Using Competitive Dialogue in EU Public Procurement – Early Trends and Future Developments

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Affordable and timely implementation of complex infrastructure projects is crucial to the completion of the EU Internal Market and meeting deadlines for the implementation of EU environmental legislation. Competitive Dialogue was created by the 2004 Public Procurement Directives as a new and more flexible solution for public authorities wanting to award contracts for such projects. But some predicted that it might be used only rarely and others saw problems in applying it effectively to obtain value for money for the public sector. Yet it is now firmly established in Europe as a means of awarding public contracts, with more than 3000 award procedures launched. This article assesses how and where the procedure has been used so far and the challenges at European and national level for using it effectively in future.

What is Competitive Dialogue and why does its effective use matter?

Competitive Dialogue is a new procedure for awarding public contracts, introduced by the latest EU Public Procurement Directives[1] (the Public Procurement Directives).[2]

It is meant to allow a public entity which knows what outcome it wants to achieve in awarding a public contract but does not know how best to achieve it to discuss, in confidence, possible solutions in the dialogue phase of the tender process with short listed bidders before calling for final bids.[3] This can often occur in the case of complex and high value infrastructure projects.

To achieve this aim, Art. 1(11)(c), Directive 2004/18 defines Competitive Dialogue as "a procedure in which any economic operator may request to participate and whereby the Contracting Authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender".

The use of the Competitive Dialogue procedure by public authorities[4] wishing to award "particularly complex" contracts[5] is very explicitly (though not exclusively) linked with the implementation of Public Private Partnerships (PPP).[6]

The importance of the effective application of PPP in meeting the infrastructure needs and service delivery objectives of the public administrations across Europe, and the implementation of key EU policies, can hardly be overstated.

There are strong pressures both in old and new EU Member States driving public authorities to use PPP as a means of delivering public services e.g. budgetary pressures (whether in or out of the euro zone) leading to the need

for cost reduction, better revenue collection and financing of infrastructure investment and pressures from citizens as consumers with ever higher service expectations. In some cases public entities seek also to use PPP as a way of introducing private sector management skills for different methods of service delivery and use public assets more effectively.

One consequence of the budgetary pressures facing EU Member States is a "funding gap" between the financing needed to implement the policies and the public funds available e.g. by completing the Trans-European Networks (TENs), and enabling Member States, and particularly the new Member States, to comply with EU environmental legislation, which often have specific deadlines for implementation.

Why was the Competitive Dialogue procedure needed?

Prior to the introduction of the Competitive Dialogue procedure, Contracting Authorities faced a dilemma in determining how to conduct a contract award for complex contracts.

Even if Contracting Authorities had a good idea in advance of the award process of the precise shape of the key features and the strengths and weaknesses of potential solutions to their needs, and often they did not, there were practical difficulties in enabling them to remain open to the development of their ideas to improve those solutions.

Competitive Dialogue aims to make it easier for the public sector to avoid legal challenges in awarding complex infrastructure contracts.

They faced the choice between the Restricted Procedure and the Negotiated Procedure but:

- The Restricted Procedure constrained competitive innovation between suppliers and prohibited negotiations once the award process had started, in essence by requiring the Contracting Authority to have defined the service specification (what was to be done, how and to what standards) and the contractual terms and conditions in advance of the process. This was restrictive, particularly for PPP contracts, even if the Contracting Authority prepared an outcome-based specification, because the Authority may not have incorporated the most innovative solutions into the specification and, even if it had, the Restricted Procedure, though permitting clarification and supplementing of information in tenders, does not allow post offer negotiations.[7]
- The Negotiated Procedure, while allowing such competitive innovation, and in particular allowing post offer negotiations, was intended to be an exceptional procedure designed to be very difficult to justify under the former EU Public Procurement Directives.[8]

In reality the boundaries of both were stretched - in the Restricted Procedure post-offer clarification became quasi-negotiation and, prior to the issue of the Invitation to Tender it was possible for a Contracting Authority to consult the short list on the draft contract documentation, whereas Contracting Authorities often hid behind legal opinions justifying the Negotiated Procedure which were far from robust. Neither of these types of action was widely challenged because:

- Losing bidders moved on to the next opportunity and/or were often reluctant to be seen to be aggrieved lest they prejudice their chances for future opportunities either with the Contracting Authority or more widely in the market.
- The variability of independent national scrutiny and ease of securing redress meant that the practices did not come to light in a consistent way.
- The Commission focused its resources and energies on challenging the use of the Negotiated Procedure without prior publication rather than the use, per se, of the Negotiated Procedure where the Contracting Authority had at least published a notice in the OJEU.

This situation was nevertheless unsatisfactory, forcing Contracting Authorities to choose between the need for flexibility and the need for legal certainty, because they could not be certain that the Commission would not change its focus and start to challenge more regularly the use of the Negotiated Procedure with prior publication or a broader interpretation of what was permitted after the receipt of tenders by Restricted Procedure.

The Commission recognised this situation but did not want to widen the scope of the use of the Negotiated Procedure with notice and thus proposed a new procedure, Competitive Dialogue, "in response to the finding that the "old" Directives, Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, do not offer sufficient flexibility with certain particularly complex projects due to the fact that the use of negotiated procedures with publication... is limited solely to the cases exhaustively listed in those Directives".[9]

Early trends in the use of Competitive Dialogue in the EU

Extent of use of Competitive Dialogue

Competitive Dialogue has started to be used widely within the EU, following the transposition of the Public Procurement Directives into national law, which was due to be completed by 31 January 2006.

As of 19 June 2009, 3027 contract notices relating to Competitive Dialogue procedures had been published in the Official Journal of the European Union.[10] This appears to have allayed the concerns expressed by some early commentators[11] that Contracting Authorities may be unwilling to use the procedure on the grounds that it does not provide sufficient flexibility as compared to the Negotiated Procedure.

The use of Competitive Dialogue is nevertheless very uneven to date as between EU Member States, with 80.4% of the cases where Competitive Dialogue has been used being in France (40.9%) and the United Kingdom (39.5%). A further three Member States, Germany, Poland and the Netherlands, account for 9.3% of the number of contract notices, with the remaining 22 Member States and other bodies, including European institutions and agencies, accounting for slightly more than 10% of the total number of notices.

Methods of application of Competitive Dialogue[12]

The legal provisions of Art. 29, Directive 2004/18 for the dialogue phase of the Competitive Dialogue Procedure may be summarised as follows i.e. that:

- "Contracting Authorities shall open, with the candidates selected... a dialogue... to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue".
- "During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. Contracting Authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement".
- "Contracting Authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option".
- "The Contracting Authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs".
- "Having declared that the dialogue is concluded and having so informed the participants, Contracting Authorities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project".

As regards the post tender phase, Directive 2004/18 provides that:

- "(The final tenders received) may be clarified, specified and fine-tuned at the request of the Contracting Authority. However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect".[13]
- "At the request of the Contracting Authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination".[14]

But both of these sets of provisions in Directive 2004/18 leave Contracting Authorities with significant discretion in the implementation of the Competitive Dialogue Procedure, though subject to the need to comply with EU Treaty principles enshrined in the Public Procurement Directives of equality of treatment and non-discrimination, and different approaches to the dialogue phase and the post tender phase are starting to emerge.

Competitive Dialogue is now firmly established in Europe as a means of awarding public contracts, with more than 3000 award procedures launched.

The conduct of the dialogue phase

The emerging evidence of practice to date in the dialogue phase is that different decisions are being made about the number of phases in the dialogue, the objectives of the dialogue sub-phases, how the phases are conducted, the time to be allowed for the dialogue phase, the information to be requested from bidders in the dialogue sub-phases, whether or not elimination of solutions should occur during the dialogue phase and, crucially, the position which the Contracting Authority needs to arrive at by the end of the dialogue phase.

The current methods of conducting the dialogue phase may be summarised as follows:

- Inviting several solutions, then narrowing the differences between them towards a single merged solution i.e. to use the early part of the dialogue phase to develop a hybrid solution (one based on the best features of the solutions proposed by the different participants).[15]
- Inviting outline solutions and then one or more progressively more detailed solutions.
- A consecutive approach i.e. dialogue first on technical/operational aspects and then on financial aspects of the offer.
- Starting from a provisionally preferred solution of the Contracting Authority and inviting bidders to comment on it by marking up the solution as the basis of the dialogue.

All of the approaches described here are compatible with the legal requirements for the Competitive Dialogue procedure in general and the dialogue phase in particular. But the fact that they are legally permissible does not mean that, in terms of the likelihood of securing value for money for the public sector, they are necessarily equally effective.

The main conclusions emerging from these different approaches are that:

- Most of the approaches have, in practice, led to at least two sub-phases within the dialogue phase.
- There has not always been sufficient clarity about the objectives of each sub-phase i.e. what the Contracting Authority needs to have achieved at the end of each sub-phase.
- The methods used in the dialogue phase have converged towards written submissions by bidders, regular one to one discussions between the parties, presentations by bidders, availability of information through extranets, access by bidders to relevant personnel of the Contracting Authority and submission of interim solutions by bidders.
- The time allocated in practice by Contracting Authorities for the dialogue phase has varied widely, with the observed range being between one and eight months.
- There are practical difficulties associated with the approach of inviting outline, then detailed solutions because of the pressure that it creates on the Contracting Authority if it has failed to devote sufficient resources

to understand the issues associated with the project in detail and to work out its approach to them in advance of discussions with bidders, thus placing it at a disadvantage in the dialogue.
- It is difficult in practice to separate out the technical/ operational and financial aspects of a bid because of the links between the cost of project and its scope, duration and performance standards.

The conduct of the post tender phase

In the conduct of the post tender phase there are different interpretations of the terms "clarifying", "specifying" and "fine-tuning" tenders, and, following the selection of the winning bidder, where there are different interpretations of the terms and "clarify aspects of (the winning) tender" and "confirm commitments in (the winning) tender".

Where these terms are interpreted restrictively, the post tender phase can be completed quickly, in contrast to the post-offer phase in the Negotiated Procedure which in many cases has lasted between 12 and 18 months.

Challenges for the future

An experimental period in the use of the Competitive Dialogue procedure has, broadly, been beneficial. Diversity of practice to date has created an opportunity to assess different emerging practice in the application of Competitive Dialogue and to blend it with existing good practice in the Negotiated Procedure.

But, having had the opportunity to experiment with different approaches, it raises several questions about the development of future practice in the application of Competitive Dialogue.

Are all the emerging approaches equally valid? And how should their fit with the key criterion of achieving value for money through transparent and competitive procurement be assessed?

Most importantly, are there now clear benefits to standardising the approach to the application of Competitive Dialogue and clear pointers to aid the development of an optimal methodology, i.e. one which will promote value for money for the public sector?

These questions mainly centre on two areas i.e:
- The extent to which the core approach to the dialogue phase should be consultative or investigative.
- The extent to which the terms "clarifying", "specifying" and "fine-tuning" tenders, and, in the phase following the selection of the winning bidder, "clarifying aspects of (the winning) tender" and "confirm commitments in (the winning) tender" should be permissive or restrictive.

A consultative or investigative approach to the dialogue phase?

These approaches may be distinguished as follows:
- A consultative approach to the dialogue phase is one, in essence, based on the Contracting Authority's solution(s) i.e. a solution or solutions developed by the Contracting Authority as its provisionally preferred solution(s) and launched by it at the opening of the dialogue phase. In practice, this means that the dialogue phase will start with the marking up (proposed amendments/comments) by bidders of the Contracting Authority's preferred solution(s).

This enables the Contracting Authority to manage the dialogue phase with reference to its own provisionally preferred solution(s), basing it on variations to its own solution.

Put simply, the consultative approach defines the dialogue phase as, in principle, a dialogue about a single solution - that of the Contracting Authority - and variations about implementing that solution rather than competition between different solutions of different bidders:
- An investigative approach to the dialogue phase is one based on bidder-driven solutions. This starts from a definition by the Contracting Authority of its objectives and desired outcomes but less definition of the elements of the preferred solution(s). In this method, the dialogue phase will typically start with the submission of outline solutions by the bidders which subsequently become more refined during the course of the dialogue.

A permissive or restrictive approach to the post-tender phase?

Competitive Dialogue has been applied in several different ways so far but not all of them are equally effective in achieving value for money.

What may be termed a permissive approach to the post tender phase may be characterised as an attempt to base the approach to that stage of the award process on the approach often applied in the Negotiated Procedure, i.e. with the fast track selection of a "preferred bidder" on the basis of heavily conditional offers, or, in some cases, indicative offers. This was then followed by lengthy post-tender negotiations with the "preferred bidder" after competition had been eliminated, often on significant elements of the contract.[16]

In a restrictive approach, the extent to which changes are made to the contract after tenders have been submitted and even more so after the selection of the winning tender are minimised by:
- A wide definition of what constitutes the "basic features of a tender" and "substantial aspects of the winning tender".
- A wide definition of what might be regarded as an actual or potential distortion of competition or what might have a discriminatory effect at that stage.
- Consequently, a narrow definition of how much and what type of variation to tenders can be permitted in the process "clarifying", "specifying" and "fine-tuning" the final tenders and of "clarifying aspects of (the winning) tender" and "confirming commitments in (the winning) tender".

In such a restrictive approach, it also means that the process of "clarifying", "specifying" and "fine-tuning"

tenders and "clarifying aspects of (the winning) tender" and "confirming commitments in (the winning) tender" refers solely to actions taken by the Contracting Authority and does not include the right of bidders to re-open issues resolved at an earlier stage in the process or to amend their tender.

Conclusions

The author's view is that it would be desirable in the context of securing value for money for the public sector if a consultative approach to the dialogue phase were to emerge as good practice, though, using such an approach, the dialogue phase can only be launched when the Contracting Authority has a clear prior understanding of the possible technical solutions, the strengths and weaknesses of those solutions, the optimal allocation of risks, and the approximate cost of the solutions.

Ultimately, a Contracting Authority will, in any event, as part of the process of determining the final form of the contract and of evaluating the tenders, have to form judgments on these matters, so this approach is likely to represent a shift in the timing of work by the Contracting Authority (and thus the timetable for different phases of the procedure) rather than an increase in its overall workload or increase in the overall elapsed time for the procedure.

If properly applied, Competitive Dialogue leads to the detailed planning necessary for effective procurement of infrastructure.

Furthermore, developing a prior understanding of the potential solutions is not only desirable but should be a logical next step for a Contracting Authority if it has conducted a rigorous market assessment before launching the opportunity, supplemented, if necessary by pre-dialogue discussions with the short list. Such pre-dialogue discussions are not forbidden by Directive 2004/18, to the extent that they do not distort competition, i.e. that such discussions do not give one or more economic operators an unfair advantage over others (because of, for example, having received more or more detailed information). They will also have to do so to develop outline and final business cases, where this forms part of the process of investment appraisal of projects, for subsequently seeking approval for their inclusion in capital expenditure programmes and launching the procurement.

Put simply, it enables the Contracting Authority to stay in control of the process of arriving at the ultimate optimal means for delivering the project which is the subject of the award procedure.

It is also worth noting that, following the inclusion in Directive 2004/18 of provisions[17] requiring the disclosure of the award criteria and their weighting,[18] recent court judgments, both in the ECJ and national courts, have marked a trend towards a requirement for more detailed disclosure of the basis on which contracts are awarded i.e. not merely of the main evaluation criteria and their weighting but also of the award sub-criteria.[19] This is in order to fulfil the obligation of Contracting Authorities to ensure that tenderers should be aware of all elements to be taken into account in evaluating tenders, including their relative importance.

The fact that there is now likely to be greater disclosure of the basis on which contract are awarded (and thus closer scrutiny and potential challenge) is another reason why Contracting Authorities should tend towards the consultative approach to the dialogue phase. Put simply, the greater the detailed understanding by a Contracting Authority of how its needs might be met, the greater will be its ability to refine the evaluation criteria and their weighting in a way which enables them to meet the demands of this additional scrutiny.

Similarly, the author considers that the emergence of a restrictive approach to the post-tender phase as being desirable, as well as being, in the author's view, implicit in the wording of the legislation.

The main weaknesses of the permissive approach to the post-tender phase in a Competitive Dialogue Procedure are already evident from its application in the Negotiated Procedure i.e.:

- It leaves the Contracting Authority in a weak negotiating position and that, therefore, there is a risk that the terms of the contract finally agreed will become significantly less favourable to the public sector than those envisaged at the time the preferred bidder was selected. This is because the preferred bidder may subsequently seek to introduce qualifications and conditions associated with the matters included in the initial offer which are stated to be guaranteed and which were relied upon by the Contracting Authority in selecting the preferred bidder. In the case of PPP contracts this frequently occurred because of the demands of lenders not sufficiently engaged with the process until the winning bidder was selected.[20] In practice, it is then difficult for a Contracting Authority to resist pressure arising from the momentum of the negotiations and the time invested in the process to date to strike a deal which may no longer then represent value for money as compared to alternative service delivery methods originally considered in the options appraisal and/or the terms offered by the second placed bidder.
- The consequent risk is that, if the final contract signed is one which, in the view of the nearest contender to the preferred bidder, could have been negotiated with them on terms as favourable as those ultimately agreed with the preferred bidder, there may be a challenge from nearest contender which could be embarrassing, time consuming and expensive to respond to.

The arguments for a restrictive approach thus rest on both value for money grounds i.e. of the benefits of substantially fixing the terms of the contract while bidders are subject to competitive pressures, and on legal grounds i.e. to minimise the risk of breaching the principles of transparency, equality of treatment and non-discrimination.

In the case of Competitive Dialogue, the argument for a restrictive approach is enhanced by the provisions of Directive 2004/18, since there is also the explicit freedom

to opportunity to resolve uncertainties during the dialogue phase because all aspects of the contract may be discussed and by the requirement in Art. 29(6) of Directive 2004/18 that the final tenders "shall contain all the elements required and necessary for the performance of the project".

The use of a restrictive approach is not, however, solely for the benefit of the Contracting Authority – it can also act as protection to bidders from attempts by the Contracting Authority to re-negotiate the contract in its own favour as part of the post tender process.[21]

But the emergence of an optimal methodology for the application of the Competitive Dialogue Procedure remains in the balance – there is, for example, no case law to date relating to the Competitive Dialogue Procedure in the ECJ and very little in national courts. Lack of legal certainty might thus lead Contracting Authorities to refrain from using this new procedure and lead them to use instead the Negotiated Procedure with which they are much more familiar, despite the legal risks associated with that route.

Similarly, such guidance from the European Commission and at national level as exists[22] for the practical application of the Competitive Dialogue Procedure does not fully address many of the key questions faced by Contracting Authorities aiming to ensure that the public sector optimises the likelihood that it will obtain value for money in the award of long-term high value contracts such as PPP.

The need to improve Europe's infrastructure and the effective implementation of key European policies, such as compliance with environmental legislation and the completion of the Internal Market, at an affordable cost is pressing and thus, therefore, in the author's contention is the emergence of guidance on the effective practical application of the Competitive Dialogue Procedure.

NOTES

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1 "Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts" and "Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector". This article deals with the issues arising in the Directive relating to public contracts (Directive 2004/18) since the option to use the Competitive Dialogue is not provided for in Directive 2004/17 and is not needed because there is the freedom in the Directive to use the Negotiated Procedure without the need for special justification.

2 In Directive 2004/18 the transposition of the Competitive Dialogue was left to the option of Member States, though in practice all have chosen to exercise this option.

3 One example cited in the "Explanatory Note on Competitive Dialogue in the Classic Sector", European Commission, January 2006, p.p. 2-3 is that of a Contracting Authority which wants to provide for a river crossing but does not know if a bridge or a tunnel, or which construction methods for either, would be would be best suited to satisfying its needs.

4 The term widely used in the EU context (including in Directive 2004/18), and thus subsequently in this article, " Contracting Authority".

5 See Art. 29 and Recital 31, Directive 2004/18.

6 There is no universally agreed definition of what constitutes a PPP. The key features, described by the author elsewhere, (see Michael Burnett, *PPP – A decision maker's guide*, European Institute of Public Administration, 2007, p. 9) may be summarised as being that of a single contract embracing both the construction of infrastructure and its availability for, or use in, the provision of services. PPP contracts are typically longer term than normal service contracts, of higher value and often complex and high profile. Remuneration for the private party derives from the provision of the service, or making the asset available for use, rather than from the construction of the asset.

7 See the joint Commission and Council of Ministers' statement issued in 1989 on what constituted "clarification" in the context of the Restricted Procedure, OJ L 210, 21 July 1989.

8 This was clear from Art. 11, Directive 92/50, which set out the specific circumstances in which the Negotiated Procedure could be used and then said that "in all other cases, Contracting Authorities shall award their public service contracts by the Open Procedure or by the Restricted Procedure". At Art. 11(2)(b) it referred to "exceptional cases, when the nature of the services or the risks involved do not permit prior overall pricing" Similar wording existed in Art. 7(2)(c), Directive 93/37, which regulated the award of public works contracts.

9 As subsequently expressed in the Explanatory Note on Competitive Dialogue in the Classic Sector, p. 1.

10 Tenders Electronic Daily, 1 January 2004 to 19 June 2009.

11 See, for example, Adrian Brown, "The impact of the new Procurement Directive on large public infrastructure projects: Competitive Dialogue or better the devil you know?", *Public Procurement Law Review*, Sweet and Maxwell, Issue 4, 2004, p. 160 et seq.

12 The focus in this article is on the issues arising in the dialogue phase and the post-tender phase, because of the fact that the dialogue phase is new aspect introduced by Directive 2004/18 and the specific legislative provisions for the post tender phase in a Competitive Dialogue Procedure which are not set out for other award procedures. There is, of course, no intention to suggest that the proper conduct of other aspects of the contract award process is any less important in a Competitive Dialogue Procedure than in other award procedures.

13 See Art. 29(6), Directive 2004/18.

14 See Art. 29(7), Directive 2004/18.

15 This, of course, would require their agreement in the light of the confidentiality provisions in Directive 2004/18. See Art. 6 and Art. 29(3), Directive 2004/18.

16 For example, the appointment of preferred bidders at an early stage in the tender procedure has been long standing common practice in many UK PPP projects. See Sue Arrowsmith, "Law of Public and Utilities Procurement", Sweet and Maxwell, 2006, paras 8.42 et seq and Ciara Kennedy-Loest, "What can be done at the preferred bidder stage in Competitive Dialogue", *Public Procurement Law Review*, Sweet and Maxwell, Issue 6, 2006, p. 316 et seq.

17 See Art. 53(2), Directive 2004/18.

18 The weighting can be replaced by the listing of the award criteria in descending order of importance when, in the opinion of the Contracting Authority, weighting is not possible for demonstrable reasons.

19 See, for example, ECJ Case C-532/06, Lianakis and Others v the Municipality of Alexandroupolis.

20 See Ciara Kennedy-Loest, op. cit., p.p. 316 and 319 and "Explanatory Note on Competitive Dialogue in the Classic Sector", European Commission, January 2006, Note 35. There is also the suspicion, not entirely unjustified in the experience of the author, that this approach has been used as a substitute for the Contracting Authority's willingness to undertake the key planning and preparation tasks prior to the publication of a contract notice which form the key to the successful implementation of any complex procurement procedure.

21 There is, of course, the possible risk that a restrictive approach could be used by Contracting Authorities more readily to cancel award procedures which look unlikely to result in the award of the contract to their pre-favoured tenderer and then relaunch it in a way which achieves the desired result. However, it is the settled case law of the ECJ that a decision to cancel an award procedure is a decision capable of being challenged through review procedures (Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs GmbH v Stadt Wien and C-15/04, Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH*), so that this risk is capable of being managed.

22 See for example, the Commission's "Explanatory Note on Competitive Dialogue in the Classic Sector" referred to above and "Competitive Dialogue in 2008 – Joint guidance from HM Treasury and OGC", June 2008, from the UK Government.