

Dutch PPP tendering infrastructure into the equation

Marcelle van Valkenburg and Marijke Nagelkerke¹

Abstract

Tendering PPP infrastructure in the Netherlands is currently mostly based on tendering a DBFM-contract with the competitive dialogue in accordance with the EU Procurement Directive. In this paper the current tendering practice in the Netherlands of PPP infrastructure projects is explained. The applicable provisions regarding the competitive dialogue are compared to the corresponding provisions of the tender procedure 'request to proposals with dialogue' in the UNCITRAL Model Law on Public Procurement on the subjects of grounds for use, award criteria, procedure requirements and confidentiality. In making this equation it will be explored what can be learned towards inclusive competitiveness by harmonising and modernizing tender law applicable for PPP.

1. Introduction

The member states of the EU countries have incorporated the EU Directive on public procurement 2014/24/EU² (hereinafter: EU Procurement Directive) in their national tender laws. In the Netherlands, tendering PPP infrastructure projects is currently based on tendering DBFM-contracts with the use of the competitive dialogue³. The aim of PPP contracts is to achieve value for money, which so far seems to be mostly accomplished in the Netherlands⁴. Other EU countries use the competitive dialogue⁵ for tendering PPP contracts as well, while some EU countries⁶ also use the 'competitive procedure with negotiation'⁷. Although there are some differences, these two procedures are largely the same⁸. For the sake of limiting this paper however, the scope of this paper will be restricted to the competitive dialogue.

Companies participating in PPP tenders throughout Europe, are familiar with the EU Procurement Directive and the competitive dialogue. Next to the EU Procurement Directives other international tender regulations exist. One being the UNCITRAL Model Law on Public Procurement, with the purpose of progressive harmonization and modernization of international trade, which Model Law is an important international benchmark in procurement law reform⁹. As PPP is used worldwide it would obviously enhance inclusive competitiveness if applicable procurement regulations could be uniform worldwide. It is therefore interesting to compare the differences between these regulations to see if they may be further harmonised and modernised by profiting from each other's drafts. The 'request to proposals with dialogue' procedure, as regulated in the UNCITRAL Model Law on Public Procurement, is largely comparable to the (EU) competitive dialogue.

The defining question of this paper therefore is **"how does the procedure 'request for proposals with dialogue' compare with the competitive dialogue and what can be learned from this comparison towards inclusive competitiveness by harmonising and modernising tender law applicable for PPP?"**

¹ Marcelle van Valkenburg LL.M, is senior legal consultant with Rijkswaterstaat, Department of Public Works of the Ministry of Infrastructure and the Environment.

Marijke Nagelkerke LL.M is also senior legal consultant with Rijkswaterstaat and a PHD student at the Delft University of Technology, researching DBFM(O)-contracts (PPP).

² Next to EU Directive 2014/24/EU (*Public Procurement*) also EU Directive 2014/23/EU (*Concession Contracts*) and 2014/25/EU (*Special Sectors*).

³ Incorporated in the Dutch Procurement Act 2012 (in Dutch: Aanbestedingswet 2012)

⁴ Paragraph 1.3 Progress Report DBFM(O) 2016-2017 (in Dutch: Voortgangsrapportage DBFM(O) 2016-2017) reports a financial value for money of 10-15%, which is up to 2016 € 1,5 billion of approximately € 13 billion.

⁵ For example the UK, France, Belgium, Denmark and Sweden.

⁶ For example Germany.

⁷ Article 29 EU Procurement Directive.

⁸ An essential difference is that in the 'competitive procedure with negotiation' candidates have to submit an initial tender which shall be the basis for the subsequent negotiations, article 29, paragraph 2 and 3 EU Procurement Directive.

⁹ *UNCITRAL Model Law on Public Procurement*, United Nations Commission on International Trade Law, United Nations, New York, January 2014, page 1.

The findings in this paper have been based on literature research, evaluations on the application of the competitive dialogue and long-term experience in tendering PPP projects and PPP policy of both authors.

Firstly in this paper the current Dutch tendering practice of PPP infrastructure projects are explained. Secondly the applicable provisions regarding the 'request to proposals with dialogue' in the UNCITRAL Model Law on Public Procurement are compared to the competitive dialogue on the subjects of grounds for use, award criteria, the procedure requirements and confidentiality. These subjects have been chosen because they comprise the core elements of the tender procedures to be compared. Finally conclusions will be drawn, including some advice for adaption of both regulations.

2. Current tendering practice in Dutch PPP projects

2.1 Introduction

In the Netherlands, the Ministry of Infrastructure and the Environment is, i.a. responsible for the national highway and waterway network. The Department of Public Works and Water Management (in Dutch: Rijkswaterstaat), is this Ministry's procurement agency and is i.a. responsible for the development and maintenance of the national road infrastructure network.

Since approximately 10 years PPP is one of the approaches of the Dutch government for public procurement of large infrastructure and housing projects. For these PPP projects DBFM(O) contracts are often used. The government has implemented PPP-contracts with the presupposition that it would be able to complete large infrastructure projects faster and more efficiently – i.a. through life cycle costing – with the use of PPP¹⁰. For a proper use of the private sector's contribution and to achieve the desired results the following principles were formulated:

- (1) formulating output based (functional) description of the contracting authority's requirements;
- (2) using an integral life cycle approach to procurement and project realisation, thus combining the consecutive stages (design, build and maintenance), corresponding disciplines (like obtaining permits, coordinating relocation of cables and pipelines, stakeholder management, IT etc.) and an integral project scope (e.g. an integral scope like a road corridor and total housing concept);
- (3) optimising or broadening the project scope and contract duration in order to obtain value for money;
- (4) transferring risks to the party best able to control them;
- (5) payment based on performance instead of products delivered;
- (6) integrating finance into the contract resulting in an actual transfer of risks for an optimal incentive for the private sector to control and reduce risks;
- (7) realising mutual cooperation;
- (8) tendering based on price/quality ratio.

2.2 Why the competitive dialogue

Rijkswaterstaat procures PPP infrastructure projects through the use of the competitive dialogue¹¹. In the competitive dialogue any economic operator may submit a request to participate in response to a notification of tender. After pre-selection, the procuring authority will establish a dialogue with the candidates selected, with the aim to identify and define the means best suited to satisfy its needs. The procuring authority may limit the number of suitable candidates. The candidates selected are invited to the dialogue. After the dialogue stage candidates will be invited to submit their best and final offer¹².

¹⁰ "Final report of the project More Value through Mutual Cooperation (Meer Waarde door Samen Werken)". (1998) Dutch government report.

¹¹ Dutch Procurement Act 2012 (in Dutch: Aanbestedingswet 2012)

¹² Article 1.1 Aanbestedingswet 2012, definition 'competitive dialogue'.

Since before 2004 the procurement strategy of Rijkswaterstaat has been subject to substantial changes. Where it used to be a large somewhat unwieldy and bureaucratic organisation, aimed at tendering bills of quantity or contracts with detailed specifications and making its own designs, Rijkswaterstaat was required to make a substantial change in its performance, size and structure. The government required Rijkswaterstaat to become cheaper, smaller and more agile and to transfer more work to the private sector. In order to change its structure and performance the policy of Rijkswaterstaat focussed on involving the market in an early stage of the project development, based on contracts with functional specifications. It was expected that through the use of functional specifications in PPP- and D&C-contracts and an early involvement of the private sector the innovative capacity and expert knowledge on e.g. contract realisation and -exploitation could be utilised. The principle of approaching the private sector without a clear-cut solution incorporated in the contract however necessitates a more tailored tender approach, for which the competitive dialogue in particular was seen as the most suitable method .

The fact that the market is approached without a clear-cut solution in mind in order to invite the private sector to devise new and smarter solutions fits the grounds for use of the competitive dialogue¹³. Use of the competitive dialogue by Rijkswaterstaat is based more specifically on the following criteria:

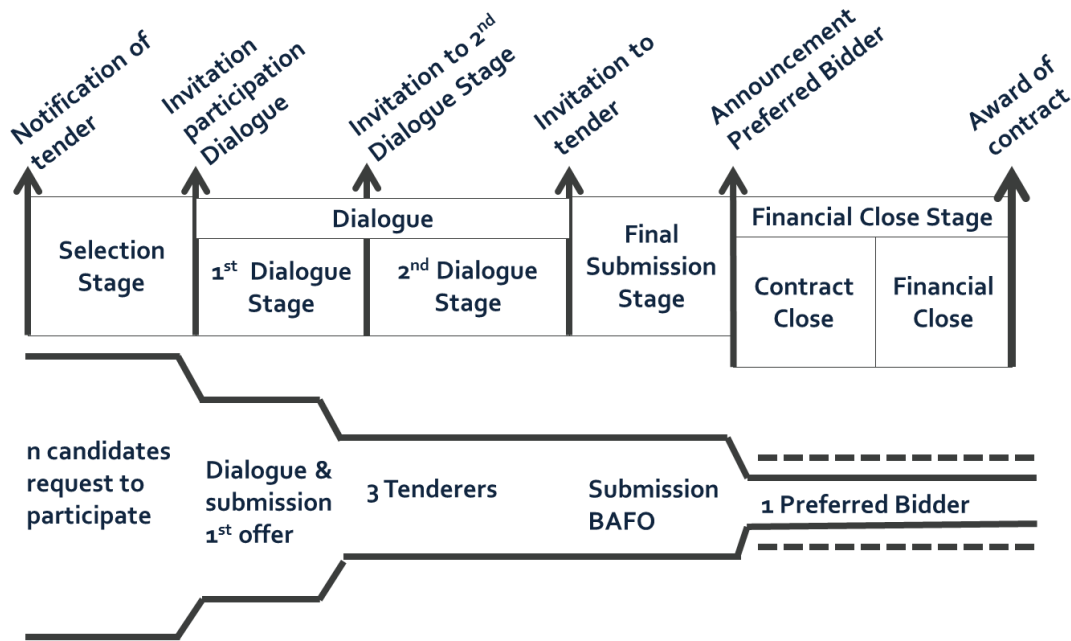
- (1) the requirements of the contracting authority cannot be met without adaptation of readily available solutions;
- (2) they include design or innovative solutions;
- (3) the contract cannot be awarded without prior negotiations; and
- (4) the technical specifications cannot be established with sufficient precision.

2.3 Overview tender process

At Rijkswaterstaat the competitive dialogue has been elaborated and optimised over the last 10 years in a 'standardised' framework procedure the size of which has been limited by stating applicability of the Dutch legislation on procurement and its guidelines, more specifically the guideline on the General Procurement Regulations for Works 2016 (Dutch abbreviation: ARW 2016). This framework has been laid down in its procurement policy for DBFM infrastructure projects, while the use of the ARW 2016 is obligatory for all government procurement authorities through the Dutch Procurement Act. The added bonus of this regular use of the ARW 2016 is that parties involved in government tenders are fully conversed on its contents, which saves time and money as the need for (legal) scrutiny of these rules is reduced.

The competitive dialogue takes place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage, as the candidates are requested to specify their proposals in the form of progressively refined proposals, as explained in the picture below.

¹³ Article 26 EU Procurement Directive.



The Competitive Dialogue Process

Industry Day

Before notification of tender the procuring authority organises a so called Industry Day to generate interest for the tender and to inform possibly interested parties of the PPP project’s scope, targets, procurement aims, etc.

Selection stage

After its notification the tender commences with the selection stage during which candidates can qualify for participation in the first stage of the dialogue. Tendering Instructions are digitally provided to interested parties. These Tendering Instructions regulate the selection and the following stages of the tender procedure. Admission to the first stage of the dialogue is based on an assessment of the grounds of exclusion and suitability requirements. These suitability requirements, aimed at ensuring sufficient competition, mostly concern:

- economic and financial standing;
- project management experience;
- project financing experience.

The procuring authority invites the candidates in respect of whom no grounds of exclusion apply and who meet the suitability requirements to participate in the dialogue. These candidates receive in addition to the digital Tendering Instructions the concept contract documents and are given access to a virtual “Data Room” on an extranet site with information about the project.

Dialogue stage

The dialogue is organised in two successive stages: the first and second dialogue stage.

In the event that more than three candidates satisfy the minimum conditions in the selection stage, the number of candidates are reduced to three by way of assessing their shortlisting products in the first dialogue stage. During the first dialogues with the procuring authority, the candidates are informed about the tender documents in general. The focus of the first dialogue stage is the project as such and the candidates’ shortlisting products which must be submitted at the end of this stage. The shortlisting products usually exist of a risk management plan in which candidates formulate measures to mitigate the risks as specified by the procuring authority and elaborate upon what in their opinion could be good (innovative) opportunities for the project. The procuring authority

invites the three candidates with the highest assessment scores for their shortlisting products to participate in the second dialogue stage.

During the second stage of the dialogue, the procuring authority completes the content of the DBFM contract in more detail in consultation with the candidates. During the dialogue the candidates can discuss the admissibility of certain proposals, as well as possible modifications of the DBFM contract¹⁴. The candidates may submit parts of their offer as a draft for discussion purposes. The objective of the second stage of the dialogue is to:

- discuss the principles of the DBFM contract and the final invitation to tender;
- give the candidates the opportunity to discuss parts of their draft offer;
- complete the DBFM contract;
- discuss the process to obtain project finance.

During this stage, no further shortlisting takes place. On the basis of the results of the dialogue, the procuring authority may revise the tender documents identically for all candidates. The procuring authority sets out the result of the dialogue in writing in a dialogue report.

Tender submission stage

After conclusion of the second dialogue stage, the procuring authority invites the candidates to submit their best and final offers. The objective of this stage is to identify the preferred bidder. The award of the project takes place based on the criterion of the most economically advantageous tender (MEAT). The award criteria are tailor-made for each PPP infrastructure project. In general the criteria concern sustainability, stakeholder management, limiting construction/traffic nuisance and risk management.

3. UNCITRAL Model Law on Public Procurement versus EU Procurement Directive

3.1 Introduction

Both the UNCITRAL Model Law on Public Procurement and the EU Procurement Directive provide (model) tender law for countries to include in their national legislation. Although the procedure 'request for proposals with dialogue' corresponds with the competitive dialogue and both tender procedures aim at achieving similar objectives, the actual texts and content of specific provisions differ. The UNCITRAL procedures 'Request for proposals with consecutive negotiations' and 'Competitive negotiations'¹⁵ also show similarities with the competitive dialogue. The comparison in this paper is however limited to the procedure 'request for proposals with dialogue' based on the fact that the 'request for proposals with consecutive negotiations' is limited to negotiations on price only, while the procedure on 'competitive negotiations' can only be used in cases of urgent need by the procurement authority¹⁶. As a result authors consider that there is a higher degree of compatibility of the procedure 'request for proposals with dialogue' with the competitive dialogue compared to the other two.

In this chapter the following subjects – which comprise the core elements of these tender procedures – are compared with regard to PPP:

1. the grounds for use of the procedure 'request for proposals with dialogue' versus the competitive dialogue;
2. requirements for the procedure 'request for proposals with dialogue' versus the competitive dialogue;
3. award criteria;
4. confidentiality.

¹⁴ Possible modifications are limited as substantial modifications are not allowed after the start of the tender.

¹⁵ Articles 50 and 51 UNCITRAL Model Law on Public Procurement.

¹⁶ Article 30, paragraph 4 UNCITRAL Model Law on Public Procurement.

Based on this comparison, some advice is formulated for adaption of both regulations to increase inclusive competitiveness by harmonising and modernising tender law.

3.2 Grounds for use of the procedure 'request for proposals with dialogue' versus the competitive dialogue

The grounds for use of the procedure 'request for proposals with dialogue' are provided in article 30, paragraph 2 (*Conditions for the use of methods of procurement [...] requests for proposals with dialogue [...]*) of the UNCITRAL Model Law on Public Procurement and the grounds for use of the competitive dialogue are stipulated in article 26 (*Choice of procedures*) of the EU Procurement Directive.

The provision regarding the grounds for use of the procedure 'request for proposals with dialogue' is to some extent similar to the grounds for use of the competitive dialogue as it stipulates the following conditions for use:

- (1) where it is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement and the procuring entity assesses that dialogue with suppliers or contractors is needed to obtain the most satisfactory solution to its procurement needs;
- (2) where the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs; and
- (3) where the procuring entity determines that the selected method is the most appropriate method of procurement for the protection of essential security interests of the State; or
- (4) open tendering was engaged in but no tenders were presented or the procurement was cancelled and engaging in new open-tendering proceedings would probably not result in a procurement contract.

The grounds for use of both tender procedures allow the procuring authorities to use these procedures for PPP projects, for which the market is approached without a clear-cut solution in mind in order to invite the private sector to devise new and innovative solutions.

With regard to the grounds for use the UNCITRAL Model Law on Public Procurement offers the possibility to apply the procedure 'request for the proposals with dialogue' for research objectives, be it with substantial restrictions on the scope of these research contracts¹⁷. The EU Procurement Directive has introduced the so called Innovation Partnership for research objectives¹⁸. On the one hand the possible scope for research contracts can be substantially extended in comparison to the stipulations in the UNCITRAL Model Law on Public Procurement, as the restrictions on establishing commercial viability and recovering research and development costs no longer apply in the EU setting¹⁹. On the other hand however the procedure applicable to Innovation Partnership is compared to the competitive dialogue less open to dialogue on possible solutions offered by the private sector as the basis of the tender for an Innovation Partnership is based on the 'competitive procedure with negotiation', which requires an initial tender which will be subject to negotiations²⁰. In order to be able to submit a viable tender the information provided by the procuring authority to the participants needs to be sufficiently precise²¹, which precision in itself limits the possible solutions – some of which may not be known to the procuring authority– offered by the private sector.

¹⁷ Article 30, paragraph 2 UNCITRAL Model Law on Public Procurement.

¹⁸ Article 31 EU Procurement Directive.

¹⁹ Article 31 EU Procurement Directive.

²⁰ Article 31, paragraph 3 EU Procurement Directive.

²¹ Article 31, paragraph 1 EU Procurement Directive.

In view of the developments within the EU Procurement Directive one could consider removing the current restrictions on the contract scope for research objectives for the UNCITRAL Model Law on Public Procurement. On the flip side, the EU Procurement Directive could leave more room for determining the possible innovative solutions available by incorporating more aspects of the competitive dialogue instead of the 'competitive procedure with negotiation'²².

3.3 Requirements for the procedure 'request for proposals with dialogue' versus the competitive dialogue

The requirements regarding the procedure 'request for proposals with dialogue' are elaborated in article 49 (*Request for proposals with dialogue*) of the UNCITRAL Model Law on Public Procurement and the requirements for the competitive dialogue are elaborated in article 30 (*Competitive dialogue*) of the EU Procurement Directive.

The first issue that comes to mind while comparing both articles is that the EU Procurement Directive provision is much more concise. The UNCITRAL Model Law on Public Procurement contains some overly detailed provisions, together with the use of some obscure language, which makes it less easy to understand. The EU Procurement Directive in comparison is more to the point. Whether or not the level of detail is necessary for provisions in law may be held to scrutiny. Some examples:

- the detailed instructions to be included in the invitation (paragraph 2) compared to paragraph 2 of the EU Procurement Directive, which is more concise;
- the pre-qualification proceedings (paragraph 3) compared to paragraph 1, third and fourth sentences, of the EU Procurement Directive, which is more concise;
- the detailed instructions to be included in the requests for proposal (paragraph 5).

In the Netherlands the EU Procurement Directives are incorporated in Dutch Procurement Act while more detailed instructions – like e.g. the detailed instructions to be included in the tender documents, invitation and requests for proposal – are incorporated in general procurement regulations for tenders, such as the ARW 2016²³. It is therefore possible to remove these detailed instructions from article 49 of the UNCITRAL Model Law on Public Procurement and incorporate these instructions into either separate general regulations or a legislative guide.

The EU Procurement Directive requires the procuring authority to set out its needs and requirements, award criteria and indicative timeframe, in either the contract notice or descriptive document²⁴. Therefore, in the tender practice of Rijkswaterstaat, Tendering Instructions including the legal, organisational and procedural information necessary for the tenderers to participate in the tender, are issued to the candidates upon their request as from the notification of tender. Within EU procurement it is deemed more transparent to provide information about the tender procedure – e.g. the award criteria, whether or not the subject matter is divided in portions, the currency for the proposal price, the number of candidates to be selected – at the very start of the tender. Article 49 of the UNCITRAL Model Law on Public Procurement requires the procuring authorities to limit inclusion of this kind of information in the request for proposals, so after the pre-qualification²⁵. For transparency purposes this article could be adapted in accordance with the transparency requirements from the EU Procurement Directive.

The procedure 'request for proposal with dialogue' is required to start with a request for proposals after pre-selection²⁶. In lieu of the room for dialogue as stipulated in the EU Procurement Directive²⁷

²² Article 29 EU Procurement Directive.

²³ General Procurement Regulations for Works 2016 (in Dutch: Aanbestedingsreglement Werken 2016 (ARW 2016)).

²⁴ Article 30, paragraph 2 EU Procurement Directive.

²⁵ Article 49, paragraph 5 UNCITRAL Model Law on Public Procurement.

²⁶ Article 49, paragraph 4 until 7 UNCITRAL Model Law on Public Procurement.

²⁷ Article 30, paragraph 4 EU Procurement Directive.

there seems to be no opportunity for a dialogue between the procuring authority and the pre-selected candidates before the (first) proposals have to be submitted.

Furthermore the procedure 'request for proposal with dialogue' is based on a more traditional approach of pre-selecting participants on the basis of their qualifications only (e.g. based on the level of past experience). This may have as a consequence that new companies and companies which would like to expand onto a new field of expertise do not really stand a chance to compete with large and or experienced companies, while these companies might have certain innovations to offer. By using the opportunity offered by the competitive dialogue to reduce the number of solutions in successive stages²⁸ parties are selected because of submitting the best solutions irrespective of the length of their experience in a specific field.

Lack of dialogue before the initial proposal may also mean that there is no opportunity to explain and discuss the needs and requirements of the procuring authority. This may leave room for misunderstandings. The procuring authority must have a clear view of its needs and requirements from the start, resulting in less room for approaching the private sector without a clear-cut solution incorporated in the contract. Some smart and/or innovative solutions may not completely fit within the initial requirements despite being attractive for the procuring authority. As there is no room for dialogue, the procuring authority will not know how to adapt unintentionally restrictive requirements. These limitations do not seem to be consistent with the following grounds for use of the procedure 'request for proposals with dialogue':

- (a) "it is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement [...], and the procuring entity assesses that dialogue with suppliers or contractors is needed to obtain the most satisfactory solution to its procurement needs;
- (b) the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs"²⁹.

The requirement to start with a request for proposals after the pre-selection is comparable to the requirement regarding the 'competitive procedure with negotiation'³⁰, where it is stipulated that candidates have to submit an initial tender which shall be the basis for the subsequent negotiations³¹. However, the 'competitive procedure with negotiation' is meant to be used for less innovative, more clear-cut projects in a mature market.

In order to solve the above mentioned inconsistencies it could be considered to adapt the provisions in the UNCITRAL Model Law on Public Procurement to allow the dialogue stage to take place in successive stages in order to reduce the number of solutions and or candidates to be discussed during the dialogue stage by applying the award criteria in accordance with article 30 of the EU Procurement Directive.

The UNCITRAL Model Law on Public Procurement requires that the "*dialogue shall be conducted by the same representatives of the procuring entity on a concurrent basis*"³². This seems to aim at maintaining a consistent make-up of the dialogue team of the procuring authority during the dialogue and by extension of the dialogue itself. This requirement however may also be unnecessarily restrictive. This kind of consistency is difficult to uphold as employees and consultants may change jobs, get ill or leave the dialogue team for other reasons. There are other measures to ensure consistency in the dialogue. In the Netherlands for example the procuring authority makes sure that the key players in the tender and dialogue team have deputies, which can step in if

²⁸ Article 30, paragraph 4 EU Procurement Directive, states: *competitive dialogues may 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 laid down in the contract notice or in the descriptive document.*

²⁹ Article 30, paragraph 2 sub (a) UNCITRAL Model Law on Public Procurement.

³⁰ Article 29 EU Procurement Directive.

³¹ Article 29, paragraph 2 and 3 EU Procurement Directive.

³² Article 49, paragraph 8 UNCITRAL Model Law on Public Procurement.

necessary. Consistency may also be upheld by allowing informal, specialist dialogue meetings - in which specific technical, legal, financial, or other subjects regarding the contract can informally be discussed between specialists of the candidates and the procuring authority - while only issues decided upon by the dialogue team can be legally binding. The details of these organisational measures are not provided for in the EU Procurement Directive. As long as the principles of the EU Procurement Directive are upheld procuring authorities have freedom to establish their own tender organisations. With this in mind, the UNCITRAL paragraph seems too restrictive and could in our opinion be removed.

The procedure 'request for proposals with dialogue' should include *"any element of the description of the subject matter of the procurement or term or condition of the procurement contract that will not be the subject of dialogue during the procedure"*³³. Moreover it is not allowed to *"modify the subject matter of the procurement"* or *"any element of the description of the subject matter of the procurement or any term or condition of the procurement contract that is not subject to the dialogue as specified in the request for proposals"*³⁴. These requirements seem to aim at restricting the dialogue, in order to make sure that no substantial modifications of the contract will take place. However these requirements may be unnecessarily restrictive. Despite a thorough preparation of the tender it may not be foreseeable that some elements need to be subject of dialogue after all, e.g. for clarification purposes. This is inherent to the principle of approaching the private sector without a clear-cut solution incorporated in the contract to give room to innovative solutions of the market parties, of which the procuring authority is as yet unaware. In comparison, the EU "substantial modification" doctrine³⁵, which is based on long term EU jurisprudence and allows modifications to a certain extent, is a sound framework for how this doctrine could be included in the UNCITRAL Model Law on Public Procurement.

Furthermore paragraph 12 of article 49 of the UNCITRAL Model Law on Public Procurement seems too restrictive for complex contracts, especially when the tender is based on involving the market in an early stage of determining the procurement authority's needs and requirements, without the aforementioned clear-cut solution. Why should the procuring entity not be able to negotiate any changes, clarifications or refinements at all in the final offer? Of course the room for manoeuvre that procuring authorities have after the submission of a final offer is fairly limited. Fundamental changes cannot be made, but in (complex) procurement – like PPP – there should be room for some final adjustments to tenders (fine-tuning). The EU Procurement Directive allows adjustments to final tenders after the dialogue stage has been concluded, provided the essential aspects of the tender are not changed and that the adjustments are not likely to distort competition or have a discriminatory effect³⁶. The argument that there already has been an entire dialogue stage prior to the tenders in which (preliminary) offers can be fully synchronized to the requirements fails to observe the economical facts. Considering the complexity of the tenders, the available time in the tender procedure and the need to limit transaction costs it is highly unlikely that tenders are fully elaborated and discussed during the dialogue. On top of that participants will want to further optimise their solutions. The procuring authority may also want to partly fine-tune its output specifications on the basis of progressive understanding. It could be considered to adapt the UNCITRAL Model Law on Public Procurement in similar fashion to allow adjustments to final tenders after the dialogue stage has been concluded, provided that the essential aspects of the tender are not changed and that the adjustments are not likely to distort competition or have a discriminatory effect.

3.4 Award Criteria

³³ Article 49, paragraph 5 sub (f) UNCITRAL Model Law on Public Procurement.

³⁴ Article 49, paragraph 9 UNCITRAL Model Law on Public Procurement.

³⁵ Article 72, paragraph 4 sub (a) EU Procurement Directive.

³⁶ Article 30, paragraph 6 EU Procurement Directive.

The award criteria for tenders are elaborated in article 11 of the UNCITRAL Model Law on Public Procurement and article 67 of the EU Procurement Directive.

Both regulations give room for tailor made elaboration of award criteria relating to either just price or (life cycle) costs or the best price-quality ratio, which is called the most economically advantageous tender (MEAT) in the EU Procurement Directive. Both regulations give examples of possible award criteria and require that the criteria are linked to the subject matter of the contract. However, the examples given in the EU Procurement Directive are somewhat broader than the examples given in the UNCITRAL Model Law on Public Procurement, for example those with regard to the “*social aspects*” and “*quality*”.

On the other hand however, the UNCITRAL Model Law on Public Procurement leaves more room for listing all evaluation criteria in descending order of importance, instead of specifying the relative weights of the criteria. In comparison the EU Procurement Directive only allows this if weighting is not possible for objective reasons. For simplification’s sake it could seem attractive to adapt the EU Procurement Directive in order to suffice with listing the evaluation criteria in descending order of importance. Whether this would lead to improved tender results however is up for debate. Before deciding on such a simplification it would therefore be advisable to research the tender results from the use of both methods.

The UNCITRAL Model Law on Public Procurement provides a practical guideline with “*to the extent practicable, all non-price evaluation criteria shall be objective, quantifiable and expressed in monetary terms*³⁷”. This guideline could be a very useful tool for the EU Procurement Directive as well.

The UNCITRAL Model Law on Public Procurement allows the procuring authority “*a margin of preference for the benefit of domestic suppliers or contractors or for domestically produced goods, or any other preference, if authorized or required by the procurement regulations or other provisions of law of this State*³⁸”. This preferential treatment for domestic suppliers or contractors is not allowed according to the stipulations of the EU Procurement Directive, because it is deemed to conflict with the non-discriminatory principle. The non-discriminatory principle is firmly based on the EU Treaty, which has realising an open internal EU-market as one of its founding principles³⁹. Furthermore it is unclear in the UNCITRAL Model Law on Public Procurement which procurement regulations are meant with the provision stating “*the margin of preference shall be calculated in accordance with the procurement regulations*”. As preferential treatment of domestic suppliers or contractors is an anathema to one of the founding principles of the Treaty on the EU and the Treaty on the Functioning of the EU, for harmonisation purposes it could be considered to remove said provision in the UNCITRAL Model Law on Public Procurement.

3.5 Confidentiality

Confidentiality of information communicated by candidates who participate in a tender is elaborated in article 24 of the UNCITRAL Model Law on Public Procurement and articles 21 and article 30, paragraph 3, of the EU Procurement Directive.

Both regulations provide which information supplied by the candidates participating in a tender, and more specifically, during the dialogues, has to be considered confidential. However, the UNCITRAL Model Law on Public Procurement seems unnecessary restrictive, as it states: “*Any discussions, communications, negotiations or dialogue between the procuring entity and a supplier or contractor [...]*”

³⁷ Article 11, paragraph 4 UNCITRAL Model Law on Public Procurement.

³⁸ Article 11, paragraph 3 sub (b) UNCITRAL Model Law on Public Procurement.

³⁹ Article 3, paragraph 3 Treaty on the EU and article 18 Treaty on the Functioning of the EU.

shall be confidential. Unless required by law or ordered by the [name of the court or courts] or the [name of the relevant organ designated by the enacting State], no party to any such discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogue without the consent of the other party⁴⁰. While it makes sense to make an exception when disclosure of information is required by national law or court, it seems too restricting to order all communication during the dialogues as confidential. Namely, it is possible that subjects discussed during the dialogue are not confidential. Some information the procuring authority may even be obliged to share with the other candidates, to ensure equality of treatment among all candidates. An example may be that information provided by one of the candidates concerns an error in the contract or tender document of which the procuring authority must inform the other candidates. Of course confidential information about the solutions planned or proposed by the candidate or other commercially sensitive information has to be kept confidential, but a general clause that all communication during the dialogue is confidential can be too restrictive. In this case the wording of the EU Procurement Directive seems more balanced: *“the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders⁴¹”*. There is the possibility within the EU Procurement Directive to agree upon disclosure of confidential information, however this agreement may not take the form of a general waiver⁴². This means that information that is not confidential, like information that does not concern solutions, technical or trade secrets, confidential aspects of tenders or other confidential information, does not have to be kept confidential. In this light it could be considered to adapt the UNCITRAL provision accordingly.

4. Conclusions

In the Netherlands the national Procurement Act is based on the EU Procurement Directives⁴³. The EU Procurement Directives correspond with the General Agreement on Tariffs and Trade (GATT) of the World Trade Organisation (WTO). The UNCITRAL Model Law on Public Procurement on the other hand does not completely correspond with both the EU Procurement Directives or the GATT. Use of language, definitions, (names of) tender procedures, etc. are different. However, although the distinctive regulations have similar objectives aimed at achieving fair competition, transparency and equality, legislative harmonisation is not complete. We therefore advise to update the Model Law and align it with both the EU Procurement Directives and the GATT. Updating the Model Law could also be used to obtain a regulation more easily understood. In addition it could result in actual legislative harmonisation by a large part of the international community as the EU Procurement Directives are already in use and known to a large part of the private sector. Companies participating in PPP tenders throughout Europe, are familiar with the EU Procurement Directive and the competitive dialogue. As PPP is used worldwide it would obviously enhance inclusive competitiveness if procurement regulations could be uniform worldwide.

In the previous chapter several examples have been illustrated of specific provisions of the UNCITRAL Model Law on Public Procurement and the EU Procurement Directive which could be harmonised and even modernised. In our view, these examples show that both regulations can profit

⁴⁰ Article 24, paragraph 3 UNCITRAL Model Law on Public Procurement.

⁴¹ Article 21, paragraph 1 EU Procurement Directive.

⁴² Article 30, paragraph 3 EU Procurement Directive, states: contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer participating in the dialogue without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

⁴³ EU Directive 2014/24/EU (*Public Procurement*) also EU Directive 2014/23/EU (*Concession Contracts*) and 2014/25/EU (*Special Sectors*).

from each other's drafts. We therefore also advise to compare the remainder of the regulations of the UNCITRAL Model Law on Public Procurement with the EU Procurement Directives. The resulting harmonisation and modernisation could further enhance worldwide inclusive competitiveness in public procurement.

In order to obtain regulations more easily understood the more detailed instructions incorporated in the UNCITRAL Model Law on Public Procurement could be removed from the Model Law itself and included in general regulations and (legislative) guidelines for tenders, like this has been done in the Netherlands⁴⁴. Uniform procurement regulations available for each tender procedure can also promote efficiency in preparing and conducting (individual) tenders as procurement agencies could suffice with simply declaring these regulations applicable to a specific tender procedure. Especially when these procurement regulations are drafted in a way so that they can be used irrespective of the applicable national laws, or with very little adjustments, it would make life a lot easier for many procurement authorities.

Finally, the UNCITRAL Model Law on Public Procurement uses somewhat obscure language which makes it difficult for people – not being proficient in English – to quickly and easily grasp the essence and finesse of the UNCITRAL Model Law on Public Procurement. This difficulty is somewhat less of a problem with the EU Procurement Directive. Should the UNCITRAL Model Law on Public Procurement be updated simplification of the language used should also be given attention.

⁴⁴ General Procurement Regulations for Works 2016 (in Dutch: Aanbestedingsreglement Werken 2016 (ARW 2016)).