completed in a suitable manner only when the project team really works as a team.¹³ Create sufficient opportunities for the members of the team to become thoroughly acquainted with each other and take an active approach to fostering mutual confidence. Make sure that the members of the team are not compelled to spend all their time on working for their line organisation. A practical solution for this problem is the provision of accommodation for the project organisation away from the members' line organisations. It will also prove worthwhile to organise a training course for the project team to improve collaboration and enhance their personal skills (i.e. a dummy tender procedure).

2.3.6 Dialogue skills

The project team needs to have a good feeling for the market's interests. The members also need to be thoroughly familiar with the government organisation (and, consequently, should preferably originate from the administrative organisation). However, the interests of one side should not be allowed to dominate. At least the team leaders need to have an eye for the various disciplines, be team players, possess excellent communication skills (both active and passive [listening]), and be open to new ideas and/or other opinions.

2.3.7 Protection of information

Confidential information must be protected from disclosure to third parties. Give careful consideration to the method used to distribute information and the parties who will have access to that information. This is of extra importance during the dialogue phase, since this is a lengthy process which involves exchanges of information with three candidates - information that may not all be made available to all parties. Take measures to avoid cherry picking. Measures are also required to prevent the incorrect addressing of documents. Assign one person the responsibility of controlling the flow of information to and from the candidates.¹⁴

2.3.8 Planning

The time required for the preparations and the completion of the tender procedure largely determine the lead times. Make an estimate of the scope and complexity of the contract to prepare the first version of the planning for the tender procedure's lead time. Make a first estimate of the number of dialogue rounds that will need to be conducted during the tender procedure.

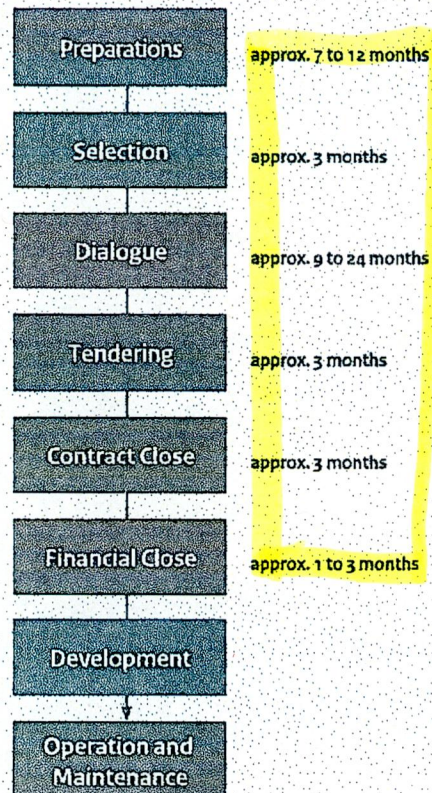
¹² http://www.mininlnl.nl/cd/pub/servlet/CDLServlet?p_file_id_39229.

¹³ See also Section 5.2.1 (Assessment team).

¹⁴ See also sections 3.10 (Tender Protocol) and 5.4.2 (Clarifications).

Example 7

Overall time schedule for Competitive Dialogue for the tendering of a large DBFM(O) Agreement



2.3.9 Archiving

A large amount of information and many conceptions will be exchanged during the (preparations for the) tender procedure. The majority of this information will also be stored. It will prove worthwhile to give consideration to the structure used to store the information, if necessary in collaboration with an information specialist. Make sure that information can be retrieved as simply as possible. Candidates may ask the same or a similar question later in the tendering procedure: the answers to these questions will need to be consistent and in agreement with earlier answers. Any decisions to depart from earlier answers on the basis of advancing insights must be motivated. In addition, it will prove worthwhile to make sure that the background information about the ultimate tender collected during the tender procedure can be retrieved during the development phase. In conclusion, the organisation can retain its knowledge only when the relevant staff are retained and appropriate archives are maintained¹⁵.

¹⁵ See also Section 2.3.3 (Extra risk: changing of the guard).

3 The steps prior to the announcement

3.1 Introduction

The dialogue is primarily a process focused on the achievement of an optimum harmonisation of the request and offer. The process does *not* relate to (price) negotiations in the traditional sense of the word¹⁶, since "opening bids" play no role: the dialogue begins with "no more than" a question for which a solution is sought. Every aspect of the contract may be discussed during the dialogue - including (elements of) the price.¹⁷ The tender procedure may also be subdivided into successive phases: in addition, the number of solutions to be discussed during the dialogue may be restricted.¹⁸ Any such restriction, also referred to as "short-listing" must be based on award criteria *announced in advance*.

A number of steps can be worked through prior to the announcement of the project.

3.2 Tender strategy

The tender strategy of a project is comprised of a set of internal decisions indicating the approach to the market: it serves as the "route itinerary" of the project. The tender strategy must be clear to and univocal for all those involved. A great deal of discretion can be exercised in detailing the tender strategy, although the implementation must be consistent. The approach to the market is determined on the basis of the objective of the project and the degree of uncertainty about potential solutions.

The basic questions to be addressed for the tender strategy include:

- 1 Which parties will be able to carry out the contract?
- 2 Which minimum requirements will be imposed on the candidates?
- 3 Which selection criteria will make a distinction between the candidates?
- 4 How many parties will be selected to take part in the dialogue¹⁹?
- 5 How many dialogue phases will be involved?
- 6 Will the number of solutions be restricted during the procedure?
- 7 How will the dialogue be given content (which themes will be addressed and what dialogue output shall need to be submitted by the candidates)?
- 8 How will the tenders be assessed on the basis of the award criteria?
 - a Which conformity requirements and minimum requirements will be imposed on the tenders?
 - b Which qualitative criteria will be stipulated?
 - c How will the qualitative criteria be weighted relative to each other?
 - d How will the price and quality elements be weighted relative to each other?

¹⁶ See also Section 6.3 (Award decision and rejections).

¹⁷ Directive 2004/18/EC Article 29, paragraph 3 in conjunction with consideration 31, BAO Article 29, paragraph 4, and ARW 2005, 4.18.2.

¹⁸ Directive 2004/18/EC Article 29, paragraph 4, BAO Article 29, paragraph 7, and ARW 2005, 4.1.5.

¹⁹ Pursuant to Directive 2004/18/EC Article 44, paragraph 3, BAO Article 44, paragraph 5 and ARW 2005, 4.1.2, at least 3 parties must be invited to take part in the dialogue phase.

3.3 Output specifications

Preference is given to the preparation of functional specifications of the requirements and preferences governing integral contracts.²⁰

a. Contents

It is recommended that the output specifications²¹ are formulated in a manner that offers maximum scope for the candidates' proposal of solutions. The requirements should be formulated so that they will yield a measurable result and, preferably, be related to generally-accepted standards. Output specifications formulated in this manner serve as an excellent point of departure for a dialogue in which the contracting authority's request and the solution proposed by a candidate can be optimised to achieve the maximum benefit for both parties. An open formulation of the output specifications based on functional requirements creates scope for innovation and sustainability. The output specifications need to make clear which elements are of importance²²; these elements will also have an influence on the award criteria.

b. Contractor's performance measurement

The formulated functional and minimum requirements, supplemented with the data the candidate submits in the tender, serve as the basis for the measurements carried out during the operational phase to determine whether the contractor fulfils the obligations arising from the contract. For this reason the formulation of the output specifications needs to take account of the specification of objective measures that can be used to determine and settle the contractor's performance. Consequently, measurable units must be requested and/or submitted: failure to do so will make the determination of contractor performance extremely difficult, if not impossible. During the development phase the contractor will also need to demonstrate that he actually delivers what the contracting authority expects on the basis of the winning tender: the client will not wish to be confronted with an unpleasant surprise on the completion date, when the client discovers that the limestone floor specified in the tender has been replaced by concrete.

3.4 Market consultation

It can be worthwhile to organise a market consultation prior to the tender procedure. For the authorities, the primary role of market consultations is to test whether the project is a feasible proposition for the market players. The decision whether to organise market consultation can in part be based on the extent to which the authorities have an overall view of the opportunities and limitations and are able to assess whether the scope of the project and the ideas and/or outline solutions submitted by the market players in plan initiatives can be viewed as feasible for implementation. Market consultation also serves to gauge the private parties' interest in the realisation of the relevant project, as well possibly – to a limited extent – provide scope for the contribution of ideas and proposals for the realisation of the project. However, market consultations are not intended to get a process or project that has become bogged down moving again.

Before proceeding to market consultation it will be necessary to give consideration to the following issues:

- 1 Make sure that you know what you want to ask before you consult the market.
- 2 Ask specific questions to make sure that the parties understand the intention.
- 3 The costs incurred by the market and the market's interest. Where relevant, inform the parties that they may receive reimbursement for their efforts: base the approach on a realistic assumption of the ideas the market can and will divulge.
- 4 Inform the market parties taking part in the consultation what will be done with their replies and why.

²⁰ See, for example, RWS/Prorail's system engineering manual.

²¹ This is the descriptive document as referred to in Directive 2004/18/EC Article 29, paragraph 2, BAO Article 29, paragraph 3 and ARW 2005, 4.7.

²² See also Section 2.2.2 (Critical Success Factors (CSFs))

It is important to make sure that the participants in a market consultation do not obtain an unacceptably great (knowledge) edge²³. For this reason the information they received must be made generally available: the parties taking part in the market consultation must be informed of this approach in advance.²⁴

3.5 The pre-announcement and briefing meeting

The pre-announcement informs the market that the contracting authority will be introducing the contract in the market. This is also the time to give consideration to the organisation of a briefing meeting.

In this phase the primary objective of the briefing meeting is to provide interested parties the information about the nature and (overall) content of the project they need to decide whether they wish to apply as candidates and, if so, whether they wish to apply in the form of a consortium. Make sure that the interval between the pre-announcement and the ultimate announcement offers candidates who wish to do so sufficient time to form a consortium. A brochure and the publication of answers to questions about the content of the project - if so required, on the project website - are also appropriate means of briefing the market.

Example 8

Output specifications:

The output specifications for the Kromhout Kazerne include climate requirements. The principle is that individual users must be able to exert an influence on the indoor climate and experience the indoor climate as agreeable. The objective measure used to determine compliance with this requirement is specified by linking it to NEN-EN-ISO 7730.

Thermisch Comfort werken (Com00034)			
Algemeen			
Onder thermisch Comfort wordt verstaan de mate van tevredenheid over de thermische omgeving.			
Kenmerken			
soort	naam	waarde	bepalingmethode
Prestatiecriterium			
a. Functionele omschrijving	Beïnvloedbaarheid	De individuele Gebruiker moet per Functie in die mate invloed kunnen uitoefenen op het binnenmilieu in zijn directe omgeving dat dit resulteert in een positieve waardering van het binnenmilieu.	
b. Functionele omschrijving	Tevredenheid	Het thermisch binnenklimaat moet door de Gebruiker als aangenaam worden ervaren en de bedrijfsprocessen niet nadelig beïnvloeden.	
c. Prestatie-omschrijving	Luchtsnelheid	Klasse B	Bepaald en beoordeeld conform NEN-EN-ISO 7730.
d. Prestatie-omschrijving	Operatieve temperatuur	Klasse B	Bepaald en beoordeeld conform NEN-EN-ISO 7730.
e. Prestatie-omschrijving	Stralingsasymetrie	Klasse B	Bepaald en beoordeeld conform NEN-EN-ISO 7730.
f. Prestatie-omschrijving	Verticale temperatuurgradient	Klasse B	Bepaald en beoordeeld conform NEN-EN-ISO 7730.
g. Prestatie-omschrijving	Vloortemperatuur	Klasse B	Bepaald en beoordeeld conform NEN-EN-ISO 7730.

²³ See also Section 2.3.4 (Entanglements of interests).

²⁴ See the Werkwijze Marktconsultatie ('Market Consultation Approach'), RWS, July 2006.

A briefing meeting serves as an explicit beginning of the provision of information to the market. During the period until the briefing meeting all members of the project team must maintain strict confidentiality. After the meeting the need for confidentiality is restricted to (commercially) confidential information that can result in any form of distorted competition. Information that must always be treated as confidential includes the contracting authority's project estimates and commercially confidential information about solutions proposed by candidates. This confidentiality extends beyond the office walls.

3.6 Formulation of selection and award criteria

Chapter 2 urged the timely adoption of the (project) objectives and the critical success factors²⁵. These also serve as the basis for the output specifications and for the grounds for exclusion, minimum requirements and selection criteria that need to be formulated before the publication of the announcement. In conclusion, the critical success factors serve as the basis for the award criteria that must be announced to the participants in the descriptive document for the dialogue (and in any case by no later than the invitation to the dialogue).

3.6.1 Grounds for exclusion/minimum requirements²⁶ and selection criteria

The method used to select candidates on the basis of grounds for exclusion, minimum requirements and selection criteria is no different from that used in restricted procedures.

The grounds for exclusion are stipulated in accordance with Article 4.8 of the ARW (Tender Regulations for Works) 2005. The minimum requirements are stipulated on the basis of the exhaustive list of criteria laid down in articles 4.9 to 4.14 inclusive of the ARW 2005. These articles²⁷ can also serve as the basis for selection criteria used to decide which candidates are most eligible for an invitation to take part in the dialogue. This offers a means of restricting the number of participants in the dialogue. Pursuant to the Directive at least three candidates must be invited to take part in the dialogue²⁸.

Care must be taken when formulating the minimum requirements and selection criteria to ensure that they are in proportion to the nature and scope of the project and provide sufficient distinguishing capacity. Take care, for example, with the turnover requirements that are imposed and examine the type of market player that must be able to carry out the contract and the certainty required in view of the project. The nature and scope of reference projects need to be related to the project being put out to tender. What is the scope and (technical) content of the reference project? Potential contractors do not need to have already designed or constructed a school to design or construct a school or arrange for its design or construction. Give consideration to possible comparable (possibly somewhat smaller) projects that could serve as reference projects.

²⁵ See Section 2.2.2 (Critical Success Factors (CSFs)).

²⁶ Referred to in Directive 2004/18/EC as suitability requirements.

²⁷ Directive 2004/18/EC articles 45 to 52 inclusive and BAO articles 46 to 53 inclusive.

²⁸ Directive 2004/18/EC Article 44, paragraph 3, BAO Article 44, paragraph 5, and ARW 2005, 4.1.2.

Example 9

Reference projects:

Kromhout Kazerne (estimated value of 400 million euros).

Minimum requirements for technical and organisational competence:

a Project management - design, non-residential/non-civil construction and maintenance:

The Candidate shall state one non-residential/non-civil construction reference project in which the Candidate was responsible for the project management relating to at least the following disciplines: design, construction and maintenance. The construction sum of the reference project shall amount to at least EUR 20 million (exclusive of VAT). The Candidate must demonstrate that the Candidate was responsible for or involved in the management role for the following tasks:

- contract management: the formal and informal, contractual and contractual reaching and monitoring of agreements, preparation of procedures and evaluation of agreements required for the maintenance of client and supplier relationships;
- the planning and management of planned maintenance and corrective maintenance and/or planning and management of renovations and alterations: planned maintenance relates to the technical maintenance carried out with the objective of maintaining the condition of the object at a specified level. Corrective maintenance relates to the technical maintenance that is not foreseen and has to be carried out on an ad-hoc basis;
- risk management: the identification and quantification of risks, and the specification and monitoring of control measures. 'Control measures' refers to actions taken to reduce the probability of the materialisation of the risks or the consequences of the risks that materialise;
- planning: the preparation and management of a project planning (from initiative right through to realisation) on the basis of a viewpoint that is interpreted in terms of a strategy and detailed in the form of specific, measurable, acceptable, realistic and time-bound objectives and actions. This is followed by the monitoring of the achievement of the objectives and the adjustment, where relevant, of the actions to be taken;

b Project management facility services:

The Candidate shall state one reference project in which the Candidate has carried out/is carrying out the project management required for facility services. The value of the reference project must amount to at least EUR 2 million (exclusive of VAT) per financial year. The contract must have been concluded for a period of at least two years and must have been in progress for at least one year. The Candidate shall demonstrate that the Candidate is or has been responsible or involved in a management role for at least three of the following tasks:

- the planning and management of cleaning services;
- the planning and management of catering facilities;
- the planning and management of the delivery of office equipment;
- the planning and management of reception services;
- the planning and management of copy services;
- the planning and management of security services;

As a rule of thumb, the turnover requirement can be specified by using a multiplication factor of a maximum of 3 or 4 times the estimated value of the order. Candidates can comply with the turnover requirement either as a single party or as a consortium: members of a consortium can total the individual members' turnover to comply with the turnover requirement.

3.6.2 Award criteria

The award criteria must be derived from the project's objectives and the critical success factors. The award criteria relate to the tender, not to the tenderers. The contracting authority uses these to value the tender. The award criteria need to be formulated in a manner that results in the tender offering the best price-quality ratio being awarded the highest value in the assessment.

Make sure that the formulation of the award criteria is restricted to the criteria that:

- 1 offer the contracting authority added value in comparison with the minimum requirements formulated in the agreement (including the output specifications).
- 2 possess sufficient distinguishing capacity.
- 3 can be assessed in an unequivocal manner.

Example 10			
Qualitative assessments for the tenders for the PPS Belastingkantoor tax office in Doetinchem:			
Elements:	Aspects:	Weighting factor:	Score:
Architecture (15%)	The degree to which a 'fitting' office block is realised. <.....>	<.....>	<.....>
Functionality (50%)	Office concept: the degree to which a 'fitting' office concept is realised. <.....> Logistics and accessibility: the degree to which the office block supports efficient logistics. <.....>		
Sustainability (10%)	The degree to which more sustainability measures are implemented than stipulated in the output specifications. <.....>		
Provision of services and monitoring (25%)	Provision of services: the degree to which the service concept is compatible with the model for the desired collaboration between the contracting authority and the contractor. <.....> Monitoring: the degree to which the monitoring system contributes to the realisation of the requirements and preferences stipulated for the provision of service. <.....> Quality management: the degree to which the contractor's quality management contributes to the realisation of the requirements and preferences stipulated for the provision of service provided by the contractor.		

Careful consideration then needs to be given to the requirements that will serve as minimum requirement (in conformance/not in conformance) and the requirements that will serve as gradable²⁹ award criteria (the degree to which a candidate can distinguish himself from the other candidates). The minimum requirements are also referred to as 'knock-out criteria', since a candidate's tender that does not comply with these requirements will be set aside³⁰. Discussions about the composition and formulation of the award criteria take a great deal of time – but they lay the foundations for the completion of a successful tendering procedure and the award of the contract.

Give consideration to the following elements when formulating the award criteria:

- 1 The measurability: are the criteria sufficiently SMART³¹?
- 2 The relationship with the project's objective.
- 3 The relationship with the critical success factors, output specifications and the agreement.
- 4 Are they minimum requirements or award criteria?
- 5 How will the various award criteria need to be weighted relative to each other? What is (more) important for the contracting authority?

²⁹ See also Section 2.2.2 (Critical Success Factors)

³⁰ Directive 2004/18/EC Article 41, BAO Article 41 and ARW 2005, 4.29.8.

³¹ SMART: Specific, Measurable, Acceptable, Realistic and Time-bound.

It is recommended that the formulation of the award criteria is followed by calculations of a number of potential scenarios such as:

- 1 a very high tender price.
- 2 a very low tender price.
- 3 quality aspect needs that are met to a good, moderate or poor extent.

The objective of the calculations of these scenarios is to determine whether the award criteria have been formulated in a manner that will result in the assessment of the optimum tender as the most economically advantageous tender. The results – are the results in line with the “ideal situation”³²? – can be used to make any necessary adjustments to the award criteria and carry out new calculations of the scenarios³³.

Care also needs to be taken to avoid formulating too many award criteria. The probability that the overall assessments are (too) close to each other increases with the number of award criteria. Matrixes in which many elements of a criteria are assessed individually also have a levelling effect.

3.6.3 Assessment committee

Appoint one or more assessment committees. Preference is given to committees that are comprised (in part) of experts independent of the project organisation, since this will promote the objectivity of the assessments. These committees assess the ultimate candidates on the basis of the selection criteria and the ultimate tenders on the basis of the award criteria³⁴. Take time to instruct all those who will be involved in the assessment of applications and tenders.

Prior consultations with the members of the assessment committee(s) on the formulation of the criteria and the specification of the assessment are necessary if the tenders are to be assessed in the appropriate manner: in addition to making full use of the members' expertise, this also avoids discussions and misunderstandings during the tender procedure. Inform the members of the assessment committee(s) about the objective of each criterion, the relationship with the agreement and the output specifications, and consult with them on the manner in which the assessment is to be made.

However, do not lose sight of the project's objectives and the critical success factors: these are fixed, and they are determinative for the requirements and criteria that will be stipulated. The members of the assessment committee(s) can use their expertise to make a major contribution to the formulation of the measurability of the criteria, and they can also make a contribution to the motivation of decisions to reject solutions and/or candidates.

3.6.4 From 5 to 3 in the dialogue

It is possible to decide to admit more than 3 parties to the dialogue and then reduce the number to 3³⁵ after the first dialogue round. This selection can, for example, be made on the basis of assessments of the plan of approach and/or project vision. These assessments are made using the award criteria. The suitability of the companies no longer plays a role in this phase.

When this method is used to shortlist the candidates then the selected candidates must continue along the lines of the plan of approach and/or project vision they have submitted: this is necessary to ensure that rejected candidates have no grounds to object to the procedure. The quality of successive products must be better than or at least the same as the plans submitted earlier.

³² To be determined on the basis of the project's objective and critical success factors.

³³ Detailing of the Plan-Do-Check-Act cycle.

³⁴ See also Section 6.2.1 (Assessment team).

³⁵ At least 3 parties must be invited to take part in the dialogue, see Directive 2004/18/EC Article 44, paragraph 3, BAO Article 44, paragraph 5, and ARW 2005, 4.1.2.

3.7 The planning

Prepare an appropriate planning for the activities that imposes an acceptable pressure of work on the members of the project team (including the back office) before and, in particular, during the tender process: this will avoid errors due to too much work needing to be done in too little time. In addition, make sure that expert committees for the assessment of submitted (interim) tenders and/or dialogue output are available in time and that they have sufficient time to carry out their duties.²⁶ Do not underestimate the time they will require when making the planning: the completion of appropriate assessments (including the preparation of written motivation) costs a great deal of time. Motivation that is drawn up too hastily and is too concise can result in incomprehension that in turn gives rise to disputes which will cost much more time and money, especially when the dispute is heard in court.

Grant the candidates sufficient time to form their dialogue teams before the dialogue begins. In addition, take account of holiday periods (Christmas, etc.), when many companies are less well-staffed and their officers will wish to enjoy some time off.

Market parties taking part in a tender procedure will require time to carry out their work. The candidates for major projects may need to study several thousand pages before they can draw up a sound tender, and they must be offered an opportunity to become thoroughly familiar with the project if they are to be able to submit a high-quality tender: a project team that has, for example, spent one year on the preparations for a tender procedure cannot expect candidates to assimilate all the information they need within the space of 2 or 3 weeks.

In addition, the market players need a reasonable amount of time to prepare and submit their dialogue output and other documents.

3.8 Tender instructions

The tender instructions are intended to provide the candidates information about the nature and scope of the project and the rules governing the tender procedure.

The tender instructions will in any case state:

- 1 The background to the project.
- 2 The precise steps (in the procedure) and the planning for the relevant phase.
- 3 The relevant milestones – such as the last dates for the submission of documents – and the lead times.
- 4 The (selection or award) criteria that will be used.
- 5 Other conditions applicable to the relevant phase, such as:
 - a Legal protection;
 - b Confidentiality;
 - c Intellectual property;
 - d Bank guarantees;
 - e Design fee.
- 6 The documents to be submitted by the candidates and the manner in which they are to be submitted.
- 7 The relationship between the tender documents.
- 8 Communication about the project.

The tender instructions for the competitive dialogue can be subdivided into sections corresponding to the various phases of the dialogue. An example of a subdivision is as follows:

- 1 Selection.
- 2 Dialogue (if so required, divided into the various phases with, for example, a plan of approach and/or project vision that can, if so wished, serve as a basis for the initial short-listing of potential solutions).
- 3 Final tender.

²⁶ See also Section 6.1 (Organisation).

A new section of the tender instructions can be issued to the candidates at the beginning of each phase which contains further information about the relevant phase (the planning, issues to be discussed and the products requested, etc.). Note: the information contained in documents issued at a later date may not diverge from the information in earlier documents: the later documents may provide solely further explanations, further details or clarifications. Pursuant to public procurement law, changes to project characteristics are not permitted.

Make sure that all (interim) documents and/or tenders can readily be compared with each other. Preference is given to a specification of the layout of the ultimate tenders, for example a specification of the maximum number of A4 pages, the division into sections, tabs etc., since this will simplify the uniform assessment of the various tenderers and tenders. When possible, issue the candidates (digital) formats they can or must complete with the requisite information: make sure that the candidates need to copy as little text as possible. Limit the number of amendments to the instructions. Making sure that the candidates know in advance how which documents are to be submitted will avoid them wasting valuable time on the modification of formats during the dialogue phase.

Most organisations have standard tender instructions at their disposal.³⁷ Use the standard instructions, in part with a view to the transaction costs:³⁸ making the maximum use of an identical document that always contains similar information at the same location in the document will simplify and improve the process for both the market and the contracting authority.

In conclusion, make clear who can seek publicity and when. Preference is given to stipulating that all communications shall be routed via the contracting authority during the tender period, and that the candidates may seek publicity only after contract close.

3.9 Legal protection

3.9.1 Period of appeal

Incorporate legal protection in the tender procedure.

It will in any case be necessary to make use of the 15-day standstill time after the announcement of the award decision.³⁹ Consideration can be given to the incorporation of clear interim points during the tender procedure that offer candidates an opportunity to seek legal protection, namely at the times at which decisions are made that have an effect on the number of candidates participating in the procedure. One of these points can, for example, consist of a period after the selection of candidates and the restriction of the number of solutions/participants on the basis of the plans of approach or the mass studies. Adopting this approach ensures that rejected candidates are offered an opportunity to lodge an objection or appeal. In addition, the failure to make use of a period stipulated in one of the documents and instead bringing a matter before the court at a much later time will reduce the probability that the courts will uphold the complainant's objection or appeal⁴⁰. However, the disadvantage of the inclusion of explicit periods for objections or appeals is that the parties could decide not to miss an opportunity to lodge an objection or appeal.

3.9.2 Intellectual Property

It will be necessary to determine the approach to the intellectual property of the solutions proposed by the candidates. The DBFM(O) agreements prepared for all government agencies⁴¹ include model texts for intellectual property related to the agreement. The principle is that the contracting authority and contractor include conditions in the agreement providing for the use of intellectual property or licenses in connection with the object to be developed, repeated development and the operation.

³⁷ In any case at Rijkswaterstaat and Rijksgebouwendienst. Work is also in progress on the preparation of standard tender instructions to be used by all government agencies.

³⁸ See also Section 3.1.1.1 (Cost savings)

³⁹ ARW 2015, 4, 30, and the (draft) legislative proposal for the Implementatie Rechtsbeschermingsrichtlijn Aanbesteden ('Implementation of the Public Procurement Remedies Directive', WIRA), Article 2.1.

⁴⁰ CIEC 12 February 2004, Case C-230/02, *Grossman Air Service*.

⁴¹ The steps prior to the announcement

3.10 Tender Protocol

The preparation of a tender protocol for internal use by the organisation is recommended for complex tender procedures of the nature of the competitive dialogue. The tender protocol can be regarded as a form of timetable that provides for the correct processing of questions, provision of information and dialogue discussions and the correct assessment of applications and tenders. The tender protocol structures the internal process and reduces the risk of procedural errors.

The issues addressed by the protocol include the following (non-exhaustive) list of issues:

- 1 The officer who receives the questions, documents and tenders (the secretary)⁴¹.
- 2 The officer who dispatches all communications to the candidates (the secretary).
- 3 The officers who answer the questions (the division of duties).
- 4 The officer who tests for conformity and consistency.
- 5 The officers who assesses the technical, legal and financial aspects of the tenders.
- 6 The officer who maintains an overview of the process and coordinates the work.
- 7 The officer who has the final say.
- 8 The logistics of the assessment (the location and any changes in the location).
- 9 The manner in which the individual assessments of sections are combined to arrive at an overall assessment.

Should one of the parties institute legal proceedings to contest the correctness of the internal process carried out by the contracting authority then the tender protocol and internal reports can serve as proof that the process was carried out in accordance with the procedure published by the contracting authority.

However, the protocol may not serve as a supplement to the criteria nor contain contradictions with the tender documents including the agreement document.

Preference is given to the assignment of the responsibility for the management of the process-oriented preparations for the assessment points and their monitoring to the process manager/project manager.

3.11 Limitation of the transaction costs

3.11.1 Cost savings

Make use of standard tender instructions and standard agreements.⁴² A DBFM(O) agreement for all government agencies is available⁴³ that was prepared in consultation with the market and is known to the market players. Do not prepare an individual agreement or incorporate entirely new provisions in an existing standard agreement when this is not necessary.

When drawing up the design for the tender procedure give consideration to the information that will be requested from the market in the selection phase, the dialogue phase and in the final tender. Which documents and proof will be requested, and at which times? How much work will the candidates need to carry out and what costs will they incur in the preparations for an application or a tender? How much work will the contracting authority need to carry out in the assessment of specific documents? Give careful consideration to the information that will be absolutely necessary in a tender to ensure that the tender is assessed in an appropriate manner and that the contractor is held to his commitments in the tender. In addition, make sure that the planning after the award of the contract offers the candidates sufficient time to make the necessary preparations: when there is insufficient time they may well need to prepare their provisional or final design *before* they submit their tenders so that they can begin the next phase quickly after the award. This results in them incurring unnecessary costs.

⁴¹ Article 17 of the DBFM(O) agreement model for all government agencies.

⁴² See also Section 2.3.7 (Protection of information).

⁴³ See also Section 3.8 (Tender instructions).

⁴⁴ www.ppsbijhetrijk.nl

In general, adopt the rule of thumb that solely those issues that constitute a risk need to be worked out in more detail. When the standard is readily measurable and it is less important how the standard is attained then it will not be necessary to request a detailed specification.⁴⁵ Ask for no more than that: have the courage to leave the rest to the candidate's discretion.

It is important to realise that the candidates will also have tender teams that have been released from their other duties to focus on the tender procedure. Consequently, do not prolong the tender procedure unnecessarily.

3.11.2 Design cost reimbursement

Notwithstanding the measures implemented to reduce the transaction costs involved in the competitive dialogue, the market players taking part in the tender procedure will still incur substantial transaction costs. The contracting authority can decide to award a design cost reimbursement⁴⁶. It is recommended that the amount of the design cost reimbursement be based on the organisation's policy for reimbursements.

When the organisation has not implemented a reimbursement policy then the following questions can be of assistance in deciding whether the transaction costs incurred by the market parties will be reimbursed either in whole or in part.

- 1 Make a reasonable and objective estimate of the design or transaction costs incurred by the parties.
- 2 What amount can be regarded as a reasonable reimbursement of the costs? For example, what percentage of the contracting authority's estimate of the transaction costs incurred by the market constitutes a reasonable reimbursement?
- 3 Who will come into consideration for a design cost reimbursement? For example, all candidates who submitted a valid tender but were not granted the contract?

3.12 Data to be made available to the candidates

Make sure that the candidates receive the relevant, correct and complete (project) data they need to prepare an appropriate tender. Check for any gaps in the data and determine how these gaps will be filled. Will, for example, a soil survey be carried out and the results made available to the candidates, or will the candidates be offered an opportunity to carry out a soil survey during the tender procedure? Make sure that confidential information or potential solutions in, for example, an unsolicited proposal is not accidentally disclosed without the owner's permission.

Make sure that the information to be made available to the candidates such as the area data⁴⁷, other tender and contract documents and similar are:

- 1 up to date.
- 2 complete.
- 3 conveniently arranged and explicit, both in terms of content and location.
- 4 accompanied by their legal status (binding or for information).
- 5 capable of being accessed by the candidates in digital form (for example, using a web-based dataroom).

Make sure that the information for major projects at least extends to English translations of the relevant tender documents, such as the tender instructions and the draft agreement, and a summary of the content of the output specifications when this is not included in the instructions. The contract and tender documents will then need to include a statement that the Dutch version of the document will prevail in the event of any discrepancies between the Dutch and English versions.

⁴⁵ See, in particular, the example in Section 3.3 (Output specifications).

⁴⁶ Directive 2004/18/EC Article 29, paragraph 8, BAO Article 29, paragraph 15 and ARW 2005, 4 1 6, and Deel III Algemene toelichting (Part III, General Notes), paragraph 4.3, 16 (Design cost reimbursement), page 16.

⁴⁷ 'Area data' refers to all data relating to the specific land on which the work involved in the contract will need to be carried out.

3.13 Project team

The team that conducts the dialogue (hereinafter referred to as the dialogue team) can be organised in one of several ways: a core team, or a core team in combination with one or more subteams. It is recommended that the size of the teams be kept small to retain short lines of communication and, consequently, promote an efficient dialogue.

It will be worthwhile to make arrangements for a number of issues when working with a number of subteams. These arrangements include:

- 1 An assessment of the subjects that require the formation of a subteam.
- 2 A specification of the powers assigned to the various teams.
- 3 The provision of assurances for univocal communications with the candidates. This could, for example, be achieved by means of structural preliminary consultations between the teams.
- 4 Unequivocal communications relating to the role and powers of the subteams and the core team. For example, in the tender instructions or, in the event of the later formation of a subteam, by means of the information notice or other written record.
- 5 Make clear who has the final say when the occasion arises.

Irrespective of the organisation of the team or teams, it will always be wise to ensure that the (dialogue) team is thoroughly prepared for its work. This can, for example, extend to:

- 1 The discussion of the issues (and the planning) that will need to be addressed during the dialogue. This discussion will also need to extend to the award criteria to ensure that the issues are raised in conjunction with the relevant award criteria.
- 2 Make arrangements for the harmonisation of the dialogue (sub)teams and the assessment committee(s) during the dialogue phase, for example by having the leader of the dialogue subteam entrusted with the relevant issue chair the assessment committee.
- 3 Verify that the members of the dialogue team are ready for the tender process. They will then be familiar with:
 - a the problem addressed by the project and the objective;
 - b the critical success factors;
 - c the risks associated with and the interfaces within the project;
 - d the content and purport of the agreement and the tender documents.

Take timely measures to correct any gaps in the team members' knowledge and experience.

In general, the team that will conduct the dialogue will be staffed by the project director and a number of experts. The relevant experts will depend on the nature of the project. The experts will, for example, be the team leaders of the legal team, financial team, technical team and/or the context team. The membership of the core team can also vary during the dialogue, depending on the time and location. It will in any case be necessary to arrange for a permanent core staffing supplemented, depending on the issues on the agenda, by officers possessing the necessary expertise (when required). Arrange for the core team to be supported by a secretary who oversees the maintenance of unequivocal records of, for example, the dialogue discussions and the incoming and outgoing post.⁴⁸ The secretary carries out an initial screening of the incoming post to check its substantive relevance and then distributes the post within the project team. The secretary also checks the outgoing post for consistency and supervises its dispatch to the correct candidate.

⁴⁸ "Post" is understood as all incoming and outgoing information, irrespective of the information carrier.

3.14 The announcement

The announcement can be published solely once the preparation of the tender documents has reached a stage that excludes irresponsible risks. Consequently, before publishing the announcement it is recommended that:

- 1 A mandate has been issued by the contracting authority to proceed with the tender procedure (including an approved strategy and budget).
- 2 The selection criteria have been formulated (an element of the initial announcement).
- 3 The award criteria have been formulated (and detailed for as far as is possible to restrict the risks).
- 4 All relevant information relating to the project is available, such as:
 - a the draft agreement (including the output specifications);
 - b the area data (current record drawings, the presence of any soil pollution where relevant, the location of cables and conduits, etc.);
 - c the zoning plan;
 - d the route decision;
 - e any current agreements, etc.
- 5 It has been established that the remaining risks are controllable and/or acceptable (for example, the current status of the acquisition of the land, the route decision or amendment to the zoning plan).

The tender documents and the agreement with associated documents, such as the request or output specifications, must be detailed to the extent required to submit an explicit request to the market: in other words, the documents will need to be largely complete and all essential issues for discussion will need to have been settled at the time the announcement is published. However, it is possible that some minor details in the documents need to be adjusted or updated. Note: these documents will need to be ready for dispatch at the time the invitations to take part in the dialogue are issued.

4 Selection Phase

4.1 Submission of applications by the candidates

The procedure used for the candidates' submission of applications to participate in a competitive dialogue is the same as that used for restricted tender procedures. The parties can use the information about the project objectives and scope contained in the selection instructions to assess whether submitting a tender for the project is an interesting proposition. The minimum requirements listed in the instructions provide the parties an insight into their eligibility - either acting autonomously or in combination - for an invitation.

4.2 Assessment of the candidates

The first step is to examine the submitted applications to examine whether they are complete and valid. This is the case when the following questions are answered in the affirmative:

- 1 The contracting authority has received the application within the stipulated time.
- 2 All the documents that were stipulated are present.
- 3 The candidate complies with the minimum requirements and the grounds for exclusion are not applicable⁴⁹.

In principle, when one of the above questions is answered in the negative then the candidate is excluded from further participation in the tender procedure. However, minor mistakes may have been made that are of a nature such that immediate exclusion would be disproportionate, such as mistakes in the supporting documents accompanying the Compliance Statement.⁵⁰ Each individual case will need to be reviewed to determine the consequences of non-compliance with the requirements.

It may prove worthwhile to draw up a checklist that can be used to verify that compliance with each stipulated requirement has been checked (completeness test) and the manner in which each requirement is met (legitimacy test). Make sure that each candidate's file ultimately contains a filled-in and complete checklist. This checklist can, for example, be comprised of a simple matrix that contains fields such as the following:

- 1 A brief description of the requirement stipulated in the instructions, such as the final submission time.
- 2 A brief statement indicating that the requirements are/are not met.
- 3 Space for remarks, such as an explanation of the reasons why the application does not comply with the requirements.
- 4 A provisional assessment based on the inspection.

The overall assessment reveals whether the application complies with the stipulated completeness and validity requirements. Space can be reserved at the bottom of the matrix for an overall conclusion about the validity and completeness of the application.

After the initial assessment of the completeness and validity of the applications the next step, if this is specified in the tender instructions, is to rank the candidates on the basis of the selection criteria. Once again, a systematic assessment must be made. However, at this point more importance must be attached to the content and quality of the motivation for the assessment. The content of the motivation is extremely important at this point. Make clear how the assessment was made (how the score was awarded) and the parts

⁴⁹ Directive 2004/18/EC Articles 45 to 52 inclusive, BAO articles 45 to 53 inclusive, ARW 2005, 4.4 to 4.13 inclusive.

⁵⁰ ARW Article 4.15.4.

where the candidate lost points. It should be realised that a candidate who is rejected will need to explain the reason within the candidate's organisation. In addition, a good motivation for the rejection can be a lesson learned for a following application.

4.3 The rejection interview

Once it has been determined which candidates will be invited to take part in the dialogue it is recommended that the rejection letter sent to the non-selected candidates informing them of the motivated reason(s) why they have been rejected also contains an invitation to an exit meeting.

The exit meeting has two objectives:

- 1 To demonstrate that the (rejected) party is taken seriously.
- 2 To give the party an opportunity to ask for an explanation.

It will be wise to prepare for the exit meeting by giving consideration to the information that can and cannot be disclosed to the rejected candidate. Do not withhold any information about the reason for the rejection unless this is necessary to protect legitimate business interests⁵¹. Make sure that the information provided about the candidates admitted to the procedure is restricted to a reference to the parties and that no information is provided about other non-selected candidates.

The meeting should preferably be conducted by the core of the project team including at least the project manager.

It is important to realise that no-one welcomes rejection, even if only relatively low costs will have been incurred at this stage. A renowned party that is not selected can be dispirited, for example because of concerns of the damage the rejection can cause to the company's image. Moreover this is not restricted to larger companies, but also to smaller companies and professional groups that are part of a consortium that is rejected.

4.4 Waiting room

A waiting room has been set up for some projects. However, there are three problems with the use of a waiting room. Firstly, since a candidate that is not selected will dissolve the tender team shortly afterwards practical problems can arise when the tender team needs to be reformed at a later point in time and the former members have since been assigned to other projects. Secondly, as time passes it will become increasingly difficult for a candidate to leave the waiting room and join the tender procedure since the other candidates will have made more progress in the development of potential solutions. Even if the tender procedure is slowed down to offer the 'newcomer' an opportunity to settle into the tender procedure it will remain a moot point whether the new candidate will be able to catch up with the backlog. Thirdly, companies that are a member of a consortium stationed in the waiting room cannot become affiliated with another consortium involved in the tender procedure, for example as a subcontractor. For these reasons it will be wise to review the extent to which a waiting room can be of value and, if so, the time during which it can be of value before proceeding to make use of this form of construction.

⁵¹ Directive 2004/18/EC Article 41, paragraph 3, BAO Article 41, paragraph 5, and ARW 2005, 4.29.10

5 Dialogue Phase

5.1 Introduction

Once the candidates have been selected the dialogue can begin. Both the project team and the selected candidates' tender teams will be confronted with a high pressure of work during the dialogue phase. For this reason it will be wise to prepare for the dialogue by reassessing the objective of the dialogue, making suitable arrangements for a number of matters and giving careful consideration to the approach to the meetings.

5.2 Objective of the dialogue

The project team will need to maintain a consistent course if the dialogue phase is to progress smoothly. Consequently, it will be wise to determine the objective of the dialogue before the process begins. Is the objective to find the best (technical) solution or the best partner, or a combination of the two? The latter will usually be the case, certainly in tender procedures involving DBFM(O) agreements since these envisage entering into a long-term relationship: the contracting authority will not only wish to receive a high-quality solution, but will also require the best possible provision of service. It is recommended that to ensure that a consistent course is maintained everyone in the project and the project team is informed and kept informed of both the objective of the dialogue and the overall objective of the project.

In addition, explain the objective of the tender procedure to the candidates.

This can, for example, be achieved by including a statement in the tender instructions indicating that the objective is to arrive at a harmonisation of the request and offer such that:

- 1 Sufficient confidence is created in the service to be provided and/or performance to be delivered by the future contractor.
- 2 The agreements reached as formulated in the tender are readily measurable, so that they can serve as the basis for the definitive agreement.
- 3 The best solution is obtained within the stipulated preconditions, agreement and budget.

In addition, emphasise the objective of the dialogue in the other communications with the candidates: this will be beneficial, since the candidates will be able to make thorough preparations for the contracting authority's questions and expectations.

5.3 The dialogue process

5.3.1 Decision-making during the tender procedure

Before entering into the competitive dialogue make sure that the mandate will be sufficient to act rapidly and flexibly. Include an unequivocal specification of the duties and powers of the project organisation with respect to the provision of answers and the assessment of the dialogue output in the tender protocol drawn up prior to the tender procedure⁵².

Make sure that there are short lines of communications with the contracting authority so that issues that lie outside the project organisation's decision-making powers can be addressed quickly. When an additional mandate is to be obtained then design the decision-making process⁵³ in a manner that lays sufficient basis for rapid decision-making during the tender procedure. Reach agreement on the manner in which who will

⁵² See also Section 3.10 (Tender protocol).

⁵³ See also Section 2.2.7 (Mandate).

be approached for a separate mandate, the form of the requisite information and the period within which an answer may be expected. Promote rapid decision-making by involving the contracting authority in the progress in the tender procedure in a manner that furthers rapid and effective decision-making on alternatives, emergencies, etc. Avoid situations in which the contracting authority is confronted with a surprise whenever possible. Make clear to the candidates taking part in the dialogue who has been granted the mandate for the decision-making relating to the various issues and how the distribution of powers has been organised. Who is authorised to make the decision on which issue, and how far do the powers extend? The design of the decision-making process needs to take account of the fact that the business community will assume that promised deadlines are achieved.

5.3.2 Kickoff meeting

It is recommended that a kickoff meeting is organised to enable the candidates and the members of the project team to become acquainted with each other and to visit the object of the tender procedure and the land on which it is located.

A kickoff meeting can be organised in a variety of manners: a meeting can, depending on the issues to be discussed, be convened for all the candidates or separate meetings can be convened for each candidate.

When the objective of the kickoff meeting is restricted to the ensuring that all parties receive identical substantive information at the same time about, for example, the project, the project's scope and objectives and the coming dialogue process then the simplest approach will be to convene one meeting for all candidates. No confidential information, questions and solutions are to be expected at a joint meeting of this nature. The benefit of this approach is that it offers a simple means of providing assurances for the principle of equal treatment and transparency of information that is of importance to all candidates: the contracting authority can explain its position in the tender procedure and its expectations towards all the parties at the same time and mutual agreements can be reached between all parties. Consequently, the candidates will gain confidence from the contracting authority's open and transparent attitude.

When the kickoff meeting will also include an initial discussion of the substance then a separate meeting for each candidate can be convened. However, the disadvantage of this approach is that additional attention will need to be devoted to assuring the principle of equal treatment and transparency. Conversely, it offers the benefit that the meeting can also address the substance of the dialogue and, where relevant, the candidate's confidential solutions and questions can be discussed. The candidates will not ask questions that could be detrimental to their competitive position at a kickoff meeting convened for all candidates.

Example 11

A hybrid form of kickoff meeting was convened for the A15 Maasviakte-Vaanplein project that was attended by all candidates. The meeting began with a plenary session in which the candidates received a general explanation and an explanation of the substance of the project and the dialogue process. This was followed sessions at theme tables, when the individual candidates were offered an opportunity to discuss specific issues in more detail.

Issues that can be discussed at the kickoff meeting include the following:

- 1 An explanation of and expression of expectations for:
 - a The rules governing the dialogue.
 - b The parties' attitude during the dialogue (open and transparent).This meeting could include an opportunity for the participants to propose rules for the dialogue. These could also be submitted before the meeting to provide the contracting authority time to prepare answers to the suggestions.
- 2 An explanation of the project's scope and objectives.
- 3 An explanation of the objective of the tender procedure, the documents to be submitted by the candidates during the dialogue - also referred to as the dialogue output - and the manner in which these are assessed by the contracting authority.

- 4 When the contracting authority's core team is supplemented with subteams: an explanation of the consultative organisation and the status of the various meetings. It can, for example, be decided that solely agreements made with and/or approved by the core team are binding.
- 5 The powers of the representatives of the contracting authority and candidates. On which issues can the parties call each other to account?
- 6 Subjects submitted by the candidates. Issue the agenda for the kickoff meeting to the candidates in advance and give them an opportunity to become familiar with the objective so that they can make effective suggestions for subjects to be discussed during the meeting.

Make sure that the kickoff meeting and any later documents, where relevant, are compatible with the tender instructions.

5.3.3 The agenda for the dialogue

Prepare for the dialogue discussions by setting an agenda so that the discussions can be subdivided and the priorities set. Both the contracting authority and the candidates will then be able to tailor the work and the deployment of their experts and members of the teams to the agenda. The project team will need to retain control of the dialogue. However, the candidates must be offered scope to have a say in the agenda.

Limit the number of dialogue discussions, in advance, to a specific maximum: this will ensure that both parties are aware of the time available to discuss issues. Try to collect related issues in one dialogue discussion in which the issues are, for as much as possible, addressed and 'dealt with' in clearly-demarcated discussion rounds. Take and give, in consultation with the selected candidates, sufficient time for the preparation, submission and settlement of questions and dialogue output. Make sure that both the candidates and the members of the contracting authority's team have sufficient time to make appropriate preparations for the dialogue meetings. Reaching consensus on the layout – for example, during the kickoff meeting – will simplify the contracting authority's decision-making on this matter.

It is recommended that the layout of the agenda for the discussion rounds is the same for all candidates: this will provide the necessary assurances for unambiguity, transparency and equal treatment, and will be conducive to the efficiency of the planning of the preparatory work to be carried out by the teams. Make clear that the same agenda is used for all candidates, and also when changes have been made to the agenda in response to an individual candidate's comments. However, the above is without prejudice to the individual candidate's right to state that they have no need to discuss an issue on the agenda that has been introduced by another candidate.

In conclusion, it is important to emphasise that offering the candidates scope to ask any questions they wish to raise to gain an insight into the contracting authority's needs is in the interest of both the candidates and the contracting authority. Experience gained with dialogue processes has revealed that it can on occasion be necessary to begin the dialogue discussions by making clear to candidates with little or no experience of the procedure that asking questions is not indicative of stupidity but rather of the required curiosity.

5.3.4 "Soft in the relations, hard in the interests"

Set an open and professional tone for the meetings with the candidates. Whenever possible, try to avoid the parties feeling compelled to hide behind a position or opt for the adoption of a legal or negative strategic position. If, nevertheless, one of the parties appears to be adopting a negative strategic position then take time to discuss this in the dialogue and try to identify the reason. It may well be possible to solve the problem. The project team must fulfil all its agreements: the other party can be called to account for any failure to do so. The project team can also expect to be called to account by the candidates and must provide scope for them to do so – which includes the opportunity, if they feel the wish to do so, to discuss a less open attitude of the core team.

One approach to this is to agree that one party will be provided the opportunity to lay their arguments on the table without the other party interrupting or defending. If so required, allow time for the arguments raised by the other party to sink in and, if necessary, agree that the response to the arguments will be given at a later

point in time - either after a 5 or 10-minute break or, possibly, during the next dialogue meeting. An alternative method is to agree that the detailing of a question or issue to be discussed will be submitted in writing before the dialogue round to enable the other party to study the information and determine a standpoint.

Make sure that the meetings do not become bogged down in unnecessarily long – and expensive – discussions, especially when this offers no added value to the optimisation of the requirement. Make the contracting authority's interests clear to the other party. Do not step into the shoes of the other party: it is safe to assume that the other party will be capable of standing up for his interests.

5.4 Content of the dialogue

An optimum harmonisation of the request and offer can be promoted by discussing every aspect of the contract during the dialogue - including (elements of) the price.⁵⁴ The principles governing tender procedures based on competitive dialogue are as follows.

The contracting authority determines the request prior to the dialogue and to this end issues, as part of the tender documents, the *draft agreement* and, as an annex to the draft agreement, the *output specifications*.

The dialogue is conducted on the basis of these documents. The parties can submit proposals during the dialogue that result in the *optimisation* of the documents issued at the beginning of the procedure. This optimisation is carried out within the bounds of the acceptable and subject to the provisos that the dialogue may not result in material changes in the contract and that information that does not relate to specific solutions must, in principle, be shared by all participants in the dialogue.

Once the contracting authority concludes the dialogue the selected candidates are invited to submit a final tender. The tender from the candidate that is the most economically advantageous tender forms, together with the agreement as adopted before the closure of the dialogue, the agreement between the parties⁵⁵. Negotiations on the tender submitted by the successful tenderer are not permitted by the competitive dialogue procedure.

5.4.1 The dialogue as an optimisation process

Prior to the dialogue the contracting authority needs to decide which products will be required from the candidates and when. The procedure is focused on optimisation. Experience has revealed that it will often be desirable to conduct a dialogue with the candidates before the candidates submit the dialogue output, since this approach offers the opportunity to explore the request and potential solutions. However, the above is without prejudice to the option of requesting the candidate to submit dialogue products that is then used to conduct the dialogue. This element of the procedure can be designed as required.

It is important to establish the information that will be needed from the candidates to determine whether the request and offer match each other, since this will promote the orderly and efficient completion of the dialogue. This information can, for example, be comprised of the elements of the request for which the candidates will need to submit a solution. When doing so it is important to restrict the requirements to the issues of importance to the assessment of aspects that create added value (related to the award criteria) and aspects that relate to the measurable criteria of importance to the development and operational phases (related to the indicators from the output specifications).

This can, for example, relate to:

- 1 A more detailed definition of the output specifications for a further demarcation of the technical scope of the contract, if so required (the Contractor's Schedule of Requirements).
- 2 A more detailed definition of the contracting authority's preferences to specify more explicit margins.
- 3 A further discussion and division of the division of the risks proposed in the agreement.

⁵⁴ Directive 2004/18/EC Article 29, paragraph 3, in conjunction with consideration 31, BAO Article 29, paragraph 4, and ARW 2005, 4.18.2.

⁵⁵ Netherlands Civil Code, Article 6:217 and Article 6:225.

- 4 A more detailed definition of the performance of the management system in relation to the solutions proposed by the candidate.
- 5 A more detailed and complete project planning.
- 6 The detailing and robustness of the financial model.

The dialogue is conducted in one or more rounds, each of which is comprised of a number of dialogue meetings. The candidate will use the dialogue meeting to ask questions, submit proposals or raise issues for discussion. Since the contracting authority conducts the dialogue with more than one party it may be necessary to defer issues and subsequently respond in the form of a written answer or a further discussion in a following meeting. It will be necessary to keep a systematic (digital) summary of the dialogue meetings to maintain an insight into the issues that have been settled with each candidate and the issues that are still open. A summary of this nature enables the contracting authority to adopt a standpoint on issues of relevance to all candidates and, in doing so, assures that the answers are consistent. Both parties can introduce new issues, preferably in advance of the relevant dialogue meeting.⁵⁶ Adopting this approach minimises surprises: it also makes the number of issues to be discussed clear and, consequently, manageable. Experience has revealed that a large number of issues are discussed during a dialogue, and for this reason it is recommended that advance consideration is given to the design of the summary of the meetings and that use is made of digital means such as a database. Prior to a dialogue meeting it will be wise to review the issues to be discussed during the meeting and give consideration to the following:

- 1 How the candidate's solution can contribute to the project's objectives.
- 2 The modifications (that are not detrimental to the contracting authority) that could be of assistance to the candidate.
- 3 The issues in the tender documents that could push up the price.
- 4 What a solution/idea will yield and its price.
- 5 The margins the core team will employ in the meeting.

In a competitive dialogue all parties begin with the same set of formulated principles. The contracting authority must guarantee a level playing field. The solutions and designs the candidates submit with their ultimate tender may vary, and it is even possible – when this is made known in advance – that the conditions attached to the candidates' tenders differ. In the latter instance the contracting authority will need to adopt an assessment method that renders the tenders mutually comparable, for example by using a formula made known in advance.

Example 12

The tender instructions for the construction of the A10 motorway cite and specify 6 risks that will be discussed during the dialogue. During the course of the dialogue the specification of the risks will be further tightened in consultation with and for all candidates. The candidates will then be offered an opportunity to determine the amount of the risk increment by which their tender should be increased in the event that they bear the risk on the award of the contract. Prior to this meeting the contracting authority has calculated the risk increments that will need to be reserved if the risks remain with the contracting authority and has deposited this information with the civil-law notary. Subsequent to the submission of the risk increments as part of the dialogue output the risks shall be assigned to the party (the contracting authority or the contractor) in the best position to control the risks, i.e. at the lowest price. The division of the risks can vary between candidates. Fictive increments for each risk will be made known to all parties in advance. The addition or subtraction of these fictive increments to or from the tender price on the basis of the division of the risks with each candidate will result in definitive tender prices that are mutually comparable.

At the end of the dialogue it will be possible to use the results from the discussions to draw up a definitive version of the agreement. All the selected candidates will then be invited to submit a tender for this contract. This version will incorporate all non-confidential clarifications and amendments, which results in the optimum comparability of the tenders. A summary of the confidential clarifications can be incorporated in a separate report for each candidate.

⁵⁶ See also Section 5.3.3 (The agenda for the dialogue).

5.4.2 Clarifications

Since both the project team and the candidates' tender teams will be confronted with a very high pressure of work during the tender procedure it will be necessary for the tender protocol to devote attention to appropriate logistics for the submission of questions and answering of questions in relation to the planning for the dialogue meetings.

The candidates will usually ask a large number of questions during the dialogue phase of major, complex projects and it is very important that the answers to these questions are consistent. It is recommended that the provision of consistent answers be promoted by the use of an automated system for the receipt, registration (for reasons including for retrieval purposes) and distribution of questions for further processing and the necessary links to the various tender documents and conditions of the agreement. Linking the flow of information to the documents in the dataroom³⁷, the agreement and tender documents, questions raised earlier, answers, issued clarifications and similar will ensure that when questions are raised during the dialogue then the sections to which the questions relate can be traced rapidly and simply, thereby assuring the consistency of the answers.

Make a distinction between the processing of general and confidential clarifications issued during the competitive dialogue.³⁸ Questions and answers that relate to solutions proposed by a candidate should be treated as confidential³⁹. Lay down and make use of an unequivocal procedure for dealing with questions and clarifications that prevents confidential information from leaking out. Maintain security by implementing a two-pairs-of-eyes system, whereby information to be dispatched is always checked by another officer to verify that confidential information is addressed to the correct party. Make sure that the pressure of work prior to the dispatch of information is not at a level such that errors are made: most errors are made when people dispatch information by post or e-mail as the last task before going home at the end of a hectic day or week.

Any confidential information relating to one candidate that becomes known to one or more other candidates can result in competitive distortion, also referred to as cherry-picking. In the most serious case this can result in market failure.

Inform the candidates that when they ask questions they must state their opinion as to whether the question is confidential. This will avoid misunderstandings in situations in which the candidate deems a question to be confidential whilst the contracting authority does not.

Adopting this approach can lead to one of the following situations:

- 1 The candidate deems the question to be "non-confidential". Consequently, the answer can be disclosed to all candidates.
- 2 The candidate deems the question to be "confidential" and after an assessment the project team is in agreement. The answer can then be deemed to be confidential and is issued solely to the candidate who asked the question.
- 3 The candidate deems the question to be "confidential" and after an assessment the project team is *not* in agreement. The tender instructions should include a procedure laying down the approach to be adopted in situations of this nature. One option is to offer the candidate an opportunity to explain his grounds for regarding the question as confidential. If the project team is of the opinion, subsequent to this explanation, that the question should be deemed to be confidential then the team can continue with the formulation of the answer. If, after the explanation, the project team continues to be of the opinion that the question cannot be deemed to be confidential then the candidate can be offered a choice from either no longer deeming the question to be confidential – whereby, if so required, the question can be reformulated in the form of a more functional question – or withdrawing the question.

³⁷ A digital collection of all documents of importance to the tender procedure and which are made available to the participants in the dialogue.

³⁸ See also Section 2.3.7 (Protection of information).

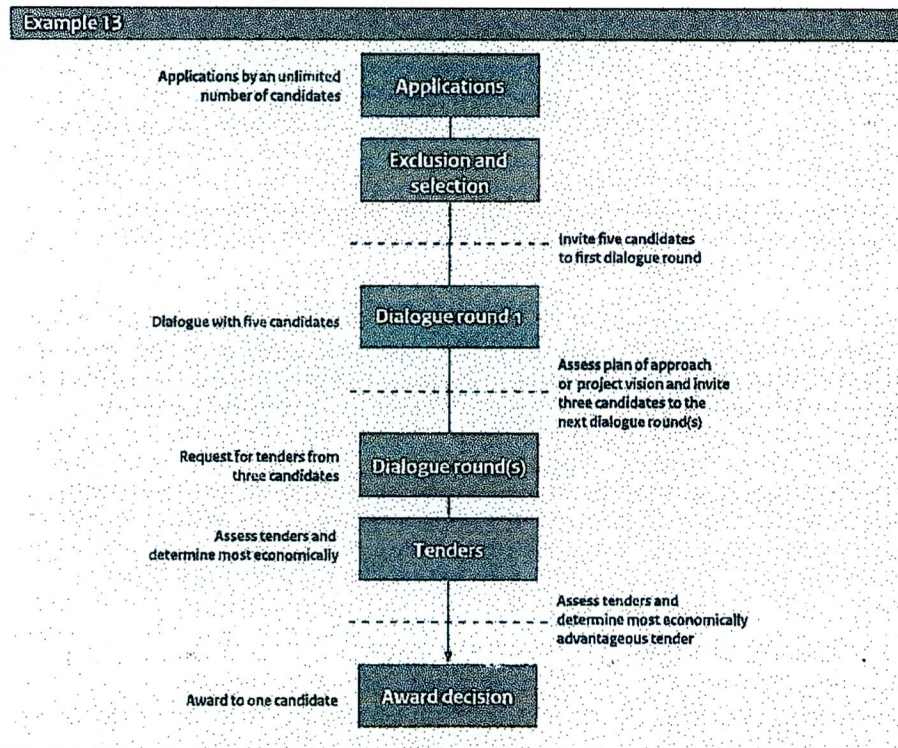
³⁹ Directive 2004/18/EC Article 29, paragraph 3, BAO Article 29, paragraph 6, and ARW 2005, 4.18.5.

In the event of a continued difference of opinion about the confidentiality of the question whereby the candidate does not withdraw the question then the contracting authority can decide not to answer the question since it is of the opinion that the answer must be issued to all the candidates.

- 4 When the questions submitted by the candidates result in developments in the contracting authority's insights that in return result in the amendment of the agreement documents, etc., then all candidates must be informed accordingly. When the amendments relate to non-confidential questions or information then this is not a problem. However, when the developing insights are based on a question of information that is deemed to be "confidential" then the project team must formulate the amendment in a manner that does not disclose confidential information from one of the candidates to the other candidates. Make sure that the candidates receive a good general description and verify that no information about potential solutions is disclosed. In addition, make sure that the amendment of the agreement and tender documents does not result in a material change in the nature and/or scope of the contract.

5.4.3 Short-listing solutions

One method that can be used to reduce the number of solutions submitted by the candidates during the procedure entails a request for a plan of approach and/or project vision from each candidate, whereby a number of elements of the outline documents that are requested will form the basis of a final tender. The submitted plans for action⁶⁰ are assessed on the basis of award criteria announced in advance to select the best plans. The candidates who submitted the selected plans receive an invitation to take part in the next phase of the dialogue⁶¹; the candidates who submitted the plans that were not selected receive a letter of rejection that includes the motivation for the decision.



⁶⁰ Directive 2004/18/EC Article 29, paragraph 6, refers to the submission of final tenders which, in combination with the opportunity to carry out the tender procedure in successive stages (Article 29, paragraph 4), suggests that interim tenders may be submitted (see also BAO Article 29, paragraphs 9 and 7).

⁶¹ The competitive dialogue is governed by a minimum of three participants.

All candidates must receive simultaneous notification informing them whether they are admitted to the next dialogue round. The candidates whose solution is rejected must be informed of the reason for the rejection of their solution.⁶² The solutions or interim tenders submitted during the competitive dialogue are confidential⁶³ and, consequently, rejected candidates may not gain access to information about the plans of action / project visions of the selected candidates. However, the rejections must be accompanied by appropriate motivation to ensure that rejected candidates do not find themselves compelled to institute interim injunction proceedings to obtain more information.

To ensure that short listing does not become a paper exercise it is recommended that a condition be imposed on the candidates stipulating that their later tenders must elaborate on the plan of approach that they submitted earlier in the procedure. This avoids a situation in which candidates deviate from their plan of approach or project vision without permission from the contracting authority, in turn resulting in plans of a lower quality as assessed on the basis of the award criteria. It should be noted that the candidates have been selected for or rejected from further phases of the dialogue on the basis of their plans of approach: consequently, problems can arise when selected candidates deviate from their plans of approach.⁶⁴ The principle should be that changes to plans of approach are permissible solely when they result in an improvement in the plan of approach and optimisation of the tender.

5.4.4 Dialogue output

Within this context 'dialogue output' is understood as the documents to be submitted by the candidates with details about their ultimate tender and elements of their technical solution.

To avoid the accumulation of work, give consideration to the subdivision of the final tender into dialogue outputs that – where relevant, in combination – can be submitted and discussed during the dialogue. Make sure that you do not step into the candidate's shoes: it is not the intention that the contracting authority takes part in the formulation of potential solutions. This could result in interesting solutions proposed by the market being cut short before they are fully developed and in the unintentional assumption of risks from the contractor. In addition, there is a risk of a specific candidate unintentionally receiving information about ideas from other candidates, thereby resulting in distortion of competition or cherry-picking. Make sure that the time granted to the candidates to submit the amount and volume dialogue output with the required content offers them a reasonable opportunity to comply with the requests. The information obtained by the subdivision of the final tender into a series of dialogues can be processed during the dialogue using one of several methods.

The first method is to discuss the (draft) dialogue output – either individually or in combination – during the dialogue. Once the dialogue has been completed the candidates submit their final tender, comprised of their definitive solution together with the 'price'. Adopting this approach emphasises the integrality of the tender and offers the tenderers an opportunity to optimise their tender until the very last minute. The second method is to make discuss each element in a dialogue round that is completed by making the element definitive. At the end of the dialogue the candidates merely need to submit their 'price' (where relevant, with any parts of the solution that have not yet been made definitive) to complete their final tender. Adopting this approach divides the submission of the tender into phases and avoids the need for the project team to assess all elements of the tender within a very short period of time. This method is feasible solely when elements (including the price) can be assessed independently of the overall solution.

5.5 Invitation for final tender

Once the contracting authority has concluded the dialogue the candidates are requested to submit their final tender⁶⁵. This also terminates the communications about the content of the contract between the contracting authority and the candidates.

⁶² Directive 2004/18/EC Article 41, paragraph 2, BAO Article 41, paragraph 2, and ARW 2005, 4.16.7.

⁶³ Directive 2004/18/EC Article 29, paragraph 3, BAO Article 29, paragraph 6, and ARW 2005, 4.18.5.

⁶⁴ Directive 2004/18/EC Article 29, paragraph 6, BAO Article 29, paragraph 11, and ARW 2005, 4.27.

⁶⁵ Directive 2004/18/EC Article 29, paragraph 6, BAO Article 29, paragraph 9, and ARW 2005, 4.19.1.

6 Final tender

6.1 Introduction

Thorough preparations for the assessment are essential if optimum use is to be made of the available time and capacity of the persons who assess the quality of the content of the tenders.⁶⁶ Prior to the assessment of the tenders it will be necessary to give attention to the membership of the assessment teams on the basis of the (sub) sections to be assessed and the assessment method. It is also recommended that the assessment teams become familiarised with the award criteria and the requirements related to the award criteria in the output specifications. The teams should also be issued the information from the dialogue of relevance to their duties. It is advisable to organise the process in a manner that will enable the members of the assessment team to focus on the content of the tenders from day one. Within this context it should be realised that the core team will usually have been fully occupied with the intensive (completion of) the dialogue with the candidates in the period prior to the submission of the final tenders.

6.2 Assessment of final tenders

6.2.1 Assessment team

It is customary to form a number of teams of experts⁶⁷ for complex DBFM(O) agreements that each assess part of the tender. It is recommended that time is reserved on the first day after the submission of tenders for the distribution of the relevant sections of the tenders between the assessment committees.

The assessment team's offices at the contracting authority's premises must be ready for them on the day of their arrival. A rapid start can be made only when quiet offices are available at some distance from their day-to-day work, the offices are provided with the necessary equipment such as computers and office articles, and the teams have been issued the relevant sections of the tenders.

It is recommended that attention be given to this period in which a large amount of work needs to be carried out. A meeting of all the teams, in an informal setting (such as a work breakfast or lunch), in which the project management gives a presentation of the project's objectives, the tendering procedure and the assessment process will contribute to the development of the team spirit⁶⁸ required for a smooth and integral assessment of the tenders.

The members of the assessment teams need to be convinced of the need for their assessment to be based on a sound motivation⁶⁹ that makes clear to the candidates why they do or do not come into consideration for the award of the contract. The members of the teams should base their assessment on the requirements and award criteria with the associated weighting factors made known prior to the tender procedure, the agreement and the output specifications. The arguments included in the motivation of the ultimate decision should be derived from this information. It is important that the motivation of a lower score awarded to the tender for one of the award criteria is as clear and as complete as possible.

The assessment procedure must be specified in the tender protocol to lay firm foundations for this phase of the tender procedure. The assessment process should be designed to ensure that the assessment of the tenders on the basis of the award criteria is carried out in a structural manner and that the assessments are

⁶⁶ See also Section 3.7 (The planning).

⁶⁷ See also Section 3.6.3 (Assessment Committee).

⁶⁸ See also Section 2.3.5 (Teambuilding).

⁶⁹ See also Section 6.3 (Award decision and rejections).

substantiated with solid arguments. Structural records of the arguments for the assessment constitute the basis for the award of the contract and, possibly of even greater importance to the smooth completion of the process, the rejections.

6.2.2 Assessment of tenders

The final tenders are submitted to an integral assessment. The intensity of the work involved in these assessments depends on the layout of the dialogue⁷⁰ that was selected for the tender procedure.

The first step is to examine the submitted tenders to examine whether they are complete and valid⁷¹. This is the case when the following questions are answered in the affirmative:

- 1 Has the contracting authority received the tender within the stipulated time?
- 2 Have all the documents that were prescribed been enclosed in the tender?
- 3 Does the tender comply with the stipulated minimum requirements?
- 4 Does the tender still comply with the minimum requirements and are none of the grounds for exclusion⁷² applicable?

If one or more tenderers or tenders do not comply with the above then the relevant candidate's tender is laid on one side on the grounds of the aforementioned assessment.

Although a tender can be rejected on the grounds of non-compliance with the above requirements, consideration can be given to providing the relevant tenderer feedback about the quality of the tender as compared to the stipulated award criteria. A tenderer who has taken part in a competitive dialogue and whose tender is rejected because it is invalid will have usually spent a great deal of effort on the tender: an assessment of the quality of the candidate's tender can give him directions that can be of assistance in the preparation of an appropriate tender for a following tender procedure.

The financial information needs to be separated from the technical content of the tender and assessed separately to ensure that the assessment of the quality of the tender is not influenced by knowledge of the tender price.

Once it has been verified that the tender includes all the elements as requested from the candidate⁷³ then the next step is to answer the following questions:

- 1 What added value does the tenderer's solution as based on the award criteria offer relative to the stipulated minimum requirements?
- 2 How should the value of the tender submitted on the basis of the award criteria be determined and on which arguments is this value based?
- 3 Which candidate is awarded the highest score on the basis of the formula made known in advance? This formula could include a weighting factor for the individual (sub) award criteria.

The assessment should ultimately result in a tender being assigned as the most economically advantageous tender. The assessment should also demonstrate why the tenders of the candidates that were not selected were awarded a lower value⁷⁴.

⁷⁰ See Section 5.4.4 (Dialogue output).

⁷¹ See also Section 4.2 (Assessment of the candidates).

⁷² Directive 2004/18/EC Article 45, BAO Article 45 and ARW 4.8.

⁷³ Directive 2004/18/EC Article 29, paragraph 6, BAO Article 29, paragraph 10, and ARW 2005, 4.20.1

⁷⁴ See, for example, Gunnen op waarde (Awarding contracts on the basis of value), <http://www.psibouw.nl/details/kennis?kennis=97&name=Gunnen+op+waarde>

6.3 Award decision and rejections

The contracting authority notifies the candidates of the award decision as soon as possible after the completion of the assessment. This notification, in writing or at least in the form of a fax or electronic message, includes at least the grounds for the award decision with, for example, information about the characteristics and benefits of the selected tender, and the name of the successful tenderer⁷⁵.

In view of the efforts that the tenderers will have made in taking part in the dialogue and preparing their tenders it is recommended that they receive letters that explain the arguments on which the rejections are based in exhaustive detail. It is also recommended that the contracting authority takes the initiative to invite each rejected candidate to a meeting to explain the rejection.⁷⁶ This planning should take account of the duration of the standstill period (15 days⁷⁷) to offer the candidates sufficient opportunity to assimilate the contents of the letter, hold internal feedback on the outcome of the tender procedure and, after the meeting, give consideration to the institution of interim injunction proceedings. It is recommended that this meeting, held on the contracting authority's initiative, is held on about the fifth working day after the issue of the award decision. Plan these meetings in good time.

Take account of the fact that specific information does not need to be – or even may be – communicated or disclosed, in particular when disclosure would impede law enforcement, would be contrary to the public interest or would prejudice the legitimate commercial interests of companies.⁷⁸ In practice, the information issued to a rejected candidate about the assessment of the candidate's tender is restricted to its characteristics and benefits relative to the characteristics and benefits of the tender submitted by the candidate who will be awarded the contract.⁷⁹ No information is issued about the tenders of other rejected candidates.

Bear in mind that the tenderers' tender teams have had to make a substantial investment in time and costs during the dialogue phase – costs that will probably not be covered (completely) by the design cost reimbursement – and that they shall need to present convincing arguments within their organisations for their failure to win the contract.

The contracting authority may request the tenderer of the most economically advantageous tender to clarify elements of the tender or to confirm commitments contained in the tender, provided that 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 discrimination⁸⁰. Consequently, the tender rules do not provide any scope for negotiations with the successful tenderer after the submission of the tender: in this respect the competitive dialogue procedure is comparable to public procedures and restricted procedures, but differs from the negotiation procedures.

6.4 Notice and official report of the award

The tender procedure is concluded with the submission of a notice of the award to the Office for Official Publications of the European Communities within 48 days of the award of the contract⁸¹. In addition, the contracting authority is under the obligation to prepare an official report.⁸²

⁷⁵ Directive 2004/18/EC Article 41, paragraph 2, BAO Article 41, paragraph 1, and ARW 2005, 4.29.6.

⁷⁶ See also Section 4.3 (The rejection interview).

⁷⁷ ARW 2005, 4.30, and the (draft) legislative proposal for the Implementatie Rechtsbeschermingsrichtlijn Aanbesteden ('Implementation of the Public Procurement Remedies Directive', WIRA), Article 2.1.

⁷⁸ Directive 2004/18/EC Article 41, paragraph 3, BAO Article 41, paragraph 5, and ARW 2005, 4.32.2.

⁷⁹ Directive 2004/18/EC Article 41, paragraph 2, BAO Article 41, paragraph 4, and ARW 2005, 4.29.6.

⁸⁰ Directive 2004/18/EC Article 29, paragraph 7, BAO Article 29, paragraph 14, and ARW 2005, 4.29.3.

⁸¹ Directive 2004/18/EC Article 35, paragraph 4, BAO Article 35, paragraph 12, and ARW 2005, 4.32.1.

⁸² Directive 2004/18/EC Article 43, BAO Article 43 and ARW 2005, 4.31.1.

6.5 Maintenance of tender

The tender procedure can include a request to the candidates to maintain their tenders. This can offer the advantage of having a second tenderer in reserve in the event that, for example, the winner is unable to complete the financing. However, the problem may then be that the team of the relevant tenderer may already have been dissolved on the deployment of the staff to other projects. The probability of succeeding in calling on this tenderer increases when clarity is obtained about the contract close and, in particular, financial close as soon as possible after the award of the contract. Consequently, try to keep the time between the intention to award the contract and the ultimate contract and financial close as short as possible.

Example 14

Maintenance periods:

Ministry of Finance Offices (Korté Voorhout 7): 12 months.

Tweede Coentunnel/Westrandweg tunnel and road: 12 months.

Rotterdam penal institution: 12 months.

A15 motorway, Maasvlakte-Vaanplein: 6 months.

A12 motorway, Lunetten-Veenendaal: 6 months.

Evaluations with the candidates have revealed that a 12-month maintenance period is perceived as being too long.

6.6 Preparations for the development phase

Provide assurances for the continuity and retention of the knowledge of the project organisation that is or will be entrusted with the supervision of the performance of the agreement. Take the time to prepare the development phase (and potential points of discussion during the phase) with the project team.

6.6.1 Contract Close

This phase relates to the determination of the commitments on the basis of the tender documents and the tender from the most economically advantageous tenderer. These are laid down in the ultimate agreement to be signed by the parties. The inclusion of the final tender in the agreement will take a period of time that depends on the number of parameters to be entered.

6.6.2 Financial Close

During this phase the definitive availability payment to be laid down in the DBFM(O) agreement is determined on the basis of the interest rate level on the date of the Financial Close⁸³ and the financial model: in addition, the direct agreement is concluded with the financier. Although it would seem logical to complete the Contract Close and Financial Close at the same time, in practice the financiers have to date wished to receive a copy of the signed DBFM(O) agreement before they are prepared to make a definitive decision to provide the financing.

6.6.3 Kickoff of the development phase

Give the start of the performance of the agreement a festive touch. Take the time to celebrate the success of the tender procedure and the award of the contract and, in so doing, set the ambience for the further collaboration with the contractor.

⁸³ In most instances the risk of the interest rate level is borne by the contracting authority until the time of the Financial Close.

Annexes

Annex 1: Golden rules for the dialogue

The project team conducts a "safe" dialogue by:

- 1 Always paying due heed to the transparency of actions that comply to the principle of equal treatment.
- 2 Always dealing with or confirming communications in writing.
- 3 Always issuing communications via one channel.
- 4 Making minutes of dialogue meetings.
- 5 Refraining from making telephone calls with candidates that discuss the substance – "Now you're on the line..".
- 6 Refraining from giving directions – "You must.." to the candidates .
- 7 Refraining from playing the pathfinder – "Have you thought of..".
- 8 Always beginning questions with: "How.....".
- 9 Refraining from making commitments during a meeting (take time for reflection).
- 10 Avoiding the cross-fertilisation of proposals, i.e. avoided competitive distortion (also referred to as 'cherry-picking').
- 11 Never trivialising.
- 12 Being "soft" in the relations, "hard" in the interests.

Annex II: More information is available from...

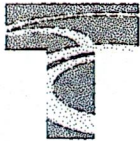
More information is available from sources including the following:

- Rijkswaterstaat, PPP unit: PPS@rws.nl & http://www.rijkswaterstaat.nl/over_ons/zakendoen_met_rws/marktinformatie/pps_bij_rijkswaterstaat/pps_kennispool
- Rijksgedebouwendienst: <http://www.rijksgebouwendienst.nl/PPS>
- The D.L.G Government Service for Land and Water Management: <http://www.minlnv.nl>
- PIANOo: <http://www.pianoo.nl/Aanbestedingspraktijk>
- PPS bij het Rijk: <http://www.ppsbijhetrijk.nl> (Government PPP website)
- Ministry of Finance: <http://www.minfin.nl>
- Europa decentraal, centre of expertise on European law and policy for the decentral government authorities: <http://www.europadecentraal.nl>
- Current legislation and regulations: <http://wetten.overheid.nl/zoeken>

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RENONCIATION ET QUITTANCE

Appel de propositions pour la conception et la construction des Infrastructures principales du Projet Turcot à Montréal

[Nom du Soumissionnaire]

Le soussigné confirme par les présentes qu'il a l'intention de participer au Processus de sélection décrit à l'Annexe 1-19 *Séances d'information et ateliers de discussion* des Directives aux soumissionnaires, dont copie est ci-jointe, qu'il convient de la marche à suivre qui y est énoncée, y compris des Séances d'information et des Ateliers de discussion, et qu'il renonce irrévocablement et inconditionnellement en faveur des Parties libérées à tous les droits de contestation ou de protestation et à toute Réclamation, sauf dans le cas de faute lourde ou intentionnelle du Ministre, à l'égard du Processus de sélection décrit dans la Convention de soumission en rapport avec le Projet C-C, qui découleraient du fait que des Séances d'information ou des Ateliers de discussion ont eu lieu ou que des renseignements pourraient avoir été reçus par un Soumissionnaire concurrent ou un de ses Collaborateurs sans que le soussigné les ait reçus, et il donne quittance, libère et exonère irrévocablement et inconditionnellement les Parties libérées de toutes telles Réclamations. Les termes en majuscule employés aux présentes ont le sens qui leur est donné dans les Directives aux soumissionnaires.

Fait à _____ le _____ 2014

[Signature]

[Nom du signataire]

[Titre]

[Fonction]