The Competitive Dialogue Procedure: Advantages, Disadvantages, and its Implementation into English and Dutch Law


Abstract
Competitive Dialogue (CD) is a new contract award procedure of the European Community (EC). It is set out in Article 29 of the 'Public Sector Directive' 2004/18/EC. Over the last decades, projects were becoming more and more complex, and the existing EC procedures were no longer suitable to procure those projects. The call for a new procedure resulted in CD. This paper describes how the Directive has been implemented into the laws of two member states: the UK and the Netherlands. In order to implement the Directive, both lawmakers have set up a new and distinct piece of legislation. In each case, large parts of the Directive’s content have been repeated ‘word for word’; only minor parts have been reworded and/or restructured. In the next part of the paper, the CD procedure is examined in different respects. First, an overview is given on the different EC contract award procedures (open, restricted, negotiated, CD) and awarding methods (lowest price and Most Economically Advantageous Tender, MEAT). Second, the applicability of CD is described: Among other limitations, CD can only be applied to public contracts for works, supplies, and services, and this scope of application is further restricted by the exclusion of certain contract types. One such exclusion concerns services concessions. This means that PPP contracts which are set up as services concessions cannot be awarded by CD. The last two parts of the paper pertain to the main features of the CD procedure – from ‘contract notice’ to ‘contract award’ – and the advantages and disadvantages of the procedure. One advantage is that the dialogue allows the complexity of the project to be disentangled and clarified. Other advantages are the stimulation of innovation and creativity. These advantages are set against the procedure’s disadvantages, which include high transaction costs and a perceived hindrance of innovation (due to an ambiguity between transparency and fair competition). It is concluded that all advantages and disadvantages are related to one of three elements: communication, competition, and/or structure of the procedure. Further research is needed to find out how these elements are related.

Keywords: Public procurement, Directive 2004/18/EC, Competitive Dialogue, English procurement law, Dutch procurement law.