

Procurement procedures under the Private Finance Initiative

the operation of the new legal framework

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Abstract

The PhD research is concerned with how EU procurement regulation impacts upon the procurement process for Public-Private Partnership (PPP) projects. The process followed to award the contract and to set the terms of the agreement in the procurement of a PPP project (invariably highly sophisticated arrangements) is crucial for value for money. Prior to 2004 the process was regulated by EU legislation designed in the 1970s, which failed to adequately cater for modern procurement methods, like PPPs. Thus new legislation in 2004 introduced a new procedure for these projects: competitive dialogue. However, commentators have identified possible problems with competitive dialogue and there are numerous legal grey areas.

The research examines the way in which the new legal framework for competitive dialogue is applied to PPPs in the UK, and actors' perceptions of the framework. It seeks to identify perceived positive aspects of competitive dialogue in facilitating best practice; perceived problems, including any legal uncertainty and constraints on best practice; strategies to conduct the process within the constraints; and the factors that influence compliance and approach to legal risk.

The research adopts a socio-legal approach, combining analysis of the legal rules, with a study of the literature on theories of regulation and enforcement, and qualitative interviews with legal advisors, procurement officers, and policymakers.

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1 Introduction

1.1 Context of the research

The PhD thesis examines the application in the UK of EU public procurement rules to Public-Private Partnerships (PPP), notably Privately Financed Infrastructure (PFI) projects.

For the purposes of the thesis, the term “public procurement” refers to the process by which the public sector (e.g. central and local government) acquires the goods, works and services it needs. In view of its economic importance, national bias in the award of public contracts is recognised as a potential barrier to intra-EU trade; the EU therefore regulates public procurement to open markets to EU wide competition. This is primarily done by requiring procuring authorities to follow set procedures that are based on principles of transparency and fairness.

PPPs are often highly sophisticated arrangements, and the process, to select the winning private sector consortium and set the terms of the agreement, is crucial if value for money is to be achieved. Competitive dialogue was introduced in 2004 (Public Sector Directive 2004/18/EC)¹ to provide an award procedure tailored to the needs of complex procurement, such as complex PPP projects. Prior to this, contracts needed to be awarded in accordance with procedures designed in the 1970s, which are intended for more straightforward contracts.

The design of competitive dialogue was heavily influenced by UK procurement practice.

However, although closely mirroring what many regard to be best practice for the

¹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (*Official Journal L 134/114*, 30/04/2004)

procurement of complex PPP contracts, the legal rules are characterised by a high degree of uncertainty, such that the extent to which past practice in the UK may continue under competitive dialogue is not clear. Indeed, in certain key areas, such as the scope for negotiations permitted following the identification of the winning tender, these uncertain legal rules have the potential to impact heavily upon UK practice.

1.2 Aims and objectives

The research project aims to examine the way in which the legal framework for competitive dialogue is applied to PPP projects in the UK, and perceptions of that framework. The project will identify: perceived positive aspects of the framework in facilitating best practice; perceived problems, including any legal uncertainty and constraints on best practice; strategies to conduct the process within the constraints; and the factors that influence compliance and approach to legal risk.

The project has two main objectives. The first is to provide information that will assist in policymaking on PPP procurement procedures at both EU and national level. The way in which the law is applied in practice, particularly where there is legal uncertainty, often has an impact on the “law”. Thus, the project, by identifying how competitive dialogue is being used in the UK and the commercially sensible interpretations that practitioners are adopting in areas of legal uncertainty, may be relevant for: (i) Developing official guidance on the procedure. Current guidance at both national and EU level fails to address many issues, including legal grey areas. The research will inform future guidance. (ii) Developing a sound legal framework through judicial interpretation. (iii) Future legislation. (iv) Informing individual procuring public authorities applying the rules. Since the introduction of competitive dialogue, the UK has been one of the heaviest users of the procedure; this, coupled with the fact that UK PPP experience is often used as a model by other countries, means that the UK experience with competitive dialogue is of

broad interest. By providing information on influences on compliance the research could also inform the EU's regulatory policy on procurement more generally.

The second objective is to enhance understanding of the way in which regulated persons respond to legal rules that conflict with their legitimate needs, and to uncertainties in the law, and the factors that influence this response. In this respect, the project enhances understanding of EU law as a socio-political/economic phenomenon as well as a legal one and will inform broader discourse on regulation and regulatory strategy.

1.3 Method and methodology

In order to effectively meet the aims and objectives set out in section two, the research project, adopting a socio-legal perspective on regulation, combined an analysis of the EU rules on competitive dialogue (including UK implementation) with an empirical study of the law in action.

The research began with an analysis of the legal framework on competitive dialogue, i.e. it sought to establish the law on paper. In many areas it is not possible to say conclusively what the law is, and the research sought to highlight these legal grey areas. In addition to EU and UK legal texts, this stage of the research involved analysis of soft law (i.e. non-binding guidance issued by policymakers), which past research suggests is influential in shaping UK procurement practice. This stage of the research also involved a review of socio-legal literature on regulatory compliance.

The next stage of the research project was an exploration of the practical application of competitive dialogue. The legal analysis was followed by a qualitative empirical study. In order to learn about the impact of the legal rules in practice, the author conducted a series

of semi-structured interviews with individuals involved in the practical application of the legal rules on competitive dialogue.

1.4 Outline of the study

1.4.1 Introduction

This section will now provide an outline of the PhD thesis, introducing the main contents of the forthcoming chapters in turn.

1.4.2 The EU regulation of Public-Private Partnership procurement

The research examines the impact of EU rules on UK PPP procurement. The law is fast moving and can only be said to be accurate as of 01 October 2011.

As PPP is a broad term used to describe various different arrangements between the public and private sector, chapter two of the thesis will serve to provide a picture of the general landscape of PPP procurement in the UK. In this chapter different types of PPP arrangement will be introduced: namely, contracting out, PFI (including concessions), institutionalised PPP, and land development agreements. In view of its practical significance, the chapter will pay particular attention to the development of PFI in the UK, describing the main capital investment schemes that were operational at the time the research was carried out and the qualitative interviews undertaken (such as Building Schools for the Future and the National Health Service Local Improvement Finance Trust schemes). The chapter will also detail relevant past and present policymaking organisations with oversight responsibilities for PPP procurement in the UK (e.g. the Office of Government Commerce, Infrastructure UK and Partnerships for Schools).

Building upon chapter two, subsequent chapters will describe and analyse the law to which PPP procurement is subject. The EU regulates public procurement at two levels.

Chapter three will discuss the first level of regulation: the general rules and principles of the EU Treaties. The chapter will discuss the articles of the Treaty on the Functioning of the EU (TFEU) most relevant to public procurement and also general principles, such as transparency and equal treatment, which the Court of Justice of the EU (CJEU) has held to impose positive obligations on the public sector in procurement.

The second level of EU procurement regulation is in the form of EU harmonising directives. Chapter four will discuss the requirements of the Public Sector Directive 2004,² which were transposed into UK law by the Public Contracts Regulations 2006³ and the Public Contracts (Scotland) Regulations 2006.⁴ This will include, inter alia, an explanation of the scope of the Directive; the advertising requirement; the requirement for technical specifications; the different procedures available; applicable time limits; the rules on qualification and selection; and the rules on contract award.

The second part of chapter four will set out the enforcement system for breach of the procurement rules. A challenge against a procurement rule breach may come from the Commission (under Art.258 TFEU) or from the market (i.e. aggrieved bidders). The market is seen as the primary means of enforcement; thus, the system of review and remedies for procurement law breach are also regulated under the Public Sector Remedies Directive 89/665/EC.⁵ The chapter will consider the requirements of the Remedies Directive, which was recently updated and strengthened by Directive 2007/66/EC,⁶ and the UK implementation of the Remedies Directive. It will be seen that, although in the past it was rare for procurement challenges to reach the courts in the UK, in recent years

² Directive 2004/18/EC, fn.1

³ Public Contracts Regulations (SI 2006, No.5) (31/01/2006)

⁴ Public Contracts (Scotland) Regulations (SSI 2006, No.1) (31/01/2006)

⁵ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (*Official Journal L 395/33, 30/12/1989*)

⁶ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (*Official Journal L 335/31, 20/12/2007*)

the number of procurement disputes being heard by UK courts has steadily risen. The research was therefore undertaken at a time when conditions were ideal for the research interviews to provide a telling insight into regulatory compliance and the deterrent effect of legal challenge on rule breaking, particularly in the context public sector organisations (rather than private corporations which are the usual focus of the compliance literature). These theories on regulatory compliance will be elaborated upon in chapter 9 (see below).

1.4.3 The legal rules on competitive dialogue

As will be explained, many UK PPP projects will be procured using the competitive dialogue procedure. Chapters five-seven will provide an in depth analysis of the legal rules on competitive dialogue. Chapter five will consider the background to competitive dialogue, looking in particular at the reasons why in 2004 a new procurement procedure was introduced. Chapters six and seven will explore in detail the legal rules on competitive dialogue, highlighting legal grey areas.

Chapter six will analyse the grounds for using competitive dialogue. Competitive dialogue can only be used in the case of “particularly complex contracts”; however, there is considerable uncertainty surrounding this phrase and thus the scope of application of competitive dialogue. The chapter will look at important legal grey areas such as whether competitive dialogue is to be seen as a standard procedure or an exceptional procedure that derogates from fundamental principles; the discretion individual procuring authorities have to choose to procure under competitive dialogue; and the scope of technical complexity and legal/financial complexity. In view of the fact that prior to competitive dialogue complex PPPs were commonly procured under the negotiated procedure in the UK, the chapter will also consider the legal availability of the negotiated procedure, the wording of the grounds for which were not varied by the Directive.

The analysis of the procedural rules is presented in chapter seven, which will discuss them in the same order as they are likely to be applied in practice, i.e. contract notice through to the close of the dialogue stage and then on to contract close. In addition to the binding law, chapter seven will draw upon relevant non-binding advice and guidance issued by policymakers, which past research suggests plays an important role in shaping UK procurement practice and steering UK procuring authorities towards particular legal interpretations. It will be seen that the dialogue stage of competitive dialogue presents a number of important legal grey areas, for example the use of final award criteria to reduce bidder numbers during dialogue on the basis of incomplete bidder proposals.

A key legal change brought about by the introduction of competitive dialogue is that a winning bidder must be identified following a final tender stage involving tenders containing “all elements required and necessary for performance of the project”. After this there are strict limits placed upon any further work that may be undertaken with the winning bidder. A narrow application of these legal provisions would on the face of it require quite striking changes to UK practice. However, it will be seen that as with other areas of competitive dialogue, the extent to which final tenders must be fully developed before identification of the winning tender and the limited scope for working with the winning tenderer is not clear.

1.4.4 Compliance with regulation

Having considered the legal rules applicable to complex PPP procurement, in order to fully understand procuring authority decision making chapter eight will consider the literature on the factors that impact upon compliance with legal rules. The chapter will begin by discussing the potential relevance of economic theories on compliance to the public procurement rules. In theory, according to these economic models, compliance becomes more likely where the risk of legal challenge and/or the severity of the

punishment as a result of successful legal challenge are increased. The chapter will also consider the shortcomings of these economic explanations along with other potential reasons for non-compliance, such as unintentional non-compliance caused, for example, by the complexity or ambiguity of legal rules.

1.4.5 Competitive dialogue in practice

Chapter 9 will present in detail the research methodology and method adopted for the empirical study (see section three above). The analysis of the EU rules on competitive dialogue identified and explored a number of legal grey areas. By going out into the field of study, the author was able to learn about the views and experiences of those applying the legal rules on the ground, and thus gain a more accurate picture of PPP procurement practice in the UK than would have otherwise been the case.

The interview findings on the availability of competitive dialogue will be presented in chapter 10. It will be seen that competitive dialogue is used heavily in the UK (in comparison to other EU Member States, such as Germany), and as to be expected from these general usage figures, the vast majority of interviewees favoured a flexible interpretation of the grounds for its use. Interestingly and in addition to the pre-identified legal grey areas, the interview data reveals that, rather than the decision on choice of procedure being based solely on an analysis of the wording of the legal text, the practical reality of decision-making at this stage entails a consideration of various factors other than the binding law, such as a consideration of legal risk and statements in government guidance.

Chapter 11 will set out the research findings on the first half of the competitive dialogue procedure, looking at pre-procurement legal issues; issues surrounding the drawing up of the OJEU notice; qualification and selection issues; equal treatment and confidentiality

issues; and the conduct of dialogue. It will be seen that prior to the close of dialogue UK practice under competitive dialogue very much resembles what many would recognise as past practice under the negotiated procedure.

Chapter 12 will present the research findings in relation to the second half of the procedure, i.e. close of dialogue to contract signature. Here, at this key stage in the procedure the interview data reflects the uncertainty of the law and the difficult balance procuring authorities must seek to strike between sometimes competing procurement objectives, e.g. legal compliance, cost minimisation, and value for money. In addition to the interpretation and operation of the legal rules, the interview findings provide an insight into the many different pressures procuring authorities are under and the factors impacting upon decision making at this crucial stage.

1.4.6 Research findings on regulatory compliance

The findings in relation to regulatory compliance will be discussed in chapter 14.

Interview findings on perceptions of legal risk and the impact of legal risk on procuring authority decision making will be presented. In addition to economic theories of compliance, interview findings touching upon the role of soft law and other reasons behind legally risky/non-compliant behaviour will be considered, such as public sector proficiency in applying the rules.

1.5 Concluding remarks

The final chapter will draw all of the main findings of the research together. It will be seen that, despite the UK's considerable experience, the legal rules and practical operation of competitive dialogue remain highly uncertain. In many cases it is evident that practitioners are seeking to interpret the legal rules in a commercially sensible, flexible manner in line with the complex projects for which competitive dialogue is intended.

Nevertheless, a perceived increase in levels of legal risk at key stages in competitive dialogue procedures, such as the stages following the close of dialogue when bidders have invested substantial resources, has led some to adopt or move towards increasingly narrow interpretations of the law, which are sometimes perceived to stand in the way of efficiency and value for money objectives.

2 Public-Private Partnerships in the United Kingdom

2.1 Introduction

The use of PPPs as a means of delivering public services and infrastructure is burgeoning in popularity throughout the world and the UK experience is at the forefront of this phenomenon.⁷ In view of this increasing importance, it is essential that the EU rules allow for the effective procurement of PPP projects.

The research examines UK procurement practice under competitive dialogue, which was designed specifically to meet the needs of complex PPP contracts. There is no universally recognised definition of PPP; however, for the purposes of the research a useful definition is provided by the Commission on Public-Private Partnerships: “[PPP is] a risk-sharing relationship between the public and private sectors based upon a shared aspiration to bring about a desired public policy outcome”.⁸ In the UK, common forms of PPP arrangement include:

- contracting out;
- Privately Financed Infrastructure (PFI) (including concessions);
- Institutionalised PPPs (IPPPs); and
- development agreements.

Chapter two will introduce the above types of PPP in turn. It will be seen that some are inherently more complex than others and so have a stronger connection with competitive

⁷ See CD.Tvarnø (ed.), *Public-private partnerships: an international analysis – from a legal and economic perspective* (2010) available at www.unpcdc.org/media/142722/ppp%20book%5B1%5D.pdf (accessed 31/10/2011); Allen & Overy, *Global guide to public-private partnerships* (2010, London); CBI, *Going global: the world of public private partnerships* (2007, London); Broadbent & Laughlin, “Public private partnerships: an introduction” (2003) 16(3) *Accounting, Auditing & Accountability Journal* 332

⁸ Commission on Public-Private Partnerships, *Building better partnerships: the final report of the Commission on Public Private Partnerships* (2002, London, Institute for Public Policy Research), 40

dialogue, which, as will be seen in chapter six, can only be used to procure contracts that are “particularly complex”. A particular focus will be placed upon PFI, as such procurement is highly sophisticated and complex.

Chapter two will serve only to describe PPP procurement in the UK; there will be no comprehensive discussion of public procurement law. This will be left to subsequent chapters.

2.2 Contracting out

Contracting out (outsourcing) is essentially where the public sector farms out services, which would otherwise have been carried out in-house by civil servants, to the private sector or other third parties.⁹ These services are commonly support functions, e.g. cleaning of public buildings, maintenance, printing and publishing of government documents, and the provision of professional advice on matters such as law, information technology and management. It is, however, increasingly common in the UK for the actual delivery of public services to be entrusted to private companies.¹⁰ For example, it is reported that outsourcing has extended to a wide range of public services, including refuse collection, school catering, public transport, social services, prison services and school management.¹¹

⁹ See Domberger & Jenson, “Contracting out by the public sector: theory, evidence, prospects”, (1997) Vol.13 (No.4) *Oxford Review of Economic Policy* 67; and Sutcliffe, “Contracting out public services: UK policy v EC law”, (1995) *Anglo American Law Review* 337

¹⁰ P.Badcoe, “Public private partnerships in local government: the legal, financial and policy framework” (1999) 8 PPLR 279, 282

¹¹ Freeman & Minow, *Government by contract: outsourcing and American democracy* (2009, Cambridge, Mass, Harvard University) cited in S.Arrowsmith, *Public procurement regulation: an introduction* (2010) available at www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf (accessed 31/10/2011), 3

2.3 The Privately Financed Infrastructure

2.3.1 Introduction

Under PFI, rather than a public authority procuring a supplier to construct infrastructure and then making separate arrangements for on-going maintenance and operation, a private sector partner will finance the build and then charge for providing associated services (e.g. facilities management services) over a long contractual duration (typically 15–30 years).¹² A typical model for such contracts is the Design-Build-Finance-Operate (DBFO) model; other models include the Build-Operate-Transfer (BOT) model and the Build-Own-Operate (BOO) model. In order to bid for and carry out a PFI contract, it is usual for the private partner, a consortium of private sector suppliers (e.g. construction firms and firms responsible for facilities management), to take the form of a special purpose vehicle, a distinct legal entity set-up with the sole purpose of delivering the project.

Under a PFI contract the private partner will receive its income in one of three ways: from the public authority directly, from third party users of the infrastructure or services, or through a mixture of public sector subsidies and charges imposed on third party users. In cases where the income is derived from third party users, the PFI contract may be classified as a concession. The key element of a concession is that the private partner is remunerated for financing the construction of infrastructure or the establishment of services by being given the right to exploit the infrastructure or services. A typical example of a concession is where a contractor constructs a road and is paid for that construction through tolls collected from road users. As will be seen in chapter four, the

¹² See P.Badcoe (ed.), *Public private partnerships and PFI* (2010, London, Sweet & Maxwell); and de Lemon et al., "From concessions to project finance and the private finance initiative" (2000) *Journal of Project Finance* 19

classification of a contract as a concession is important for the purpose of legal regulation of the procurement process.

2.3.2 Reasons for PFI

2.3.2.1 The macroeconomic argument

The conventional procurement of a capital asset will involve the public sector providing finance for the project at the outset. Here, the capital spending has a one off impact on the public accounts when the investment occurs. This is not necessarily the case under the accounting rules for PFI where it has been possible for certain PFI projects to be structured so that they do not count as capital spending for the year in which the investment is made. A common macroeconomic argument behind PFI is that private finance can allow for greater investment by funding projects that would not have gone ahead because of insufficient public funds.¹³

Off balance sheet PFI can be politically very attractive: it enables the public sector to meet demands for improved public services, whilst keeping to economic targets.¹⁴ However, it makes little long term economic sense to pursue private financing for capital projects just because the project would otherwise be unaffordable (i.e. with no expected efficiency savings or enhanced value for money), for instance, because private sector borrowing is more expensive than government borrowing. PFI is only economically sensible where, on a case by case basis, it can be demonstrated that the greater efficiencies generated by private finance outweigh additional costs.

¹³ M.Spackman, "Public-private partnerships: lessons from the British approach" (2002) 26 *Economic Systems* 283, 288; T.Valila, "How expensive are cost savings? On the economics of public-private partnerships" (2005) 10(1) *European Investment Bank Papers* 94

¹⁴ House of Common Treasury Select Committee, *Report: private finance initiative*, (2011) available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/1146/114602.htm> (accessed 01/10/2011); M.Finders, "The politics of public-private partnerships"(2005) 7(2) *British Journal of Politics and International Relations* 543

The UK government public position is that PFI should only be used over traditional methods where it offers best value; nevertheless, a common criticism of PFI in the UK is that it has been used in cases where it is not appropriate.¹⁵ The accounting treatment of PFI is beyond the scope of this thesis; however the change from UK GAAP (risk transfer test) to International Financial Reporting Standards (control test) (2009-2010) now means that much PFI debt will be brought onto departmental accounts (though, not the national accounts).¹⁶ Also, HM Treasury recently in 2010 announced a change to the PFI credits system, which may deter the inappropriate use of PFI. The change means that the investment decision is to be made before the decision over funding arrangements.¹⁷

2.3.2.2 The microeconomic argument

In the right circumstances PFI can provide enhanced value for money and efficiency savings in comparison to conventional procurement. Under the UK's private finance initiative (see below) value for money, "the optimum combination of whole life cost and quality (or fitness for purpose) to meet the user's requirement",¹⁸ is assessed on a case by case basis by reference to a public sector comparator. A public sector comparator is a cost and risk estimate of a conventionally financed project delivering the same outputs as those of an intended PFI project, and is used as a comparison to a proposed PFI project in order to demonstrate value for money. The calculations involved are highly complex, depending upon many future unknowns and assumptions. The figures are therefore easily manipulated and there can be pressure to do so if comparisons are made when in reality funding constraints mean there is no conventional public sector alternative.¹⁹

¹⁵ See for instance J.Quiggin, "Risk, PPPs and the public sector comparator" (2004) 14(2) *Australian Society of Certified Practising Accountants* 51; P.Robinson, "The private finance initiative: the real story" (2000) 10 *Consumer Policy Review* 82

¹⁶ Heald & Georgiou, "The substance of accounting for public-private partnerships" (2011) 27(2) *Financial Accountability & Management* 217

¹⁷ HM Treasury, *Public-private partnerships – technical update number 2010*, (2010, London)

¹⁸ www.nao.org.uk/sectors/third_sector/successful_commissioning/successful_commissioning/glossary.aspx#V (accessed 31/10/2011)

¹⁹ House of Lords Economic Affairs Committee, *Private finance projects and off-balance sheet debt*, (2010, 1st Report of Session 2009–10); D.Heald, "Value for money tests and accounting treatment in PFI schemes" (2003) 16 *Accounting, Auditing & Accountability Journal* 342

There are a number of potential drivers of value for money under PFI.²⁰ The primary driver is risk transfer; that is to say, the transfer of risk (e.g. construction risks) to the party best placed to shoulder and manage those risks. This is said to incentivise the supply of cost effective and high quality services delivered on time. There are, however, question marks over whether risks are truly transferred under PFI (the government cannot allow essential public services to fail), and, where risk is transferred that is better managed by the public sector, the private sector will demand premium payments to take on this risk.

In addition to risk transfer, many other microeconomic benefits of the PFI approach have been put forward, mainly related to efficiency savings flowing from the private sector's profit maximisation goal. For instance, according to HM Treasury, "compared to the private sector ... the public sector can be less equipped to challenge inefficiency and out-dated working practices, and to develop imaginative approaches to delivering public services and managing state-owned assets".²¹

2.3.3 The development of PFI in the UK²²

2.3.3.1 The Conservative Government (1990-1997)

The private finance initiative was launched in 1992 with the aim of increasing the role of the private sector in the provision of public services, replacing the Ryrie Rules which had previously governed the UK approach to PFI (1981–1989). Following a slow start, a Private Finance Panel was established to oversee implementation of the private finance initiative, and a further boost was provided by the adoption of a "universal testing rule". According to this rule, HM Treasury would not approve an investment project unless private finance options had been fully explored.

²⁰ Arthur Anderson and Enterprise LSE, *Value for money drivers in the private finance initiative*, (2000); PricewaterhouseCoopers, *The value of PFI: hanging in the balance sheet?* (2008, Public Sector Research Centre); Iossa & Martimort, *The simple micro-economics of public-private partnerships* (2009, Brunel University)

²¹ HM Treasury, *Public-private partnerships: the government's approach*, (2000, London), 11

²² See G.Allen, *Private finance initiative*, (2001, House of Common Research Paper 01/117); M.Sawyer, "The private finance initiative: the UK experience" (2005) *Procurement and Financing of Motorways in Europe* 231

In 1996, the Public Private Partnerships Programme (4Ps) was set up in England and Wales to encourage the growth of PPPs, particularly PFI, in local government. The organisation 4Ps was in 2009 absorbed into a new joint venture between the Local Government Organisation and Partnerships UK (see below) called Local Partnerships. Local Partnerships has been highly active in the area PFI procurement practice, publishing guidance on procurement procedures and standardised documentation.²³ These documents will be drawn upon in the discussion of the legal rules on competitive dialogue.

2.3.3.2 The Labour Government (1997-2001, 2001-2005 and 2005-2010)

The Labour Government came to power in 1997 determined to invest in public infrastructure and services. The private finance initiative (rebranded under Labour as Public-Private Partnerships) would “become a cornerstone for the Government’s modernisation programme of public services”.²⁴ Over the course of the Labour Government, the private finance initiative was expanded into new areas and government publications consistently reaffirmed the commitment to PFI.²⁵

Within a week of Labour taking office, universal testing was abandoned with immediate effect. A review of the private finance initiative was also conducted, with the first Bates report (1997) making 29 streamlining and improvement recommendations. As a consequence, the Treasury Taskforce was created, replacing the Private Finance Panel. The Taskforce, created within HM Treasury, consisted of a policy arm, staffed by public sector employees, and a projects arm, staffed by individuals from the private sector. Through the Taskforce the Government published policy and guidance documents on

²³ See www.localpartnerships.org.uk/ (accessed 31/10/2011)

²⁴ HM Treasury (2000), fn.21, 4

²⁵ See for example HM Treasury, *Infrastructure procurement: delivering long-term value* (2008); HM Treasury, *PFI: strengthening long-term values* (2006); HM Treasury, *PFI: meeting the investment challenge* (2003); and HM Treasury (2000), fn.21

PFI procurement. In addition, in 1999 the Taskforce published the Standardisation of PFI Contracts (SoPC) on standardising and understanding PFI contractual terms. The latest version of the document (version four) was published in March 2007 (SoPC4).²⁶

The second Bates Report, published in July 1999, concluded that centralised project support remained necessary, but that the projects arm of the Treasury Taskforce should be replaced. The recommendation resulted in the creation of Partnerships UK (itself a PPP). Partnerships UK had an arm's length relationship with HM Treasury, operational independence and 51% of its equity was owned by the private sector.

The Office of Government Commerce (OGC) was established in April 2000, absorbing the policy arm of the Treasury Taskforce. The OGC was an independent office of HM Treasury, established to help the Government deliver best value from its spending. The OGC was the lead government agency in the negotiations over 2004 amendments to EU public procurement regulation, and was responsible for domestic implementation of the EU rules (e.g. the drafting of legislation for England, Wales and Northern Ireland implementing EU law, and publishing non-binding guidance on how the legislation is to be interpreted). In addition, the OGC had the lead role in developing procurement skills across the public sector, and coordinated responses in infraction cases against the UK.

Significant PFI investment schemes instituted under the Labour Government in England include Building Schools for the Future (BSF), which aimed to rebuild or renew every secondary school in England; and National Health Service Local Improvement Finance Trusts (LIFT), relating to investment in primary care and community-based facilities and services. Commencing in 2005/2006, there were 15 waves of BSF investment, in which

²⁶http://www.hm-treasury.gov.uk/ppp_standardised_contracts.htm (accessed 31/10/2011)

over 700 schools received investment.²⁷ On 5 July 2010 the BSF programme was terminated.²⁸ LIFT investment has also been carried out in waves: six first wave schemes (February 2001); 12 second wave schemes (February 2002); 24 third wave schemes (August 2002); and five fourth wave schemes (December 2004).

The LIFT and BSF programmes operated at both a national and local level. For instance, at a national level, Partnerships for Schools (BSF) and Community Health Partnerships (LIFT) managed the delivery of the programmes. At a local level, investment was carried out through a joint venture, a Local Education Partnership (BSF) or a LIFT Company (LIFT), between relevant local authorities, the private sector and Partnerships for Schools or Community health Partnerships (whichever the case may be).²⁹ These joint ventures enter into long term strategic partnership agreements with the procuring authority to deliver an area's BSF or LIFT programme, which may consist of PFI and conventionally financed design and build infrastructure.

Under the Scotland Act 1998,³⁰ Government of Wales Act 1998³¹ and Northern Ireland Act 1998³² a range of legislative powers were devolved from the UK Parliament to national parliaments or assemblies in Scotland (the Scottish Parliament), Wales (the National Assembly for Wales) and Northern Ireland (the Northern Ireland Assembly). Scotland, Wales and Northern Ireland all have different forms of devolution; however PPP policy is a devolved matter.

In Scotland, the Scottish Finance Directorate is responsible for PPP policy. In addition, the Scottish Futures Trust was established in 2008; it is an independent company owned

²⁷ See www.partnershipsforschools.org.uk/ (accessed 31/10/2011)

²⁸ <http://education.gov.uk/inthenews/inthenews/a0061486/overhaul-to-englands-school-building-programme> (accessed 31/10/2011)

²⁹ Deloitte, *Building flexibility: new delivery models for public infrastructure projects* (2006, London)

³⁰ C.46

³¹ C.38

³² C.47

by the Scottish Government responsible for improving value for money in public infrastructure investment. PPP policy in Wales is the responsibility of the Strategic Planning, Finance and Performance Directorate. In Northern Ireland the development and coordination of PPP policy rests with the Office of the First Minister and Deputy First Minister, in conjunction with the Department of Finance and Personnel. Also, the Strategic Investment Board Limited supports the Northern Ireland executive and government departments in delivering the Northern Ireland investment strategy.³³

Responsibility for the implementation of EU law on public procurement (the most important source of public procurement law in the UK) is only a devolved matter in Scotland. The work of the Scottish Government is carried out by a number of Directorates. The Scottish Procurement Directorate is responsible for developing, advising and implementing procurement policy for the public sector in Scotland.

Due to the widespread lack of availability of suitable debt finance at the height of the financial crisis, in March 2009 the HM Treasury Infrastructure Finance Unit (now part of Infrastructure UK, see below) was established.³⁴ Essentially, the objective of the Treasury Infrastructure Finance Unit was to step in to provide lending for PFI deals on the same terms as commercial lenders to ensure that infrastructure projects make it to financial close. In April 2009 the Treasury Infrastructure Finance Unit stepped in to provide a £120 million loan on the Greater Manchester Waste Disposal PFI.

³³ See http://www.hm-treasury.gov.uk/iuk_devolved_administrations.htm (accessed 01/10/2011)

³⁴ HM Treasury, *Treasury lending to PFI projects and the Treasury's Infrastructure Finance Unit*, (Letter, 5 May 2009) (Charles Lloyd, Head of Public-Private Partnerships)

2.3.3.3 The Conservative-Liberal Democrat Coalition Government (2010-Present)

The Coalition Government came to power committed to tackling the UK's budget deficit. The central role of PFI in UK capital investment is continued under the present Coalition Government despite mounting criticism. It is reported that over 900 PFI projects have achieved financial close,³⁵ and in recent years PFI has accounted for 10-15% of total investment in public services.³⁶ PFI has been used to deliver a diverse range of projects in a variety of sectors, including, for example, defence (e.g. barracks), education (e.g. schools), health (e.g. hospitals), justice and custodial (e.g. courts and prisons), local community (e.g. leisure centres, libraries, and housing), waste (e.g. recycling centres) and ICT. According to HM Treasury in 2010, "[t]he Government has confirmed it remains committed to Public Private Partnerships (PPP), including those delivered via [PFI], and that such arrangements will continue to play an important role in delivering Britain's future infrastructure".³⁷ It is clear therefore that the question of whether there are suitable procurement processes for such complex projects as PFI remains important.³⁸

In June 2010 it was announced that responsibility for the OGC (as well as the public sector procurement agency, Buying Solutions) would move from HM Treasury to Cabinet Office where it will form part of a new Efficiency and Reform Group (ERG).³⁹

Partnerships UK is to be dissolved, with Infrastructure UK taking on most of its responsibilities. Infrastructure UK was set up in 2009 within HM Treasury. The remit of Infrastructure UK is to provide a stronger focus on the UK's long-term infrastructure

³⁵ www.partnershipsuk.org.uk/ (accessed 30/06/2011)

³⁶ HM Treasury (March 2008); HM Treasury (March 2006); and HM Treasury (July 2003), fn.25

³⁷ HM Treasury (2010), fn.17

³⁸ CBI, *Building on success: the way forward for PFI*, (London, 2007); National Audit Office, *Improving the PFI tendering process*, (2007)

³⁹ <http://www.cabinetoffice.gov.uk/news/whitehall-shake-drive-efficiency> (accessed 31/10/2011)

priorities and meet the challenge of facilitating significant private sector investment over the longer term.

2.4 Institutionalised PPPs

The Commission makes the following distinction:

- purely contractual PPPs; and
- IPPPs.⁴⁰

The former, refers to a situation where the relationship between the public and private sector is based solely on contractual links. For instance, a typical PFI contract would be a contractual PPP. The latter involves the cooperation between the public and private sector within a distinct mixed-capital entity which performs public contracts or concessions. A company set up and jointly owned by the public sector and private sector (i.e. a joint venture company) would be an IPPP, as would be a situation where shares in an existing public sector entity are transferred to the private sector.⁴¹ IPPPs will usually be established where the public and private partners have complimentary objectives.

Although considered under the discussion of PFI, the investment schemes, BSF and LIFT (see above), are strategic partnerships arrangements that involve the establishment of a mixed capital legal entity to carry out education/health projects in an area.

As with PFI and contracting out, the procurement of most IPPPs will be mandated under EU procurement rules to follow set procedures, which must be suitable for their effective procurement.

⁴⁰ European Commission, *Green paper on public-private partnerships and Community law on public contracts and concessions*, (2004, Brussels) (COM(2004) 327 final), p.8, para.20

⁴¹ See PartnershipsUK, *A guidance note for public sector bodies forming joint venture companies with the private sector*, (2001)

2.5 Land development agreements

Development agreements are invariably very sophisticated arrangements commonly employed by local government in the UK to redevelop or regenerate areas, such as brownfield sites. These agreements will tend to involve the public sector authority transferring land to a developer for it to develop an area subject to any conditions the authority concerned may wish to impose, for example that the new development must contain a supermarket or car park.

The application of EU procurement law to development agreements is problematic.⁴² A simple sale of land is not a “public works contract” for the purposes of the EU public procurement directives. It is difficult to describe a public sector authority’s activities as “purchasing” when in a typical development agreement the authority will sell land to the private sector developer and when complete some or all of the developed land may remain with the developer. Indeed, in many development agreements the obligation upon the developer to develop the land may be ancillary to the main object of the contract, disposal of the land. Nevertheless, many forms of these complex arrangements will be required to be procured under the rules of the EU procurement directives and it is important that the rules allow for effective procurement.

2.6 Concluding remarks

The chapter has introduced the concept of PPP and some of the main types of PPP found in the UK. It can be seen that in many situations these are inherently highly sophisticated arrangements. As will be seen in the following chapters, prior to 2004 the EU required many of these complex deals to be procured under an outdated framework designed for relatively straightforward transactions. The competitive dialogue procedure,

⁴² See Case C-220/05, *Jean Auroux and Others v. Commune de Roanne* [2007] ECR I-385; Case C-451/08, *Helmut Müller GmbH v. Bundesanstalt für Immobilienaufgaben* (2010/C 134/10); and Procurement Lawyers’ Association, *EU public procurement and land development agreements after the ECJ’s judgment in Jean Auroux v Commune de Roanne (C-220/05)*, (2009) available at www.procurementlawyers.org/ (accessed 01/10/2011)

the subject of the PhD thesis, was introduced in 2004 to modernise EU procurement law, providing a procurement procedure tailor made to the needs of the types of complex arrangements described in chapter two.

3 EU regulation of public procurement

3.1 Introduction

The UK has been a member of the EU since 1973. The free movement of goods and services between EU member states is a primary policy objective of the EU, and the reason behind EU regulation of Member States' procurement. The EU regulates public procurement in order to open Member States' markets in public contracts to EU-wide competition. EU public procurement law applies to the PPP arrangements outlined in chapter two.

Member States' procurement is subject to two levels of EU regulation. Chapter three will discuss the first level of EU public procurement regulation: regulation under the TFEU and regulation flowing from fundamental principles of EU law. The second level of regulation, in the form of EU harmonising directives, will be looked at in chapter four.

3.2 Regulation under the Treaty

The TFEU does not mention public procurement explicitly; however, it is well established that public contracts in the EU (unless excluded) must be awarded in compliance with the general rules and principles of the Treaty. This is even the case for those public contracts subject to more detailed regulation under the procurement directives (see chapter four), although the Treaty rules are in practice most relevant to procurements outside the scope of the directives where it is the only source of EU regulation. In this section the TFEU obligations most relevant to public procurement will be set out.

3.2.1 Article 34

Article 34 TFEU seeks to ensure that goods can move throughout the EU without restriction. It prohibits between Member States quantitative restrictions on imports (such

as quotas or bans) and measures having equivalent effect to quantitative restrictions (MEEs).

In the context of public procurement, Art.34 TFEU applies to national measures that affect the domestic market as a whole and also measures that refer to the government contracts market.⁴³ In addition, Art.34 applies to restrictions on products supplied or to be used under any type of public contract, be it a supply contract, a contract for works or for non-construction services.⁴⁴

The application of Art.34 to individual procurement decisions has yet to be specifically addressed by the CJEU. The use of the term “measures”, which in general only encompasses general laws and practices,⁴⁵ may suggest that the Art.34 is not intended for such decisions⁴⁶; however, this does not appear to be the approach of the CJEU, which has consistently applied Art.34 to individual procurement decisions.⁴⁷

The CJEU defined MEEs in Case 8/74, *Dassonville*⁴⁸ as encompassing “all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade”.⁴⁹ The scope of the formulation in *Dassonville* is wide. The *Dassonville* formulation is only concerned with the restrictive effects of a measure on inter-state trade, catching overt discrimination,⁵⁰ covert discrimination⁵¹ and certain non-discriminatory rules that nonetheless hinder or restrict cross border trade.⁵²

⁴³ Arrowsmith and Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, (Cambridge University Press, Cambridge, 2009), 57

⁴⁴ Case 45/87, *Commission v. Ireland* (“Dundalk”) [1988] ECR 4929

⁴⁵ Case 21/84, *Commission v. France* [1985] ECR 1356

⁴⁶ S. Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd ed. (Sweet & Maxwell, London, 2005), at 4.5-4.6

⁴⁷ See Case C-3/88, *Commission v. Italy*, (‘*Re Data Processing*’) [1989] ECR 4035; Case C-243/89, *Commission v. Denmark* (‘*Storebaelt*’) [1993] ECR I-3353; Case C-359/93, *Commission v. Netherlands* (‘*UNIX*’) [1995] ECR I-157; Case 59/00, *Bent Moustén Vestergaard v. Spottrup Boligselskab* (‘*Bent Moustén*’) [2001] ECR I-9505; Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG* (‘*Telaustria*’) [2000] ECR I-10745

⁴⁸ Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837

⁴⁹ *Ibid.*, 852

⁵⁰ See Case 263/85, *Commission v. Italy* [1991] ECR I-2457; *Storebaelt*, fn.47; Case C-21/88, *Du Pont de Nemours Italiana SpA v. Unita Sanitaria Locale No 2 Di Carrara* (‘*Du Pont de Nemours*’) [1990] ECR I-889

In Cases C-267/91 and C-268/91, *Keck*⁵³ the CJEU placed limits upon the scope of MEE, restricting the extent to which non-discriminatory measures would fall within *Dassonville* and require justification (see below). Here, the Court distinguished between measures concerned with the characteristics of products (e.g. measures concerning shape, size, weight, composition, presentation identification or putting up), which fall within the scope of *Dassonville*, and selling arrangements. According to the CJEU, measures restricting or prohibiting selling arrangements are deemed not to interfere with market access, but only if two conditions are met: (1) the measure must apply to all affected traders operating within the national territory; and (2) the measure must affect in the same manner – in law and in fact – the marketing of domestic products and of those from other Member States. For numerous reasons many regard the *Keck* decision as unsatisfactory⁵⁴; for instance, because certain selling arrangements (e.g. restrictions on advertising) can restrict market access more than product requirements. There are, however, signs that the CJEU tends to focus upon whether selling arrangements are likely to have a disproportionate impact on imported products (instead of discrimination).⁵⁵

Measures within the scope of Art.34 TFEU can be saved if justifiable on exhaustive grounds in Art.36 TFEU. Furthermore, pursuant to Case 120/78, *Cassis de Dijon*,⁵⁶ indistinctly applicable measures (measures that do not overtly discriminate) will not be held to breach Art.34 TFEU if they are necessary to satisfy certain mandatory

⁵¹ See *Dundalk*, fn.44

⁵² See *UNIX*, fn.47

⁵³ Cases C-267/91 and C-268/91, *Keck & Methouard* [1993] ECR I-6097

⁵⁴ See C-412/93, Opinion of Advocate General Jacobs delivered on 24 November 1994. *Société d'Importation Edouard Leclerc-Siplec v. TFI Publicité SA and M6 Publicité SA*

⁵⁵ Joined Cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB and Konsumentombudsmannen (KO) v. TV-Shop i Sverige AB* [1997] ECR I-3843; Case C-405/98, *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)* [2001] ECR I-1795; Case C-322/01, *Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval* [2003] ECR I-14887; Case C-254/98, *Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH* [2000] ECR I-151; and Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH* [2004] ECR I-3025

⁵⁶ Case 120/78, *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649

requirements. For a measure to be justified under either exception it must be proportionate.

The application of the above rules to certain procurement decisions will mean that many will be categorised as hindrances to trade under *Dassonville* and will require justification. Arrowsmith & Kunzlik put forward a strong argument based upon the need to avoid a disproportionate burden on the courts, to ensure commercial certainty, and to achieve a suitable balance between trade considerations and national sovereignty, to suggest this should not be the case in relation to some procurement measures (“excluded buying decisions”), which, even though they involve a greater burden for imports, are not hindrances to trade (such as, provided there is no protectionist motivation, initial decisions on whether to go ahead with an activity; decisions on what exactly to purchase to meet a requirement; substantive decisions concerning the features of products; and decisions on the commercial terms on which those products are supplied), and non-discriminatory buying decisions.⁵⁷ The extent to which the CJEU agree with these arguments is not clear.

3.2.2 Article 49 and Article 56

Articles 49 and 56 TFEU provide for the freedom of establishment and the freedom to provide services. Article 49 TFEU acts to prohibit government measures that hinder individuals and companies from setting up in business in other Member States or which hinder their activities once they are established. When a business is established in a Member State and seeks to provide services in another Member State without being installed there this constitutes the “provision of services” (see Art.57 TFEU), the restriction of which is prohibited under Art.56 TFEU. Articles 49 and 56 TFEU protect

⁵⁷ Arrowsmith & Kunzlik (2010), fn.43, 61-67 and 69-72

against measures hindering access to government contracts that discriminate directly,⁵⁸ indirectly⁵⁹ and also certain non-discriminatory measures. Articles 52 and 62 TFEU provide for express derogations from Arts.49 and 56 TFEU similar to the derogations from Art.34 TFEU in Art.36 TFEU.

3.2.3 Other relevant TFEU articles

Other TFEU articles relevant to public procurement include Art.18 TFEU, which sets forth a general prohibition against discrimination on the grounds of nationality; Arts.101, 102, 106 and 107 TFEU, which concern rules on anti-competitive practices and state aid; and Art.346, which provides Member States with an exemption from the Treaty's free movement and competition provisions in the field of defence procurement (i.e. related to the production of or trade in arms, munitions and war material).

3.3 Fundamental principles

3.3.1 Introduction

In addition to the rules of the TFEU there are general principles of law recognised and applied by the CJEU which impose positive obligations upon procuring authorities: the transparency principle and the equal treatment principle (i.e. non-discrimination irrespective of nationality). Principles of transparency and equal treatment have long been recognised as underlying procurement under the directives⁶⁰; however, it is not until recently that the CJEU has found such principles to apply to procurements outside the directives.

⁵⁸ Case C-360/89, *Commission v. Italy* [1992] ECR I-3401

⁵⁹ *Re Data Processing*, fn.47; and *Storebaelt*, fn.47

⁶⁰ See *Storebaelt*, fn.47; Case C-87/94, *Commission v. Belgium ("Walloon Buses")* [1996] ECR I-2043

3.3.2 Transparency

Case C-324/98, *Telaustria*⁶¹ concerned a contract for a service concession (see chapter two), a type of contract specifically excluded from regulation under the procurement directives. The CJEU held that the Treaty principle of non-discrimination implies an obligation of transparency entailing “a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed”.⁶² It was left to the referring national court to decide whether there had been compliance with the obligation in that case. The *Telaustria* ruling has been endorsed by later cases.⁶³

The CJEU has said little about the precise content of the transparency obligation. In his Opinion in *Telaustria*, Advocate General Fennelly considered that substantive compliance with the principle of non-discrimination on grounds of nationality requires that the award of concessions respect a minimum degree of publicity and transparency.⁶⁴ In his opinion, however, publicity should not necessarily be equated with publication, and does not require the awarding authority to apply by analogy the provisions of the most relevant of the EU procurement directive.⁶⁵ In Case C-231/03, *Coname* the CJEU ruled it was for national courts to decide whether the award of the concession complied with transparency requirements.⁶⁶ According to the Court, although not necessarily implying an obligation to hold an invitation to tender, the transparency requirements are, in particular, such as to ensure that an undertaking located in another Member State to that of the procuring authority can have access to appropriate information regarding that concession before it is

⁶¹ *Telaustria*, fn.47

⁶² *Ibid.*, paras.61 and 62

⁶³ See Case C-231/03, *Consorzio Aziende Metano (Coname) v. Comune di Cingia de' Botti*, [2005] ECR I-7287; Case C-458/03, *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG*, [2005] ECR I-8585; Case C-260/04, *Commission of the European Communities v. Italian Republic*, [2007] ECR I-7083

⁶⁴ Case C-324/98, Opinion of Mr Advocate General Fennelly delivered on 18 May 2000. *Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG* [2000] ECR I-10745

⁶⁵ *Ibid.*, para.43

⁶⁶ *Coname*, fn.63

awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that concession.⁶⁷

The 2000 Interpretative Communication along with a 2006 Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (addressed to contracts below the financial thresholds and Part B service, not concession arrangements) shed light on the Commission's understanding of the obligations under the principle of transparency.⁶⁸ In addition to the advertising requirement the Commission argues that a competitive process may be necessary. A particular procedure is not suggested, but the Commission make clear it must be fair and impartial.⁶⁹ All of the following are highlighted as important: non-discriminatory description of the subject matter of the contract; equal access for economic operators from all Member States; mutual recognition of diplomas, certificates and other evidence of formal qualifications; appropriate time-limits; and a transparent and objective approach.⁷⁰

The approach of the CJEU to concessions may be understandable in light of the seemingly arbitrary distinctions in EU law between public works and services contracts, public works concessions and public services concessions. Concessions are often high value arrangements of long durations, and, as such, are potentially of significant cross border interest. In view of the EU free market objective, it makes little economic sense

⁶⁷ Ibid, para.21

⁶⁸ European Commission, *Interpretative communication on concessions under Community law* (2000,Brussels) (2000/C 121/02); European Commission, *Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives*, (2006,Brussels) (2006/C 179/02)

⁶⁹ Ibid, at 2.1

⁷⁰ Ibid

applying different requirements to contracts just because they involve exploitation of third party users.⁷¹

Unlike concessions, contracts falling below the financial thresholds in the procurement directives and contracts for non-priority services (see chapter four) are generally recognised as not significant enough to attract the interest of suppliers in other Member States. Hence, as it would be unnecessary and disproportionate to do so, such contracts are not subject to the detailed rules of the procurement directives. The extent to which the transparency requirement extends beyond services concessions to below threshold and non-priority services contracts is not clear. However, CJEU case law suggests a transparency obligation may apply to these contracts, but only where they are of sufficient cross-border interest.⁷²

3.3.3 Equal Treatment

The CJEU in Case C-21/03, *Fabrimcom*,⁷³ in the context of equal treatment under the procurement directives, has defined equal treatment as requiring that “comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified”.⁷⁴ In Case C-458/03, *Parking Brixen*, a case concerning a service concession, the CJEU found there to be a principle of equal treatment under the Treaty, which results in positive obligations being placed upon authorities in procurement. According to the CJEU, Arts.49 and 56 TFEU, along with the principle of non-discrimination on the grounds of nationality (Art.18 TFEU) are specific examples of a broader principle of non-discrimination that applies

⁷¹ See S.Arrowsmith, “Public private partnerships and the European procurement rules: EU policies in conflict?” (2000) 37(3) *Common Market Law Review* 709, 714

⁷² Case C-507/03, *Commission v. Ireland* [2007] ECR I-09777; Joined Cases C-147/06 and C-148/06, *SECAP v. Comune di Torino* (2008) 2 CMLR 56

⁷³ Joined Cases C-21/03 and C-34/03, *Fabrimcom SA v. Etat Belge* [2005] ECR I-01559

⁷⁴ *Ibid*, 27

irrespective of nationality. An obligation of transparency was said to flow from equal treatment to ensure compliance with the principle.

The CJEU approach to the development of an equal treatment principle applying to procurements not governed by the EU procurement directives has attracted much criticism, particularly due to the lack of authority for such a general principle.⁷⁵ It is noted that by recognising the existence of such a principle the CJEU has extended the scope for judicial review of procurements outside the directives, thus making itself more powerful. Arrowsmith & Kunzlik point out that “any measures affecting suppliers differently - for example, on qualifications, award criteria, time limits or procedures used - could be examined to see if they involve different treatment of suppliers in a ‘comparable’ position and, if so, whether they can be justified, even though the framework provided by the directives within which an obligation of equal treatment might be fleshed out and understood will be absent”.⁷⁶ Arrowsmith & Kunzlik also note that a principle of equal treatment, embracing both discriminatory and non-discriminatory measures, threatens to render *Keck* (see above) redundant in relation to the permissibility of procurement measure under the TFEU.⁷⁷

3.4 Concluding remarks

Chapter three has served to explain the first level of regulation to which PPPs in the UK are subject, i.e. regulation under the TFEU and fundamental principles of EU law. Although lacking detail, regulation outside the procurement directives appears to be becoming more onerous with the development of transparency and equal treatment. The uncertainty over the precise implications of these principles may well be impacting upon

⁷⁵ See Arrowsmith (2005), fn.46, 4.12; Hordijk & Meulenbelt, “A bridge too far: why the European Commission’s attempts to construct an obligation to tender outside the scope of the public procurement directives should be dismissed” (2005) 14 PPLR 123; A.Brown, “Seeing through transparency: the requirement to advertise public contracts and concessions under the EC Treaty” (2007) 16 PPLR 1; D.McGowan, “Clarity at last? low value contracts and transparency obligations” (2007) 16 PPLR 274

⁷⁶ Arrowsmith & Kunzlik (2010), n.43, 87

⁷⁷ Ibid

UK PPP procurement practice, i.e. contracts outside the scope of the directives (e.g. high value concession arrangements).

4 EU procurement directives and UK transposition

4.1 Introduction

It was recognised early on in the EU market integration process that public procurement needed specific regulatory attention, and so, since the 1970s, procurement has been regulated by a series of increasingly detailed harmonising directives. These directives require procuring authorities in Member States to follow contract award procedures based upon principles of transparency and fairness.

The framework of directives governing public procurement in the EU was revamped in 2004. There are currently two directives in force governing the award of major public contracts: the Utilities Directive 2004/17/EC⁷⁸ and the Public Sector Directive 2004/18/EC⁷⁹ (“the Directive”). Both directives have been backed up with directives on review and remedies, the Utilities Remedies Directive⁸⁰ and the Public Sector Remedies Directive⁸¹ (“the Remedies Directive”). The primary focus of chapter four will be to outline the requirements of the Directive and Remedies Directive.

The PhD thesis is limited to a consideration of the public sector regime only. The research primarily intends to explore the operation of competitive dialogue. There is no provision for competitive dialogue under the Utilities Directive.

⁷⁸ 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 sectors (*Official Journal L134/1*, 30/04/2004)

⁷⁹ Directive 2004/18/EC, fn.1

⁸⁰ Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (*Official Journal L76/14*, 23/03/1992)

⁸¹ Council Directive 89/665/EEC, fn.5

4.2 The EU Directive and UK transposition

4.2.1 Introduction

Directives need to be transposed into domestic law by Member States (Art.288 TFEU).

Although Member States have some discretion over the form and method of transposition, the intended result of a directive must be ensured. The flexibility Member States had when implementing the Directive, however, was limited. Whilst early public sector procurement directives were essentially framework in character, the Directive is a detailed set of complex rules.⁸²

Member States were given two years to implement the Directive. In England, Wales and Northern Ireland the Directive is implemented by way of the Public Contracts Regulations 2006⁸³ (“the Regulations”), which entered into force on January 31 2006, the deadline for implementation. There are separate regulations implementing the Directive in Scotland (see section 2.2).

4.2.2 The UK approach to public procurement regulation

UK regulations are legally enforceable rules; however, the UK did not regulate public procurement in such a way until relatively recently.⁸⁴ Prior to 1991, non-binding guidance was used to achieve procurement objectives (e.g. value for money). In accordance with this approach, early procurement directives were implemented in the UK by way of administrative circulars, which simply instructed authorities to comply with the directives.⁸⁵ The approach, to a certain extent, continues today whereby non-binding government guidance supplements the legislative rules.

⁸² S. Arrowsmith, “The past and future evolution of EC procurement law: from framework to common code?”, (2005-06) 35 *Public Contracts Law Journal* 337

⁸³ Public Contracts Regulations, fn.3

⁸⁴ See S. Arrowsmith, “Implementation of the new EC procurement directives and the Alcatel ruling in England and Wales and Northern Ireland: a review of new legislation and guidance”, (2006) 3 *PPLR* 86

⁸⁵ *Ibid*, 89

The OGC (chapter two) (2000 - 2010) published numerous guidance notes on the application of EU public procurement law; these tend to focus on areas where the operation of the legal rules may be causing concern in practice, such as innovative aspects of the rules (like competitive dialogue).

The Regulations do little more than replicate the text of the Directive. The advantage of this approach to transposition is that it avoids the risk of incorrect transposition and also means the UK can easily adopt CJEU rulings.⁸⁶ However, the Directive is not drafted with precision; its wording is the result of intergovernmental negotiations and compromise, and thus characterised by a high degree of uncertainty. The courts of the UK would normally be relied upon to resolve legal grey areas; however, for a multitude of reasons (see chapter eight), surprisingly few procurement disputes make their way to the UK courts. Because of this lack of judicial clarification, non-binding government guidance has been seen to play a key role in assisting authorities in making sense of the EU procurement rules, steering them to particular interpretations, and giving them confidence to adopt particular interpretations in areas of uncertainty (see chapter eight).⁸⁷

4.2.3 Scotland

The Scottish Government has power to adopt regulations to implement EU obligations.⁸⁸ Whilst the OGC was responsible for negotiating the Directive, the Scottish Government consulted separately on implementation. The Public Contracts (Scotland) Regulations 2006⁸⁹ give effect in Scots law to the Directive. The Scottish Regulations essentially mirror the wording of the Directive, and, apart from slight variations, the two sets of UK regulations are identical. There are two key differences. Firstly, the Scottish Regulations expressly recognise that contracts outside the Directive may still need to be advertised

⁸⁶ Ibid, 90

⁸⁷ Ibid, 88

⁸⁸ Fn.30, S.53

⁸⁹ Public Contracts (Scotland) Regulations, fn.4

(Reg.8(21)) (chapter three). Secondly, the courts in which procurement disputes may be heard are different (see below). The ordering of the provisions in the two sets of regulations corresponds exactly; therefore, from this point onwards, references to “the Regulations” are to be read as references to both regulations.

4.3 The Directive and Regulations

4.3.1 Background

The first EU procurement directive, Directive 71/305/EEC,⁹⁰ relating to works contracts, was introduced in 1971. This was followed by a directive on supply contracts, Directive 77/62/EEC.⁹¹ These directives were both later replaced by two new directives on supplies, Directive 93/36/EC,⁹² and works, Directive 93/37/EC,⁹³ and Directive 92/50/EEC⁹⁴ was also introduced around this period, extending coverage to certain non-construction services. The directives were all later amended by Directive 97/52/EC,⁹⁵ as a result of conclusion of the WTO Agreement on Government Procurement, and also Directive 2001/78/EC,⁹⁶ which concerned the use of standard forms for contract adverts. The current 2004 directives are the result of a 1996 Commission green paper,⁹⁷ which highlighted the need for simplification and modernisation of the rules. In early 2011 the Commission published a green paper to consult on further modernisation of the EU

⁹⁰ Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (*OJ 1971 L185/5*); amended by Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (*OJ 1989 L210/1*)

⁹¹ Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (*OJ 1977 L13/1*) amended by Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts (*OJ 1980 L215/1*) and Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (*OJ 1988 L127/1*)

⁹² Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (*OJ 1993 L199/1*)

⁹³ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (*OJ 1993 L199/54*)

⁹⁴ Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (*OJ 1992 L209/1*)

⁹⁵ European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (*OJ 1997 L328/1*)

⁹⁶ Commission Directive 2001/78/EC of 13 September 2001 amending Annex IV to Council Directive 93/36/EEC, Annexes IV, V and VI to Council Directive 93/37/EEC, Annexes III and IV to Council Directive 92/50/EEC, as amended by Directive 97/52/EC, and Annexes XII to XV, XVII and XVIII to Council Directive 93/38/EEC, as amended by Directive 98/4/EC (Directive on the use of standard forms in the publication of public contract notices) (Text with EEA relevance) (*OJ 2001 L285/1*)

⁹⁷ European Commission, *Green paper: public procurement in the European Union: exploring the way forward*, (Brussels, 1996) (COM(96) 583)

procurement rules.⁹⁸ The consultation closed in April 2011 and proposals for new legislation are expected imminently.

4.3.2 General principles

The Directive endorses past case law of the CJEU, explicitly recognising the general principles of equal treatment,⁹⁹ non-discrimination, and transparency¹⁰⁰ (Art.2/Reg.4(3)).

The principles were introduced in chapter three, and apply to all aspects of the procurement process.¹⁰¹ The principles have played an important role in the development of EU procurement law, steering the CJEU's interpretation of the directives.¹⁰² The principles are therefore particularly pertinent to a discussion of competitive dialogue, as they are likely to impact upon any CJEU interpretation of legal grey areas.

4.3.3 Scope

4.3.3.1 Introduction

The Directive/Regulations apply if a contract is awarded by a “contracting authority”, is a “public contract”, meets certain financial thresholds, and is not excluded. Many PPP procurements (particularly due to their invariably high value) will be regulated under the Directive/Regulations.

4.3.3.2 A contracting authority

A “contracting authority” refers to central government, regional or local authorities, bodies governed by public law, or associations formed by such bodies (Art.1(9)/Reg.3). A body governed by public law is defined in Art.1(9) and in the UK covers organisations such as quasi-autonomous non-governmental organisations (QUANGOs).

⁹⁸ European Commission, *Green paper on the modernisation of EU public procurement policy towards a more efficient European procurement market*, (Brussels, 2011) (COM(2011) 15 final)

⁹⁹ *Fabricom*, fn.73, para.27

¹⁰⁰ See Arrowsmith (2005), fn.46, 7.12

¹⁰¹ See Case C-16/98, *Commission v. France*, [2000] ECR I-8315, para.103-109

¹⁰² See Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs-GmbH (HI) v. Stadt Wien*, [2002] ECR I-5553, para.42; and Case C-244/02, *Kaupatalo Hansel Oy v. Imatran Kaupunki*, [2003] ECR I-12139, para.31.

4.3.3.3 Regulated contracts

A public contract is a contract “for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services ...”

(Art.1(2)(a)/Reg.2(1)). A public contract may be for works (Art.1(2)(b)/Reg.2(1));

supplies (Art.1(2)(c)/Reg.2(1)); or services (Art.1(2)(d)/Reg.2(1)). The

Directive/Regulations also define public works concessions (Art.1(3)/Reg.(1)) and public

services concessions (Art.1(4)/Reg.2(1)), the distinguishing feature from a works or

services contract being that consideration consists in the right to exploit works or

services. The line between PPPs classified as public works and services contracts and

PPPs classified as concessions is not clearly drawn.¹⁰³

4.3.3.4 Financial thresholds

The Directive/Regulations only apply to contracts with an estimated value above defined financial thresholds (Art.7/Reg.8). These higher value contracts are seen to have the most potential to act as barriers to intra-EU trade. Presently,¹⁰⁴ the threshold for supplies and services is £101,323 (€125,000) for central government and £156,442 (€193,000) for other authorities. The threshold for works contracts is £3,927,260 (€4,485,000). There are rules prohibiting circumvention of the Directive/Regulations by, for example, manipulating the value of contracts so that it falls below threshold (Art.9/Reg.8).

4.3.3.5 Excluded contracts

There are a number of specific exclusions. In particular, these include public services concessions (Art.17/Reg.6) and utilities contracts (Art.12/Reg.6). Also, certain contracts,

¹⁰³ See European Commission (20040), fn.68; and Arrowsmith (2000), fn.71, 716-718

¹⁰⁴ Commission Regulation No.1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2009 L314/64)

such as those for works concessions (Art.56/Reg.36) and non-priority services (Art.21/Reg.6) are only partly regulated under the Directive/Regulations. In addition, the CJEU has held that internal arrangements within contracting authorities are not regulated under the Directive.¹⁰⁵

4.3.4 Information requirements

The usual starting point for the award of contracts under the Directive/Regulations is publication of a notice describing the contract to be awarded in the Official Journal of the EU (OJEU) (Art.35(2)/Reg.15(2), 16(2), 17(3) and 18(4)). This notifies suppliers throughout the EU of the contract, providing them with sufficient information to determine whether or not the contract is of interest. The notice must be drawn up in accordance with the specified format (Art.36/Reg.42). OJEU publication must occur within 12 days from being sent by the authority (five when sent electronically) (Art.36(3)). Authorities are prohibited from advertising at national level before the date on which the notice is sent for publication (Art.36(5)/ Reg.42(4)).

In addition to a contract notice, authorities may choose to publish a Prior Information Notice (PIN), which is a notice of their contemplated purchases for the coming year (Art.35(1)/Reg.11).

Further information requirements include a requirement to notify suppliers of exclusion (Reg.29A) and following contract award or conclusion, authorities must have a contract award notice published (Art.43/Reg.31).

¹⁰⁵ Case C-107/98, *Teckal Srl v. Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia*, [1999] ECR I-8121

The UK's Freedom of Information Act 2000¹⁰⁶ may also be used to obtain information from contracting authorities (S.1(1)). Authorities (S.3) must reply promptly to a request under the Act and not later than 20 working days following receipt. There are numerous exemptions under the Act, such as for confidential (S.41) and commercially sensitive information (S.43) (see chapter seven).

4.3.5 Technical specifications

The specifications are a detailed description of a contracting authority's requirements. These usually take the form of a written document, which forms the basis for tenders. The Directive/Regulations control the content of specifications to ensure they operate to afford equal access for bidders and do not act as trade barriers (Art.23/Reg.9). A thorough explanation of the requirement for specifications is not necessary because, as will be explained, the procedural rules on competitive dialogue (the primary focus of the thesis) do not at any point require technical specifications (see chapter seven).

It is possible for a contracting authority to accept a tender not in line with the specifications (i.e. a variant). However, such bids are not permitted where a contract is awarded on the basis of lowest price (see below). Authorities must expressly authorise variants in the contract notice, along with stating the minimum requirements variants must meet (Art.24/Reg.10).

4.3.6 Award procedures and time limits

The Directive/Regulations stipulate that public contracts must be awarded in accordance with one of the following procedures: the open procedure, the restricted procedure, competitive dialogue, the negotiated procedure, and the negotiated procedure without a contract notice (Art.28/Reg.12). As a general rule, contracts must be awarded under the

¹⁰⁶ C.36

open or restricted procedures; these are freely available. The other procedures can only be used in limited circumstances.

The open procedure is a one stage procedure, in which all qualifying suppliers may tender for the contract. In an open procedure the authority must allow a minimum of 52 days from dispatching the contract notice for the deadline for receipt of tenders (Art.38(2)/Reg.15(3)). If there has been a PIN the time limit may be shortened (Art.38(4)/Reg.15(7)).

The restricted procedure is a two stage process: the contracting authority may limit the number of qualifying suppliers (a minimum of five) that go on to tender for the contract. In a restricted procedure suppliers must be given no less than 37 days in which to request to participate (Art.38(3)/Reg.16(3)), and a minimum of 40 days from invitation to tender for receipt of tenders (Art.38(3)/Reg.16(16)). Again, a PIN will enable an authority to shorten the 40 day time limit (Art.38(4)/Reg.16(18)).

The open and restricted procedures are most suited to straightforward procurements where an authority is able to specify at the outset precisely what it wants. Tenders must be submitted in line with a technical specification (see above) drawn up at the outset, and there is generally seen to be very little scope for negotiations.¹⁰⁷

A detailed analysis of the procedural rules of competitive dialogue will be provided in chapters five, six and seven; however, briefly, the procedure was introduced in 2004 to provide a more suitable procurement process for complex contracts, such as PPPs. Essentially, it combines the transparency and structure of the restricted procedure, e.g.

¹⁰⁷ S. Arrowsmith, "The problem of discussions with tenderers under the EC procurement directives: the current law and the case for reform" (1998) 3 *PPLR* 65

there is a requirement for a formal final tender stage involving relatively complete final tenders (Art.29(6)/Reg.18(25)), with some of the flexibility of the negotiated procedure, e.g. an authority may select a minimum of three suppliers to dialogue with on all aspects of the contract (Art.29(3)/Reg.18(21)).

The negotiated procedure, other than the requirement for a contract notice, is a relatively unstructured two stage process, in which a minimum of three suppliers may be invited to negotiate with the authority. There is no express requirement for a final tender stage to select a winner.

In a competitive dialogue and negotiated procedure suppliers must be given at least 37 days to request to participate (Art.38(3)/Reg.17(5) and 18(7)). Article 38(1) emphasises that in setting time limits authorities should bear in mind the complexity of the contract, particularly relevant for competitive dialogue which is to be used only for “particularly complex contracts”. It should be noted that Partnerships for Schools advise upon a time limit of 52 days for requests to participate.¹⁰⁸ There is no minimum time limit stipulated for receipt of tenders.

All of the minimum time periods mentioned in this section may be shortened where electronic communication is used (Art.38/Reg.15(5), 15(6), 16(5), 16(19), 17(7) and 18(9)). There is also an accelerated procedure for cases of extreme urgency (Art.38(8)/Reg.16(6) and 17(8)). This is expressly stated as applicable to restricted and negotiated procedures. In 2008 the Commission recognised that the exceptional financial situation at the time

¹⁰⁸ PfS, *BSF guidance note on how to conduct a competitive dialogue procedure*, (2006) available at www.partnershipsforschools.org.uk/library/BSF-archive/BSF-guidance-documents.html (accessed 31/10/2011), section 12

could justify an accelerated procedure for “major public projects”.¹⁰⁹ Although initially only applicable for 2009-2010, the guidance was extended until the end of 2011.¹¹⁰ In its statement the Commission refers to the accelerated procedure in generic terms and then more specifically in relation to the restricted procedure; it is not made clear whether the approach could be applied to negotiated procedures or competitive dialogues.

The negotiated procedure without prior publication of a contract notice is an exceptional procedure, confined to rare situations (such as extreme urgency and where there is only one possible bidder) (Art.31/Reg.14).

4.3.7 Qualification and selection

The Directive/Regulations provide for mandatory and discretionary disqualification of suppliers. Disqualification is mandatory for suppliers that have been the subject of a conviction by final judgment of participation in a criminal organisation, corruption and bribery, fraud, and/or money laundering (Art.45(1)/Reg.23(1) and (2)). Contracting authorities may choose whether or not to set qualification standards in relation to the personal situation of suppliers (Art.45(2)/Reg.23(4)); the suitability of suppliers to pursue professional activity (Art.46/Reg.23(4)(j)); the economic and financial standing of suppliers (Art.47/Reg.24); and the technical and/or professional ability of suppliers (Art.48/Reg.25).¹¹¹ In general authorities can only exclude on these grounds¹¹²; however, exclusions may be necessary to ensure equal treatment.¹¹³

¹⁰⁹ European Commission, *Public procurement : Commission recognises need for accelerated procurement procedure*, (Brussels, 2008) (IP/08/2040); and OGC, *Procurement policy note - use of the accelerated restricted procedure*, (2009, London, Information Note 1/09)

¹¹⁰ OGC, *Procurement policy note – use of the accelerated restricted procedure in 2011*, (2011, London, Information Note 01/11)

¹¹¹ See Joined Cases 27-29/86, *S.A. Construction et Entreprises Industrielles (CEI) and others v. Societe Co-operative “Association Intercommunales purlas Autoroutes des Ardennes”* (CEI and Bellini) [1987] ECR 3347, paras.26-28; and Case 31/87, *Gebroeders Beentjes BV v. Netherlands* [1988] ECR 4635, para.17

¹¹² Joined Cases C-226/04 and C-228/04, *La Cascina Soc. Coop. Arl., Zilch Srl v. Ministero della Difesa & Ministero dell'Economia e delle Finanze, Pedrus Service et al (La Cascina)* [2006] ECR I-1347, para.21; and Case C-213/07, *Michaniki AE v. Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias* [2009] All ER (D) 226 (Jan)

¹¹³ *Fabricom*, fn.73; S.Treumer, “The discretionary powers of contracting entities - towards a flexible approach in the recent case law of the court of justice?” (2006) 15 *PPLR* 71

Any short-listing in order to limit the number of qualifying suppliers further before inviting suppliers to tender, negotiate or dialogue (Art.44(3)/Reg.16(9), 17(11) and 18(12)) must be done by reference to the economic and financial standing and technical and/or professional ability demanded by the contracting authority.¹¹⁴

The contract notice must note any qualification and selection requirements (Art.44(2)/Reg.25(5)). These do not need to involve weightings (see recital 40); however, in accordance with the principle of transparency, the CJEU ruled in Case C-470/99, *Universale-Bau*¹¹⁵ that when an authority has defined selection criteria weightings in advance then the criteria and weightings must be disclosed.¹¹⁶

4.3.8 Contract award

4.3.8.1 Introduction

A contracting authority may choose to award a contract on the basis of lowest priced tender or most economically advantageous tender (MEAT) (Art.53/Reg.30). Where competitive dialogue is used the contract must be awarded under the MEAT head (Art.29(7)/Reg.18(27)). If an award is made on the basis of the MEAT, an authority may consider various criteria (e.g. quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion) (Art.53(1)(a)/Reg.30(2)). This is subject to the proviso that criteria used to evaluate the MEAT must be linked to the subject matter of the contract.

¹¹⁴ *Beentjes*, fn.111 (particularly paras.15 and 16)

¹¹⁵ Case C-470/99, *Universale-Bau v. EBS*, [2002] ECR I-11617

¹¹⁶ *Ibid*; and *Aquatron Marine v Strathclyde Fire Board* [2007] CSOH 185

4.3.8.2 MEAT criteria

The list of criteria for assessing the MEAT is not exhaustive and authorities have considerable freedom regarding the nature of permissible criteria. The recent CJEU judgment of Case C-532/06, *Lianakis*¹¹⁷ highlighted the distinction between selection criteria, used to assess the suitability of tenderers, and award criteria, used to evaluate the tender itself.¹¹⁸ Here, award criteria, relating to the tenderer's proven experience; manpower and equipment; and ability to complete the project by the deadline, together with the firm's commitments and professional potential, were held illegitimate because they focused upon the characteristics of tenderers rather than upon the relative merits of the tenders.¹¹⁹ *Lianakis*, however, is not entirely consistent with past case law¹²⁰ and it remains legally grey the extent to which considerations relevant to selection may be used as award criteria where the aim is to compare the actual quality of performance between bidders, e.g. rather than assessing adequate experience (i.e. selection criteria) looking at comparative experience.¹²¹

4.3.8.3 Disclosure

The contract notice must specify whether the award is on the basis of lowest priced tender or MEAT. If the evaluation is under the MEAT head, the contract notice, contract documents or descriptive documents must specify the award criteria and weightings or range of weightings for each criterion (Art.53(2)/Reg.30). If it is not possible to indicate criteria weightings in advance, they should be listed in descending order of importance (Art.53(2)/Reg.30(5)).

¹¹⁷ Case C-532/06, *Emm. G. Lianakis AG v. Dimos Alexandroupolis* [2008] ECR I-00251

¹¹⁸ *Lightways (Contractors) Limited v. North Ayrshire Council* [2008] CSOH 91

¹¹⁹ See also Case T-4/01, *Renco SpA v Council* (Case T-4/01) [2003] ECR II-00171; Joined Cases C-C-462/03 and C-463/03, *Strabag v Österreichische Bundesbahnen* [2005] ECR I-5397; Case C-315/01, *Gesellschaft für Abfallentsorgungs-Technik (GAT) v Österreichische Autobahnen und Schnellstrassen AG* [2003] ECR I-6351

¹²⁰ See *Renco*, fn.119

¹²¹ See T.Kotsonis, "The nature of award criteria and the subsequent stipulation of weightings and sub-criteria: *Lianakis v. Dimos Alexandroupolis* (C-532/06)" (2008) 17 *PPLR* 128; P.Lee, "Implications of the *Lianakis* decision" (2010) 19 *PPLR* 47; S.Treumer, "The distinction between selection and award criteria in EC public procurement law - a rule without exception?" (2009) 18 *PPLR* 103

In order to evaluate tenders, authorities may divide award criterion into more detailed sub-criteria, which may in turn be broken down into sub-sub-criteria and even further sub-divisions.¹²² The CJEU has held that “potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and, their relative importance, when they prepare their tenders”.¹²³ According to the CJEU, an authority cannot apply weighting rules or sub-criteria which it has not previously brought to the tenderers’ attention. However, in relation to sub-criteria weightings, the CJEU has noted that authorities may be not need to disclose these in advance. This is provided it (i) does not alter the criteria for the award of the contract; (ii) does not contain elements which, if they had been known at the time the tenders were prepared, could have affected preparation; (iii) was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.¹²⁴¹²⁵

A further area of uncertainty concerns changes to published award criteria prior to submission of tenders, an issue the CJEU avoided in *Walloon Buses*.¹²⁶ The CJEU stated that changes were not possible in Case C-448/01, *EVN and Wienstrom v Austria*¹²⁷; however, this case concerned changes to award criteria after tenders had been submitted without any notification to bidders.

¹²² *Lightways*, fn.118

¹²³ *Lianakis*, fn.117, para.36

¹²⁴ Case C-331/04, *ATI EAC Srl e Viaggi di Maio Snc v ACTV Venezia SpA* [2005] ECR I-10109, para.43

¹²⁵ See also *Letting International Ltd v. Newham LBC* [2008] EWHC 1583 (QB); *McLaughlin & Harvey Ltd v. Department of Finance & Personnel* [2008] NIQB 25; *Morrison Facilities Services Ltd v. Norwich City Council* [2010] EWHC 487 (Ch); *J Varney & Sons Waste Management Ltd v. Hertfordshire CC* [2010] EWHC 1404 (QB); Case C-19/00, *SIAC Construction Ltd v. County Council of the County of Mayo* [2001] ECR I-07725; *Mears Ltd v Leeds City Council (No.2)* [2011] EWHC 1031 (TCC); *ALSTOM Transport v Eurostar International Ltd* [2010] EWHC 2747

¹²⁶ *Walloon Buses*, fn.60

¹²⁷ Case C-448/01, *EVN and Wienstrom v. Austria* [2003] ECR I-14527

4.4 Review and remedies

4.4.1 Introduction

The remainder of chapter four will outline the measures adopted by the EU and UK in order to encourage compliance with the above procedural rules (see chapter eight). The enforcement of EU procurement law is conducted at two levels: EU and national.

4.4.2 EU level enforcement

The Commission may enforce EU public procurement law under Art.258 TFEU, for example, as a result of its general monitoring or following an aggrieved bidder complaint. Here, proceedings are brought before the CJEU against the Member State, not individual contracting authorities. The CJEU has the power to award interim remedies (Art.279 TFEU). If the CJEU finds a State to be in violation, there are no immediate sanctions; however, the State must take “necessary measures to comply” (Art.260 TFEU). If the Member State fails to take “necessary measures” it may face sanctions under Art.260 TFEU.¹²⁸ Following Case C-503/04, *Commission v. Germany*,¹²⁹ it is evident that the CJEU can in certain circumstances (which have not been made clear) require Member States to ensure a concluded contract is set aside.¹³⁰ The Commission cannot be forced to act under Art.258 TFEU,¹³¹ and, in view of its limited resources, it has stated that it will only act in cases of systematic and significant breaches.¹³²

In addition, the Remedies Directive contains a corrective mechanism (Art.3), enabling the Commission to intervene where prior to contract conclusion it considers there to have

¹²⁸ See, for example, Case C-70/06, *Commission v. Portugal*, [2008] ECR I-1

¹²⁹ Case C-503/04, *Commission v. Germany* [2007] ECR I-6153

¹³⁰ See further Case C-328/96, *Commission v. Republic of Austria (Sankt Poelten Administrative Centre Case)* [1999] ECR I-7479; and Joined Cases C-20/01 and C-28/01, *Commission v. Germany* [2003] ECR I-3609 (confirmed in Case C-125/03, *Commission v. Germany* [2004] ECR I-4771)

¹³¹ T-126/95, *Dunmez v. Commission of the European Communities* [1995] ECR II-2863

¹³² See European Commission, *The rules governing the procedure in the award of public procurement contracts*, (Brussels, 2000)

been a “serious infringement” of the procurement rules. The Commission rarely uses this, preferring the Art.258 TFEU process.¹³³

Also, Member States may bring other Member States before the CJEU for breach of the EU procurement rules under Art.259 TFEU. In practice, however, Member States rely upon Commission enforcement under Art.258.

4.4.3 The Remedies Directive

4.4.3.1 Introduction

The procedural rules of the Directive are backed up by the Remedies Directive, which seeks to strengthen domestic review and remedies systems by requiring certain minimum standards. Recently, the Remedies Directive was amended by Directive 2007/66/EC.¹³⁴ These amendments were incorporated into UK law on 20 December 2009.¹³⁵ Relevant amendments will be highlighted below as the requirements of the Remedies Directive are explained; however, at the time of the research interviews the full impact of the amendments had yet to be felt.

4.4.3.2 Effectiveness

The Remedies Directive is underpinned by a key principle of effectiveness, which sits behind many court rulings in this area. Member States must ensure that decisions taken by authorities under the Directive “may be reviewed *effectively* and, in particular, as rapidly as possible” (Art.1(1)).

4.4.3.3 Standing

Implementing Art.1(3), Regulation 47(6) gives standing to any “economic operator” which suffers, or risks suffering, loss or damage, as a result of a breach of the Regulations.

¹³³ A.Delsaux, “The role of the Commission in enforcing EC public procurement rules” [2004] 13 *PPLR* 130, 134

¹³⁴ Directive 2007/66/EC, fn.6

¹³⁵ Public Contracts (Amendment) Regulations 2009 (2000 No.2992)

In the UK the Regulation's review and remedies system is not extended to contracts outside the scope of the Directive/Regulations.

4.4.3.4 Procedure

Challenges against violations of the Directives/Regulations in England, Wales and Northern Ireland can be brought in the High Court, and, in Scotland, challenges can be brought in the Court of Session, Sheriff Court or the High Court (Reg.47(6)).

Before initiating proceedings, there is a requirement for complainants to notify authorities of an alleged breach and the intention to seek review (Reg.47(7)).¹³⁶ There is no requirement in the UK for review to be sought from the authority concerned before taking court action (Art.1(5)).

The CJEU has accepted that challenge limitation periods are permitted.¹³⁷ Following Case C-406/08, *Uniplex*¹³⁸ and amendments which took effect from 01 October 2011,¹³⁹ the Regulations read, "proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that the grounds for starting proceedings had arisen" (Reg.47D(2)). The Court will have a discretion to extend the limitation period up to a maximum of three months (Reg.47D(3)). Prior to amendment, proceedings needed to be started "promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period ...". The research was carried out prior to the *Uniplex* amendment, when there was some uncertainty over when the grounds for bringing proceedings (the trigger for the time limit) could be said to have occurred. Case law had suggested that the three month time limit begins to run

¹³⁶ See *Luck (t/a G Luck Arboricultural & Horticultural) v. Tower Hamlets LBC QBD* [2003] EWCA Civ 52

¹³⁷ See *Universale-Bau*, fn.115; and Case C-327/00, *Santex v. Unita Socio Sanitaria Locale n.42 Pavia* [2003] ECR I-1877

¹³⁸ Case C-406/08, *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] ECR I-0000

¹³⁹ Public Procurement (Miscellaneous Amendments) Regulations 2011 (2011, No.2053)

regardless of knowledge¹⁴⁰; however, despite the wording of the Regulations, this was no longer tenable after the CJEU ruled against the approach in *Uniplex*. Thus, in recent years the domestic courts have moved away from the traditional position.¹⁴¹ Past case law on the courts' discretion to extend the time limit is likely to remain relevant.¹⁴²

4.4.3.5 Remedies

4.4.3.5.1 General

As required by the Remedies Directive (Art.2(1)), the Regulations make available three types of remedy: interim measures, set aside orders, and damages (Reg.47(8)). The UK has taken the option (Art.2(7)) to limit the remedies available for concluded contracts to damages only (Reg.47(9)); however, this is provided the grounds for ineffectiveness, a new remedy introduced by the 2009 amendments, are not met (see below).

4.4.3.5.2 Interim measures

Interim measures refer to orders before full court hearing; the most relevant from a UK procurement perspective are interim injunctions, which operate to prevent the defendant taking certain actions (e.g. concluding the contract) before final trial.

Interim injunctions are a discretionary remedy, with guidelines as to how the discretion is to be exercised developed through case law.¹⁴³ The following considerations are relevant to the decision whether or not to grant an injunction:

- (a) the strength of the applicant's case;^{144,145}

¹⁴⁰ See *Keymed (Medical & Industrial Equipment) Limited v. Forest Healthcare NHS Trust* [1998] Eu LR 71; *Matra Communications S.A.S. v. Home Office* [1991] 1 WLR 1646; *Jobsin Co UK Plc (t/a Internet Recruitment Solutions) v. Department of Health* [2002] 1 CMLR 44

¹⁴¹ *Henry Bros (Magherafelt) Ltd v Department of Education for Northern Ireland* [2008] NIQB 105; *Mears*, fn.125; *Sita UK Ltd v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156

¹⁴² See, for example, *Keymed*, fn.140; and *Jobsin*, fn.140

¹⁴³ *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396 at 407G; and, see also, *Laddie J in Series 3 Software v. Clarke* [1996] 1 All ER 853 at 865

¹⁴⁴ See, for example, *De La Rue International Ltd v. Scottish Power Plc* 2000 G.W.D. 34-1325

- (b) the adequacy of damages as a remedy for either side;¹⁴⁶
- (c) the applicant's undertaking in damages;¹⁴⁷
- (d) the balance of convenience;¹⁴⁸ and
- (e) any special factors.¹⁴⁹

In the context of public procurement, the UK courts have varied in the extent to which they have taken account of the EU effectiveness principle, with there being a disagreement over whether or not the principle required modifications to the above guidelines.¹⁵⁰

A new requirement for automatic suspension following commencement of legal challenge where the contract has not been entered into (Art.1(5)/Reg.47G), will mean that many interim hearings in the field of procurement will concern whether or not a suspension is to be continued (Reg.47H). It appears that the case law above is relevant to the decision.¹⁵¹

4.4.3.5.3 Set aside and amendment orders

According to Reg.47(8)(b) (Art.2(1)(b)), a court may order that a decision or action in violation of the Regulations be set aside (i.e. it will have no legal effect) or may order a contracting authority to amend any document. This remedy is not available where a contract has been concluded (Reg.47(9)). As with interim measures, these orders are

¹⁴⁵ See also Case C-424/01, *CS Communications & Systems Austria GmbH v Allgemeine Unfallversicherungsanstalt* [2003] ECR I-03249

¹⁴⁶ See *Burroughs Machines Ltd. v. Oxford Area Health Authority* [1983] ECC 434

¹⁴⁷ See *Partenaire Ltd v Department of Finance and Personnel* [2007] NIQB 100 at 25; *McLaughlin*, fn.125, at 11; and also the arguments of the parties before the Court of Appeal in *Letting International*, fn.125

¹⁴⁸ See *Burroughs*, fn.146; *Clyde Solway Consortium v. Scottish Ministers* 2001 SC 553; *Partenaire*, fn.147; *DeVilbiss Medequip Ltd v. NHS Purchasing and Supply Agency* [2005] EWHC 1757; *Letting International*, fn.125; *Henry Brothers*, fn.141; *Lightways*, fn.118; *BFS v. Secretary of State for Defence* [2006] EWHC 1513

¹⁴⁹ See *Burroughs*, *Ibid*

¹⁵⁰ See, for instance, *Harmon CFEM Facades (UK) Limited v The Corporate Officer of The House of Commons* 67 Con LR 1; *BFS*, fn.148; *Partenaire*, fn.147; *Henry Brothers*, fn.141; *Lion Apparel Systems v. Firebuy* [2007] EWHC 2179; *Letting International*, fn.125; *McLaughlin*, fn.125; *Lightways*, fn.118

¹⁵¹ See *Indigo Services (UK) v. Colchester Institute Corporation* [2010] EWHC 3237 (QB); *Exel Europe Ltd v. University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC)

discretionary, subject to the general requirement that the remedies system is effective.¹⁵²

In deciding whether or not to grant a set aside order the court will take into account similar considerations as those relevant to the decision to grant an interim injunction.¹⁵³

4.4.3.5.4 Damages

Damages are available regardless of whether or not the contract has been entered into (Art.2(1)(c)/Reg.47(9)). Apart from the principle that damages must be effective, it has been left for the courts to determine the availability and measure of damages. The CJEU has confirmed that an authority does not need to be at fault for damages liability.¹⁵⁴

A breach of the Regulations is a tort. Thus, the aim of damages is to put the claimant in the position it would have been in had the tort not been committed. *Harmon*¹⁵⁵ is a leading English authority on the calculation of damages. The judgement considered two possible methods for calculating damages: the “loss of chance” rule,¹⁵⁶ and the usual “balance of probabilities” approach. Under the balance of probabilities approach only the full amount of any loss may be recoverable; however, with the loss of chance rule, the courts will assess the likelihood of the claimant realising a benefit which the breach has deprived it of (e.g. the loss of the contract) and then award damages that reflect the likelihood. The *Harmon* decision appears to advocate a hybrid approach.¹⁵⁷ It was accepted that full damages for lost profits were recoverable where the claimant can show that it would have won the disputed contract. However, where it is not “almost certain” that the claimant would have won, the loss of chance rule should be applied. This would mean that if the claimant had only a 70% chance of success it would be able to recover

¹⁵² Case C-225/97, *Commission v. France Republic* [1999] ECR I-3011.

¹⁵³ See *Severn Trent Plc v. Dwr Cymru Cyfyngedig (Welsh Water Ltd)* [2001] CLC 107

¹⁵⁴ Case C-275/03, *Commission v Portugal* (14 October 2004) (not published in the ECR)

¹⁵⁵ *Harmon*, fn. 150

¹⁵⁶ See *Chaplin v. Hicks* [1911] 2 KB 786; *Allied Maples Group v. Simmonds & Simmonds* [1995] 1 WLR 1602

¹⁵⁷ S.Arrowsmith, “EC procurement rules in the UK courts: an analysis of the *Harmon* case” (2000) 9 PPLR 120

only 70% of the lost profits.¹⁵⁸ In addition, the claimant was entitled to recover bid costs because it had a “real and substantive chance” of being awarded the contract.

4.4.3.5.5 Ineffectiveness

The 2009 amendments introduced a new sanction of “ineffectiveness” (Art.2d/Reg.47E).

In the UK ineffectiveness means a contract is prospectively (not retrospectively) ineffective from the time of the declaration (Reg.47M). The limitation period for an ineffectiveness claim is 30 days for advertised contracts; otherwise it is six months (Art.2f/Reg.47E).

There are three grounds for ineffectiveness. The first is where there has been an unlawful failure to advertise (Reg.47K(2)). Here, ineffectiveness can be avoided where a transparency notice is published and the authority waits 10 days before concluding the contract. The second ground is where there has been a failure to comply with the standstill or automatic suspension rules (Reg.47K(5)). These breaches need to have deprived the claimant of the possibility to pursue pre-contractual remedies for ineffectiveness to apply, and must be coupled with other procedural infringements. The third ground is where there has been a breach of the rules relating to dynamic purchasing systems or framework agreements (Reg.47K(6)). The court may refuse to grant ineffectiveness under any of these grounds where overriding reasons relating to the general interest require that this does not happen (Art.2d(3)/Reg.47L). In situations where ineffectiveness is not granted there are alternative penalties (e.g. fines or orders shortening the contract) (Art.2e/Reg.47N).

4.4.3.5.6 Alcatel standstill and information requirements

A 2007 amendment to the Remedies Directive requires that authorities be obliged to inform losing bidders of the decision to award (including a summary of relevant reasons

¹⁵⁸ See also *Aquatron*, fn.116

and a precise statement of the exact standstill period applicable) and observe a 10day (15 where electronic communication is not used) standstill period before concluding the contract (Art.2a). The amendment endorses the ruling in Case C-81/98, *Alcatel*,¹⁵⁹ and is intended to give unsuccessful bidders the time and opportunity to challenge the award decision based on relevant information whilst interim measures and set aside orders are still available.

The Regulations already contained information and standstill requirements (Reg.32); however, 2009 amendments have strengthened these requirements (Reg.32 and 32A). Prior to amendment, Reg.32 required the contract award notice to include the award criteria, the score obtained by the losing tenderer to which the notice was addressed and the score of the winning bidder (where practicable), and the name of the winning bidder. The losing tenderer then had two working days to request the reasons why it had been unsuccessful, and to find out the characteristics and relative advantages of the winning bid. This aspect of the rules has now been removed, as an award notice must now provide tenderers with (in addition to information previously required) the reasons for the award decision including the characteristics and relative advantages of the successful tender, and must specify the operation of the standstill period (Reg.32(2)). 2011 amendments to the Regulations clarify that the above notice only needs to be sent to bidders who submitted a bid or tender and who have not been definitely excluded prior to the final award decision, e.g. bidder who have not been excluded, notified of the exclusion and the time limit for bring proceedings has expired¹⁶⁰; nevertheless, a similar notice must be sent to candidates (e.g. bidders that were eliminated or withdrew before the final tender stage). This notice does not need to set out the relative advantages of the winning bid (Reg.32(2A)).

¹⁵⁹ Case C-81/98, *Alcatel Austria v. Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-7671; see also Case C-212/02, *Commission v. Austria* [2004] All ER (D) 279 (Jun)

¹⁶⁰ 2011 Amendment Regulations, fn.139

4.5 Concluding remarks

The first part of chapter four provided an overview of key procedural requirements of the Directive and Regulations. In particular, the chapter introduced the procedures authorities must follow when awarding contracts, and requirements such as contract advertising and the criteria that may be used for qualification, selection and award. In the second part of the chapter the rules on procurement review and remedies were introduced. This is an area that has been recently strengthened with the introduction of standstill, ineffectiveness and automatic suspensions.

5 Competitive Dialogue

5.1 Introduction

The need for a new contract award procedure arose in the run up to the 2004 Directive, as existing procedures, which have lasted relatively unchanged since their design in the 1970s, were considered outdated and not suitable for modern procurement methods, such as PPPs. As briefly explained in chapter four, competitive dialogue was introduced in 2004 to supplement the existing set of procedures and provide a procurement process tailor made to the needs of complex contracts. Chapter five will provide an introduction to competitive dialogue, setting out the legal background and then moving on to provide an outline of the process. As mentioned in chapter four, soft law often plays a key role in UK procurement regulation. Chapter five will conclude by setting out the government guidance on competitive dialogue.

5.2 The need for a new procedure

5.2.1 Introduction

As discussed in the preceding chapter, before the introduction of competitive dialogue in the UK contracting authorities were required as a general rule to award contracts under the open or restricted procedures. These procedures are highly structured and transparent, which makes them ideal for straightforward procurements; however, for reasons that will be explained, these procedures are not suitable for complex procurements, such as PPPs.

5.2.2 Scope for dialogue

The open and restricted procedures provide minimal scope for procuring authorities to collaborate with the private sector in order to develop a proposed project. As was seen in

chapter four, an authority must specify its requirements precisely in technical specifications at the outset, which enables tenderers to submit complete, fully costed tenders. There are strict rules restricting discussions and negotiations between procuring authority and supplier.¹⁶¹ In contrast, in the private sector extensive contractual discussions and negotiations are commonplace, as it is through such dialogue that purchasers are able to obtain the most economically efficient outcome and maximise profits.¹⁶² This is because suppliers will generally have more information about, for instance, the products, the means of supply and the market than purchasers (particularly so in relation to complex contracts). Discussions and negotiations with suppliers help purchasers overcome such an information asymmetry.¹⁶³

In complex PPP procurement, although authorities may be able to state desired overall outcomes, such projects are often so complex with many variables and uncertainties (e.g. how can desired outcomes to be delivered in practice? what risks will the private sector be prepared to accept? how precisely will the project be financed?) that an authority will not be in a position at the outset to identify the detailed solution best able to meet its needs to the degree required to enable tenderers to submit meaningful tenders.¹⁶⁴

Nevertheless, under the EU procurement rules negotiations between authorities and suppliers tend to be viewed with scepticism, due to a perception that such dialogue lacks transparency; for example, negotiations may be seen to allow more scope for authorities to abuse discretion and provide greater possibility for authorities to pass on confidential information.

¹⁶¹ See Arrowsmith (1998), fn.107

¹⁶² See Chong et al., *Auction versus negotiation in public procurement: looking for empirical evidence*, (June 2009) available at <http://hal.archives-ouvertes.fr/hal-00512813/en/> (accessed 31/10/2011); Bajari et al., *Auctions versus negotiations in procurement: an empirical analysis* (2003, Cambridge, Mass, National Bureau of Economic Research)

¹⁶³ See P.Trepte, "Transparency requirements" in Nielsen & Treumer (eds.), *The New EU Public Procurement Directive*, (2005, Djøf), 55 and 63

¹⁶⁴ See 4Ps, *A map of the PFI process: using competitive dialogue*, (2006) available at www.localpartnerships.org.uk (accessed 31/10/2011)

In addition to the objective of compliance with EU procurement law obligations, contracting authorities are likely to be pursuing separate policy objectives, such as running procurements that maximise value for public money. Whilst restrictions on dialogue may not obstruct value for money in simple procurements, in complex procurements they may result in procurement policy goals conflicting. An authority may be faced with the decision whether to comply with the strict letter of the law or to adopt a more flexible approach in order to maximise value for money.¹⁶⁵ With this in mind, Trepte argues that in certain situations the priority of the EU procurement rules of imposing obligations on authorities designed to prevent actions which might harm the creation of a single EU procurement market, is accomplished at the expense of a positive framework through which optimum procurement results and value for money can be achieved.¹⁶⁶

5.2.3 Bidder numbers

In addition to compliance and value for money objectives, contracting authorities are also likely to be concerned to run efficient procurements that minimise costs. Again, in this regard, the open and restricted procedures are often unsuitable for many complex procurements like complex PPP because of the invariably high costs for bidders of preparing bids (potentially running into the £millions) and the high costs for the authority in administering the procurement. In complex PPP procurement it may not be in the interests of bidders or authorities to invite a minimum of five firms to tender (required under the restricted procedure) as this would likely be too costly in administrative, financial and commercial terms for all parties involved.¹⁶⁷

¹⁶⁵ See S.Arrowsmith, "National and international perspectives on the regulation of public procurement: harmony or conflict?" in Arrowsmith & Davies (eds.) *Public Procurement: Global Revolution* (1998, Kluwer Law International), 23; Arrowsmith (1998), fn.107; K.Krüger, "Ban-on-negotiations in tender procedures: undermining best value for money?" (2004) 4(3) *Journal of Public Procurement* 397; and K.Krüger, "The scope for post-tender negotiations in international tendering procedures" in Arrowsmith & Davies (eds.) *Public Procurement: Global Revolution* (1998, Kluwer Law International), 181-198

¹⁶⁶ P.Trepte, *Public procurement in the EU: a practitioner's guide* (2007, Oxford University Press, Oxford), 7.81

¹⁶⁷ See PfS, *Guidance note on classification of the contract and choice of procedure under the EU procurement rules for the Building Schools for the Future Programme* (2006, London), section 16.1

Maintaining a wide field of bidders throughout a PPP procurement process also runs the risk of deterring competition.¹⁶⁸ Because of the great time and expense required to prepare bids, bidders are unlikely to be willing to commit fully to a procurement process unless they are one of a small group and thus have a realistic opportunity of success. There is a risk that bidders will drop out if they are still, for instance, only one of five when they are required to incur the substantial costs needed to put together a tender in a PPP procurement. Use, therefore, of the competitive open or restricted procedures to procure a complex PPP deal may actually result in a lack of competition (potentially impacting upon value for money).

Also, the open and restricted procedures fail to provide an option permitting authorities to reduce the number of bidders further following qualification and selection. This can be desirable in complex PPP procurement because, as a procurement progresses and bidders are deselected, remaining bidders are encouraged and more able to justify concentrating their resources into developing their proposal and attuning it to the authorities requirements.¹⁶⁹ Indeed, it is noted that the commercial reality of complex PPP procurement is such that a bidder and debt funders will only be prepared to commit the substantial resources required to bring a project to commercial and financial close after that bidder has been selected as the preferred bidder (i.e. when there is only one bidder left in the running).¹⁷⁰

5.2.4 The pragmatic UK approach

Due to the lack of commercial suitability of the open and restricted procedures for many PPP procurements, empirical research by Braun evidences the development of a common

¹⁶⁸ Ibid

¹⁶⁹ R.Boyle, "Critique of the Commission's proposal for a new Directive on the Co-ordination of Procedures for Public Contracts COM (2000) 275 Final, as updated by discussions in the working group" (2001) 3 *PPLR* NA65, NA67

¹⁷⁰ A.Brown, "The impact of the new Procurement Directive on large public infrastructure projects: competitive dialogue or better the devil you know?" (2004) 4 *PPLR* 160, 166

UK practice, encouraged by central government,¹⁷¹ whereby the more flexible negotiated procedure would be used for the procurement of PFI projects. According to Braun, practice was for PFI projects to be classified as services so that the use of the negotiated procedure could be justified on either the ground that the nature of the services to be provided, or the risks attaching thereto, are such as not to permit prior overall pricing (Public Services Contracts Regulations 1993, Reg.10(2)(b)) (the “overall pricing” ground); or the ground that the nature of the services to be provided is such that specifications cannot be drawn up with sufficient precision to permit the award of the contract using the open or restricted procedure (Public Services Contracts Regulations 1993, Reg.10(2)(c)) (the “no specifications” ground).¹⁷²

As explained in chapter four, the negotiated procedure is a relatively unstructured procedure, and, according to Arrowsmith, was the preferred procedure for UK authorities awarding PFI contracts because, in particular, it provides scope for an iterative process in which “the ideas and capabilities of bidders and the authority’s preferences can be tailored to produce the optimum outcome, without excessive procedural costs”.¹⁷³ Under the negotiated procedure it was common for authorities procuring PFI contracts to invite a limited number of qualifying suppliers (three-five) to submit outline proposals and then reduce bidder numbers based on these proposals, inviting often as few as two or three bidders to submit more detailed offers upon which a bidder with the most economically advantageous tender would be identified (“the preferred bidder”).¹⁷⁴ In order to minimise costs and ensure only one bidder needed to incur the substantial cost of finalising the deal, it appears there was considerable pressure upon contracting authorities to appoint a

¹⁷¹ See Treasury Taskforce, *Technical Note No.2: How to follow EC procurement procedure and advertise in the OJEC*, (1998, London)

¹⁷² P.Braun, *The practical impact of EU public procurement law on PFI procurement practice in the United Kingdom*, (2001, University of Nottingham) (PhD thesis), 178-184; P.Braun, “Strict compliance versus commercial reality: the practical application of EC procurement law to the UK’s Private Finance Initiative” (2003) 9(5) *European Law Journal* 575

¹⁷³ Arrowsmith (2000), fn.71, 722

¹⁷⁴ *Ibid*

preferred bidder at an early point in the process.¹⁷⁵ Although commercially sensible, the practice was seen by some as problematical as often substantial negotiations would take place with the preferred bidder when competitive tension was minimal.¹⁷⁶

The precise scope of the “no specifications” and “overall pricing” grounds for using the negotiated procedure is not certain. According to Brown, there was little legal risk in practice of using the procedure for PFI, as most bidders accepted the need for flexibility¹⁷⁷; however, reliance on the above two grounds was contested in a judicial review action in the High Court.¹⁷⁸ Here, it was held that the authority concerned was “plainly entitled” to use the negotiated procedure, but there was no meaningful discussion of the scope of the “overall pricing” and “no specifications” grounds.

In 2000 the Commission issued a reasoned opinion to the UK in relation to a negotiated procedure for the Westminster City Council Pimlico Schools PFI.¹⁷⁹ The Commission reached the conclusion that the conditions for use of the negotiated procedure on the “overall pricing” ground were not present. According to the Commission the negotiated procedure is a derogation from fundamental procurement law principles that is only to be used in exceptional circumstances.

5.3 The competitive dialogue procedure

Early signs of Commission recognition of the need for competitive dialogue appear in the 1996 Green Paper, *Exploring the Way Forward*.¹⁸⁰ The Green Paper recognised concerns that the legal framework was inhibiting private sector involvement in relation to the EU

¹⁷⁵ See Treasury Taskforce, *Technical note no.4: how to appoint and work with a preferred bidder*, (1999, London)

¹⁷⁶ Arrowsmith (2000), fn.71, 732

¹⁷⁷ Brown (2004), fn.170, 164

¹⁷⁸ *R. (On the Application of Kathro) v Rhondda Cynon Taff County Borough Council* [2002] Env LR 15; see also S.Arrowsmith, “Application of the UK procurement regulations to PFI contracts: new case law” (2002) 3 PPLR NA84

¹⁷⁹ European Commission, *Reasoned Opinion: addressed to the United Kingdom pursuant to Article 226 of the EC Treaty, concerning failure to fulfil its obligations under Directive 93/37/EEC, and in particular Article 7(2)(c) thereof*, (2000, Brussels) (C2000 1972 Final)

¹⁸⁰ Commission (1996), fn.97

policy of promoting Trans-European Networks.¹⁸¹ One of the problems, according to the Green Paper, was that the private sector was reluctant to engage in pre-tender discussions without the assurance that it would not be excluded from the subsequent tendering procedure due to fear of infringing the equal treatment principle.¹⁸²

Industry responses to the Green Paper made the Commission fully aware that these problems were not limited to the procurement of Trans-European Networks. In its 1998 Communication the Commission stated: "... especially in the case of particularly complex contracts in areas that are constantly changing, such as high technology, purchasers are well aware of their needs but do not know in advance what is the best technical solution for satisfying those needs. Discussion of the contract and dialogue between purchasers and suppliers are therefore necessary in such cases. But the standard procedures laid down by the 'traditional' directives leave very little scope for discussion during the award of contracts and are therefore regarded as lacking in flexibility in situations of this type".¹⁸³

What would eventually become competitive dialogue was initially presented in the Commission's 2000 proposal¹⁸⁴ as an additional ground for using the negotiated procedure.¹⁸⁵ Commentators were quite critical of the provision, with Arrowsmith describing it as "the very worst kind of drafting".¹⁸⁶ The provision was regarded as too restrictive; for example, the scope of the provision was narrow and the purpose of the dialogue phase had to be used solely to discuss and define the means best suited to meeting the needs of the contracting authority.

¹⁸¹ Ibid, para.5.20

¹⁸² Ibid, para.5.23

¹⁸³ European Commission, *Communication from the Commission: public procurement in the European Union*, (1998, Brussels) (COM(1998) 143 Final)

¹⁸⁴ European Commission, *Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts*, (2000, Brussels) (COM (2000) 275 Final)

¹⁸⁵ According to Trepte (fn.166, 7.79) this uncertain conception may well be at the root of uncertainty over competitive dialogue's scope of application.

¹⁸⁶ S.Arrowsmith, "The European Commission's proposal for new directives on public and utilities procurement" (2000) 6 *PPLR* NA125; see also Boyle (2001), fn.169

Negotiations leading to the adoption of the Directive eventually resulted in the creation of a new procedure, competitive dialogue. The Directive describes competitive dialogue as “a flexible procedure ... which preserves not only competition between economic operators but also the need for contracting authorities to discuss all aspects of the contract with each candidate” (Recital 31).

The new procedure is intended to closely correspond to best procurement practice for the award of particularly complex contracts, such as “the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing the financial and legal make-up of which cannot be defined in advance” (Recital 31). According to the OGC, “lobbying by UK stakeholders, both public and private sector, helped to ensure that the final text fitted better with UK PFI practice. The end result is a structured negotiated procedure, which is similar in many ways to the existing practice of letting PFI contracts”.¹⁸⁷ The legal rules on competitive dialogue will be described in detail in chapters six and seven.

Although similar to pre-2006 UK PFI procurement practice, commentators have questioned whether competitive dialogue goes far enough to provide authorities with sufficient flexibility to maximise value for money in complex procurements.¹⁸⁸ During negotiations for the Directive the UK had sought to argue that, rather than a creating a new procedure, the scope of application of the negotiated procedure should simply be widened with no regulation of the negotiations being necessary. According to Trepte, “... competitive dialogue ..., at least as originally conceived, offered some hope of improvement but what started out as a procedure which resembled the well-known two

¹⁸⁷ OGC, *Competitive dialogue procedure: OGC guidance on the competitive dialogue procedure in the new procurement regulations*, (2006, London), 1.2

¹⁸⁸ See Trepte (2007), fn.166, 7.80

stage procedure of other international procurement systems, has to a large extent been shorn of its utility ...”.¹⁸⁹

5.4 Soft law

A considerable amount of guidance has been published on competitive dialogue. The Commission has set out its interpretation of the legal rules in an explanatory note published in 2005.¹⁹⁰ The explanatory note provides guidance on some of the contentious issues, such as the field of application of competitive dialogue, the conduct of the dialogue stage, the requirement for complete final tenders, and the scope for negotiation following close of dialogue. Although lacking official status, the explanatory note may be relevant in relation to Commission enforcement of the law.

Upon the introduction of competitive dialogue in the UK the OGC published *Competitive Dialogue Procedure: OGC guidance on competitive dialogue procedure in the new Procurement Regulations* (January 2006).¹⁹¹ The document is relatively brief and concerns itself with few contentious issues; however, unlike previous guidance which had endorsed a more flexible view of the legal rules than that of the Commission, the 2006 guidance is very much in line with the Commission’s explanatory note. Despite previously encouraging the use of the negotiated procedure for PFI procurement, the January 2006 guidance makes it clear that recourse to the negotiated procedure for PFI is in most situations no longer possible: “... the negotiated procedure should only be used in very exceptional circumstances”.

Due to uncertainty about the practical operation of competitive dialogue, the OGC supplemented the January 2006 guidance with a July 2006 information note to provide some practical guidance and invite input for the development of further guidance.¹⁹²

¹⁸⁹ Trepte (2005), fn.163, 63

¹⁹⁰ European Commission, *Explanatory note – competitive dialogue – classic directive*, (2005, Brussels) (CC/2005/04_rev 1 of 5.10.2005)

¹⁹¹ OGC (2006), fn.187

¹⁹² OGC, *Procurement policy: information note 04/06 – 31 July 2006: practical guidance on the use of competitive dialogue*, (2006, London)

In 2008 the OGC and HM Treasury published more comprehensive guidance, *Competitive Dialogue in 2008: OGC/HMT joint guidance on using the procedure*.¹⁹³ The guidance is based on discussions with authorities, practitioners, bidders and advisers, and attempts to provide a practical insight into the operation of the procedure. The 2008 guidance, however, recognises its own limitations: “[the advice] is generic and cannot hope to cover all possible scenarios for every conceivable complex procurement ...”.¹⁹⁴ In addition, the OGC has published case studies of experiences with competitive dialogue and lessons learned.¹⁹⁵ The OGC tends to shy away from definitive advice on key issues, limiting itself to explaining the law and to clarifying issues on which there is some degree of consensus. As reasons for this, Arrowsmith highlights the difficulty of predicting future CJEU interpretations and the danger that explicit guidance could in some cases threaten the very practices that it seeks to promote.¹⁹⁶

There is also sector specific guidance issued on competitive dialogue by, for example, Partnerships for Schools, the Department of Health and 4Ps.¹⁹⁷

In November 2010 HM Treasury published its findings from a review of competitive dialogue, aiming to consider how competitive dialogue is being used, illuminate areas of concern and make recommendations for ongoing and future procurements.¹⁹⁸ The HM Treasury review brings together 18 months of research involving surveys and roundtable discussions with stakeholders. This was followed in 2011 by publication of the findings

¹⁹³ OGC and HM Treasury, *Competitive dialogue in 2008: OGC/HMT joint guidance on using the procedure*, (2008, London)

¹⁹⁴ *Ibid*, 1.7

¹⁹⁵ OGC, *Competitive dialogue case study: BBC digital switchover help scheme*, (2009, London); OGC, *Olympic Delivery Authority: delivery partner procurement using competitive dialogue: a lessons learned study* (2007, London); OGC, *Competitive dialogue case study: a bidder's perspective*, (2009, London)

¹⁹⁶ Arrowsmith (2006), fn.84, 89

¹⁹⁷ PFS (2006), fn.108; Department of Health, *The Private Finance Initiative: how to conduct a competitive dialogue procedure*, (consultation draft) (2006, London); 4Ps (2006), fn.164; 4Ps, *The competitive dialogue process*, (2007, London); 4Ps, *A new chapter in procuring large and complex projects*, (2006, London)

¹⁹⁸ HM Treasury, *HM Treasury review of competitive dialogue*, (2010, London)

from the Efficiency and Reform Group's study into waste and inefficiency in central government competitive dialogue procurement.¹⁹⁹

5.5 The use of competitive dialogue across the EU

de Mars & Craven conducted an analysis of the use of competitive dialogue in several Member States, including the UK, based upon a study of OJEU notices published between 01 January 2006 and 31 December 2009.²⁰⁰ The UK, with 1,380 competitive dialogue contract notices for the relevant period, was noted to be one of the heaviest users of competitive dialogue. The figure dwarfs the usage figures for Germany (131), the Netherlands (87), Ireland (80), Spain (30), Belgium (24) and Portugal (two).

The above research also looked at the types of authority using competitive dialogue, which in the UK was found to be mainly local government (37%) (such as county councils and city councils). Contracting authorities in the health sector (19%) and central government (12%) were noted as other key procurers using the procedure. In terms of the subject area of contract notices, the majority were classified as infrastructure (27%), ICT (25%) and other (21%) categories. In addition, the UK showed the most frequent use of private finance procurement with competitive dialogue from the member states examined. 467 contract notices (34%) were found to refer to projects that potentially involved some element of private finance.

5.6 Concluding remarks

This chapter has sought to establish the background to the legal rules on competitive dialogue, looking in particular at the previous inadequacies of PPP procurement under the EU rules and how the introduction of competitive dialogue seeks to remedy these

¹⁹⁹ Cabinet Office, *Lean procurement project diagnostic findings*, (2010, London); Cabinet Office, *Accelerating government procurement*, (2011, London)

²⁰⁰ de Mars & Craven, "An analysis of use of the competitive dialogue procedure in the EU" in Arrowsmith & Treumer (eds.), *Competitive dialogue in EU procurement* (forthcoming, Cambridge University Press)

inadequacies. Chapters six and seven will build upon this chapter providing a detailed analysis of the legal rules.

6 Grounds for using competitive dialogue

6.1 Introduction

Competitive dialogue is not freely available. Chapter six will look at the legal rules governing the availability of competitive dialogue. It will be seen there is a high degree of uncertainty surrounding a number of availability issues. There is the potential for a broad interpretation, whereby the procedure can be used not only for complex PPP-type deals but also for projects that might previously have been awkwardly procured under a restricted procedure, and a narrow interpretation, whereby the procedure's availability is similar to that of the negotiated procedure. In particular, chapter six will touch upon the approach to interpretation, the scope of the phrase “particularly complex contract”, and the relationship between competitive dialogue and the negotiated procedure.

6.2 Interpretation of the legal rules

The legal rules fail to make clear whether competitive dialogue is to be regarded as a standard procedure, like the open and restricted procedures, or whether it is an exceptional procedure that derogates from fundamental principles.²⁰¹ This issue is important, as it impacts upon the interpretation of competitive dialogue and therefore its availability. For example, the negotiated procedure without a contract notice is an exceptional procedure. The CJEU has emphasised that the derogations for its use are to be construed narrowly and that the burden is with the authority to establish that the decision to use the procedure was legitimate.²⁰²

²⁰¹ Arrowsmith (2005), fn.46, 10.3

²⁰² Case 199/85, *Commission v. Italy* [1987] ECR 1039; Case 328/92, *Commission v. Spain* [1994] ECR I-I-1569; Case C-57/94, *Commission v. Italy* [1995] ECR I-1249; Case C-318/94, *Commission v. Germany* [1996] ECR I-1949

It remains unclear whether the negotiated procedure is exceptional or not. Although the Commission appears to regard the negotiated procedure as exceptional,²⁰³ there are a number of counter arguments to this. As argued by Arrowsmith, the negotiated procedure provides a much higher degree of transparency than the negotiated procedure without a notice (i.e. advertising requirements, disclosure of award criteria etc.); thus, in the opinion of Arrowsmith, the negotiated procedure “is not truly a derogation from ... general principles, but merely a modified application of those principles, that takes account of the special features of some procurements”.²⁰⁴ The same can be said of competitive dialogue.

Competitive dialogue, as originally proposed by the Commission, was expressly a standard procedure.²⁰⁵ However, by the time the procedure came to be adopted, limitations were placed upon its availability. The mere fact of this appears to have led many to conclude that, however unsatisfactory, competitive dialogue is an exceptional procedure.²⁰⁶ Contrary to this position, however, some favour the view that competitive dialogue is not to be regarded as exceptional.²⁰⁷ According to Arrowsmith, even if the negotiated procedure is exceptional it does not follow that competitive dialogue must be. Competitive dialogue is even more structured and transparent than the negotiated procedure. It is argued that the wording of the Directive supports this interpretation. In Art.28, which introduces all of the procedures, competitive dialogue is presented on its own whereas the two negotiated procedures are grouped together.²⁰⁸ Also, the procedural rules on competitive dialogue (Art.29) are separated from the procedural rules of the negotiated procedures (Art.30 and 31).

²⁰³ See, for example, the *Pimlico Schools Opinion* (2000), fn.179

²⁰⁴ Arrowsmith (2005), fn.46, 8.3

²⁰⁵ Commission (1998), fn.183

²⁰⁶ See C.Bovis, “The competitive dialogue as a procurement process of Public Private Partnerships” (2006) 1 *European Public Private Partnership Law Review* 14; Brown (2004), fn.170, 170; and S.Treumer, “Competitive dialogue” (2004) 4 *PPLR* 178, 179; see also P.Telles, “Competitive dialogue in Portugal” (2010) 1 *PPLR* 1

²⁰⁷ Arrowsmith (2005), fn.46, 10.3; M.Burnett, “Developing a complexity test for the use of competitive dialogue for PPP Contracts” (2010) 4 *EPPL* 215, 218

²⁰⁸ Arrowsmith (2005), *Ibid*

6.3 The availability of competitive dialogue

6.3.1 Introduction

Article 29(1)/Regulation 18(2)) provides:

in the case of particularly complex contracts ... where contracting authorities consider that the use of the open and restricted procedure will not allow for the award of the contract, the latter may make use of the competitive dialogue ...

The wording of Art.29(1)/Reg.18(2) appears to suggest that there are two central conditions for using competitive dialogue: (1) the contracting authority must consider that the use of the open and restricted procedure will not allow for the award of the contract; and (2) the contract must be “particularly complex”. However, the need for the first condition is not clearly apparent. This is because the use of competitive dialogue appears to hinge entirely upon the existence of a particularly complex contract. If a contract meets the definition of particularly complex then for this very reason the open and restricted procedures will invariably not allow for the award of the contract and hence competitive dialogue is available. If the open and restricted procedures will not allow for the award of the contract but the contract fails to meet the definition of particularly complex contract then competitive dialogue is not available. Nevertheless, there are several reasons why open and restricted procedures may not allow for the award of a contract; these include the requirement for at least five tenderers, the need to draw up technical specifications at the outset, and the limited scope for discussions and negotiations (see chapter five).

UK guidance emphasises the need for authorities to document the reasons behind the decision to procure under competitive dialogue.²⁰⁹ These reasons must be included in the contract award notice (Art.43/Reg.31).

6.3.2 Particularly complex contract

6.3.2.1 Introduction

A definition of “particularly complex contract” is provided in Art.1(11)(c)/Reg.18(1), with further guidance in the Directive’s recitals (Recital 31). A contract is particularly complex where:

the contracting authorities:

- *are not objectively able to define the technical means in accordance with [the Directive’s rules on technical specifications], capable of satisfying their needs and objectives, and/ or*
- *are not objectively able to specify the legal and/ or financial make-up of a project*
(Art.1(11)(c)/Reg.18(1)).

The above definition is central to question of whether or not competitive dialogue can be used; however, it gives rise to two key questions. Firstly, how much discretion does a contracting authority have in deciding whether or not to use competitive dialogue? The second question concerns the scope of the phrases “technical means” (technical complexity) and “legal and or financial make-up of a project” (legal/financial complexity).

Some further guidance is provided by Recital 31:

²⁰⁹ OGC/HMT (2008), fn.193, 5.1.5

Contracting authorities ... may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market in the way of technical solutions and/or financial/ legal solutions. This situation may arise in particular with the implementation of important infrastructure projects, large computer networks or projects involving complex and structured financing and financial and legal make-up which cannot be defined in advance.

Recital 31 is not a legal rule and not part of the Regulations; however, the recital does have interpretative value. The recital does not appear to add a great deal to the definition of complex contract; however, for some, it adds further uncertainty, particularly the reference to the seemingly higher standard of objective impossibility.²¹⁰

As explained by Treumer, the wording of Recital 31 gives the impression that there were difficulties agreeing the specific wording of Art.29²¹¹; that is, the inconsistencies between the two provisions may be the result of political compromise. For instance, the wording “objectively impossible” may not have been acceptable for certain Member States. Thus, in order to appease those in favour of the wording it was maintained, but placed in the preamble to keep its opponents content because of its reduced legal value. In this situation a resolution to the uncertainty caused by the compromise is purposively left for practitioners and the courts to resolve.²¹²

Recital 31 gives examples of types of contracts that may be particularly complex (see above). These are, however, merely examples; the circumstances for using competitive

²¹⁰ See Brown (2004), fn.170, 171; and S.Treumer, “The field of application of competitive dialogue” (2006) 6 PPLR 307, 313

²¹¹ Treumer (2006), *ibid*, 308

²¹² *Ibid*

dialogue may or may not exist in relation to such contracts or similar contracts.²¹³ The list of examples has attracted some criticism, for instance because the examples are not helpful in determining what other contracts might also be complex.²¹⁴ Also, the list is said to be confusing. For instance, why are “important” integrated transport infrastructure projects to be considered more complex (if this is the case) than less important versions of such projects.²¹⁵

6.3.2.2 Contracting authority discretion

Article 29(1)/Regulation 18(2) gives the impression that authorities have a wide discretion in deciding whether or not to use competitive dialogue; i.e. it is phrased, “... where contracting authorities consider ...”. This suggests that the assessment of competitive dialogue’s availability will come down to a subjective test. An alternative interpretation is that even where there is a complex project, an authority must still consider whether it is appropriate to use the open or restricted procedure.²¹⁶

The wording of Art.1(11)(c)/Reg.18(2) conflicts with the wording of Art.29(1)/Reg.18(1), as an objective assessment is referred to. The margin of discretion afforded to authorities apparent from the wording of Art.29(1)/Reg.18(2) is thus significantly curtailed. On the basis of the wording in Art.1(11)(c)/Reg.18(2) it is suggested that the question of availability would come down to a consideration of whether the contract would be complex in the eyes of a reasonably diligent authority.²¹⁷

The Directive’s preamble may guide a court in interpretation. Recital 31 speaks of objective impossibility (a potentially higher threshold) and notes that an authority will not

²¹³ Arrowsmith (2005), fn.46, 10.4

²¹⁴ A. Rubach-Larsen, “Competitive Dialogue” in Nielsen & Treumer (eds), *The New EU Public Procurement Directives* (2005, Djøf, Copenhagen), 70

²¹⁵ Ibid

²¹⁶ Arrowsmith 2005, fn.46, 10.6

²¹⁷ See Brown (2004), fn.170, 171

be able to use competitive dialogue where the reason for the complexity is down to fault on its part. This suggests that competitive dialogue is not available merely because the authority lacks ordinary expertise; however, the extent of any non-fault requirement is not clear. For example, are authorities under a positive obligation to take reasonable steps to make up for any of their technical, legal or financial shortcomings?²¹⁸

A further insight into some of the thinking behind the complexity definition comes from previous incarnations of the text. According to the Commission's original proposal:

*The complexity must be established and able to be objectively justified ... This does not concern subjective impossibility, i.e. due to deficiencies on the part of the contracting authority itself. The authority may not simply affirm that it is unable to provide a definition or an evaluation. On the contrary, the contracting authority must prove that this is objectively impossible, given the nature of the specific contract. Depending on the case this might mean that the contracting authority would be required to prove that there are no precedents for the project, or that disproportionate time or money would be required to acquire the necessary knowledge.*²¹⁹

It must be emphasised that the strict formulation above was not accepted, and would likely have rendered competitive dialogue worthless in view of the fact the negotiated procedure would also be available for contracts meeting the high threshold. According to the proposal, authorities would not only have to show that they are not at fault but would also have to demonstrate that all relevant positive proportionate action was taken in order to make up for their shortcomings. To require an authority to demonstrate that there are no precedents for a project would prohibit the use of competitive dialogue for many PPPs in the majority of Member States, particularly the UK, and, considering the aim of

²¹⁸ Rubach-Larsen (2005), fn.214, 71

²¹⁹ Commission (2000), fn.184, 25

competitive dialogue was to provide an effective procurement process for such projects, such restricted availability would nullify its impact.

The Commission has sought to add clarity to the matter in its explanatory note:

... it is necessary to examine on a case by case basis the nature of the market in question, taking account of the capacity of the contracting authority concerned to verify whether use of the competitive dialogue was justified. ... [T]he contracting authority has an obligation of diligence – if it is in a position to define the technical resources necessary or establish the legal and financial framework, the use of competitive dialogue is not possible.²²⁰

Under the Commission interpretation the actual level and experience held by the authority in question in relation to the type of contract being awarded will be taken into account; however, authorities have an obligation of diligence, meaning that, if they are capable of predefining the technical, financial and legal matters they will not be able to legitimately use competitive dialogue. The Commission interpretation appears to fit with Brown's recommendation that greater flexibility be allowed where an authority is awarding a complex contract (e.g. a PFI) for the first time, but a stricter approach is required for subsequent similar procurements (virtual reruns) by the authority. The OGC/HMT guidance adheres to the Commission interpretation.²²¹

6.3.2.3 Technical complexity and financial/legal complexity

The two complexity grounds resemble the “no specifications” and “overall pricing” grounds of the negotiated procedure (see chapter five). The relationship between competitive dialogue and the negotiated procedure will be looked at below; however, it is important to note when considering the availability of competitive dialogue that a reason

²²⁰ Commission (2005), fn.190, 2.1

²²¹ OGC/HMT (2008), fn.193, 3.5

behind the introduction of competitive dialogue was to provide flexibility and limit recourse to the negotiated procedure. It follows that the intention behind technical and legal/financial complexity must have been for them to be broader than the no specifications and overall pricing grounds (the scope of which are not clear); otherwise, the impact of competitive dialogue would be minimal.

The complexity grounds could be read narrowly to encompass only situations where a proposed project is so complex that it is impossible to draw up specifications in advance. However, the circumstances in which this situation could occur would be rare, particularly as specifications can be drawn up totally or partially in terms of functionality or performance.²²² Many, therefore, including the Commission,²²³ favour a wider reading to encompass a situation where an authority is not able to determine from the outset which of several solutions would be best suited to satisfying its needs. Support for this interpretation comes from Art.29(3)/Reg.18(2), which provides that dialogue is to be used to identify and define the means “best suited” to satisfying the authority’s needs, plus the fact that recital 31 speaks of authorities needing to use competitive dialogue to assess “what the market has to offer in the way of technical solutions”.²²⁴ The Commission illustrates this type of complexity with a “crossing the river” scenario; that is to say, an authority requiring a connection between two shores may not know whether the best solution is a bridge or tunnel even though it may be able to establish specifications for both. According to the Commission, competitive dialogue is appropriate for such situations.²²⁵ The OGC/HMT guidance adopts the same interpretation to that of the Commission.²²⁶

²²² Commission (2005), fn.190, 2.2

²²³ Ibid, 2.2

²²⁴ Arrowsmith (2005), fn.46, 10.5

²²⁵ Commission (2005), fn.190, 2.2

²²⁶ OGC/HMT (2008), fn.190, 3.5

In view of the often unavoidable uncertainty around financial and legal aspects at the outset of any major PPP project (i.e. projects involving risk transfer and private finance) the legal/financial complexity limb is potentially very wide. For instance, it is noted that there may be uncertainty over such financial and legal matters as the structure of the arrangement (e.g. whether it should be a joint venture or long term partnering contract), the contract terms or conditions (e.g. including matters such as risk allocation, liability for default and payment mechanisms) and funding arrangements.²²⁷ It is thus very difficult to see from the wording of the Directive where one is to draw the line when determining whether a contract is sufficiently complex. The Commission has clarified that issues of financial/legal complexity “arise very, very often in connection with projects of Public Private Partnerships”.²²⁸ However, it is warned that naming a project a “PPP-project” will not in itself entail legal or financial complexity.²²⁹ The Commission has also given a number of examples of contracts it considers sufficiently legally/financially complex, all of which involve private financing and are similar to the types of projects considered in chapter two.²³⁰ Similarly, the OGC/HMT guidance gives typical PFI procurements as examples of legal and financial complexity.²³¹

6.3.3 Competitive dialogue and the negotiated procedure

In view of the background to competitive dialogue and previous UK PFI procurement practice, in the UK the availability of competitive dialogue in relation to the availability of the negotiated procedure is highly pertinent. OGC guidance in 2006 made clear that for all but the most exceptionally complex projects the negotiated procedure was no longer available (the London Underground PPP is given as an example of an exceptionally complex contract).²³² The Partnerships for Schools guidance is drafted on the assumption

²²⁷ Brown (2004), fn.170, 170

²²⁸ Commission (2005), fn.190, 2.3

²²⁹ Ibid, 2.3

²³⁰ Ibid, 2.3

²³¹ OGC/HMT (2008), fn.193, 3.5

²³² OGC (2006), fn.187, section 2

that BSF procurements will be conducted under competitive dialogue and both Partnerships for Schools and the OGC emphasise that legal advice must be sought where a contracting authority is considering the use of the negotiated procedure.²³³ The OGC also warns that the Commission is likely to be scrutinising any use of the negotiated procedure.²³⁴

As previously highlighted, technical complexity and legal/financial complexity closely resemble the “overall pricing” and “no specifications” grounds for using the negotiated procedure. As touched upon above, the CJEU has yet to interpret the negotiated procedure and it is uncertain whether it is to be regarded as an exceptional or standard procedure. The 2004 Directive failed to take the opportunity to clarify the point. The lack of clarity over the scope of both competitive dialogue and the negotiated procedure make it very difficult to say what the relationship is between the two procedures and where an authority can choose to use the negotiated procedure over competitive dialogue.²³⁵ OGC figures and a scan of negotiated procedure OJEU notices, suggest that, although the negotiated procedure is still being used, its use has fallen steadily since the introduction of competitive dialogue. It appears that, rather than complex PPP contracts, the procurement of contracts for financial and intellectual services are the main use of the negotiated procedure in recent years (e.g. insurance services).

The no specifications ground appears similar to “technical complexity”. Under Art.30(1)(c)/Reg.13, the negotiated procedure may be used:

in the case of services, inter alia [financial services], and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that

²³³ PFS (2006), fn.167, para.22; OGC/HMT (2008), fn.193, 3.2; OGC (2006), fn.187, section 2

²³⁴ OGC/HMT (2008) *ibid*; OGC (2006), *ibid*

²³⁵ Brown (2004), fn.170, 172

contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures.

As with technical complexity, the above ground could conceivably be limited to the rare circumstance in which it is not possible to draw up any specification at the outset, or it could be construed more broadly to cover situations where a specification could be drawn up but it is useful to allow wide scope for variations.²³⁶ In the past in the UK this ground was often considered suitable for justifying use of the negotiated procedure for PFI projects, as it is often the case that, although such arrangements may be definable in terms of their general outputs, it is not clear from the outset what services could sensibly be included to make the whole arrangement cost effective from the private sector's point of view or optimum from the public sector's point of view.²³⁷

The wording of the overall pricing ground potentially overlaps with either "technical complexity" or "legal/financial complexity". Article 30(1)(b)/Regulation 13 provides that authorities may use the negotiated procedure:

in exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit overall pricing.

The overall pricing ground is expressly exceptional and so will most likely be interpreted strictly. Nevertheless, before the addition of competitive dialogue, the most logical way of interpreting the provision was so as to cover those situations where negotiations were needed after the commencement of an award procedure to determine an overall price (i.e.

²³⁶ Arrowsmith (2005), fn.46, 8.5

²³⁷ Trepte (2007), fn.166, 7.147

in line with its purpose).²³⁸ Thus, it is suggested that overall pricing refers to whether it is possible at the outset to establish a single pricing structure (or payment mechanism).²³⁹

The overall pricing ground applies in two situations. The first type of situation, the nature of the works, supplies or services do not permit overall pricing, used to be thought to cater for PPPs that rely on a combination of works, supplies and services (i.e. PFI contracts), as it is only when the make-up of the project is more certain through negotiations that an agreed overall pricing structure can be ascertained.²⁴⁰ The second situation, the impossibility of overall pricing results from the risks attaching to the works, supplies or services, again, was previously thought to best cater for complex PPP deals, as a fundamental characteristic of PPPs is the transfer of risk to the private sector.

According to Trepte, “... it is inconceivable that the risks could be allocated based on an unalterable specification established by the purchaser at the outset”.²⁴¹ The experience with the UK’s first PFI prison contracts is an example of this.²⁴²

In the UK High Court judgment *R v. Rhondda Cynon Taff County BC Ex parte Kathro*,²⁴³ concerning a local authority PFI project, despite limited discussion on the matter, the judge accepted the use of the negotiated procedure was justified. The case was taken as implying that authorities have a considerable discretion in making the commercial assessment of whether the conditions for using the procedure are met.²⁴⁴ Clearly, this view does not accord with the Commission’s position that the negotiated procedure is exceptional.²⁴⁵

²³⁸ Arrowsmith (2005), fn.46, 8.9

²³⁹ Ibid

²⁴⁰ Trepte (2007), fn.166, 7.143

²⁴¹ Ibid, 7.144

²⁴² HM Prison Service and Private Finance Panel Executive, *Report on the procurement of custodial services for the DCMF prisons at Bridgend and Fazakerley*, (1996, London)

²⁴³ *Kathro*, fn.178

²⁴⁴ Arrowsmith (2005), fn.46, 8.6 and 8.12

²⁴⁵ Pimlico Schools Opinion (2000), fn.179

The wording of the grounds for using the negotiated procedure was not changed in 2004; likewise the interpretation of the grounds should not have changed. The fact that competitive dialogue is now generally considered the most appropriate procedure for most complex PPP arrangements does not necessarily imply that UK authorities were legally in the wrong by using the negotiated procedure in the past. Authorities have considerably more experience with complex PPPs and there has also been a high degree of standardisation in most sectors. Thus, through this increasing familiarity the use of the negotiated procedure may have become inappropriate over time.

Some expect the addition of competitive dialogue to impact upon the CJEU's interpretation of the grounds for using the negotiated procedure, leading it to construe the grounds more narrowly than it otherwise would.²⁴⁶ It is difficult to speculate on the CJEU's approach to the relationship between the two procedures. It may be found that there is some degree of complexity overlap between the two procedures; alternatively, the CJEU may adopt a hierarchical approach whereby authorities will be expected to use competitive dialogue over the negotiated procedure apart from in situations where it is not suitable or even when competitive dialogue will not allow for the award of the contract.

6.4 Concluding remarks

The chapter has highlighted some of the key legal grey areas concerning the availability of competitive dialogue. These include, the discretion with which an authority may choose to procure under competitive dialogue, the scope of technical and legal/financial complexity, and the relationship between competitive dialogue and the negotiated procured. These uncertain areas were explored with interviewees in the empirical aspect of the research, as will be explained later.

²⁴⁶ Arrowsmith (2005), fn.46, 8.14

7 Competitive dialogue: procedural requirements

7.1 Introduction

Chapter seven will look in depth at the procedural requirements of competitive dialogue. The chapter is divided into three main sections: pre-dialogue; dialogue and post-dialogue. The chapter will identify areas of uncertainty and areas in which the law may not be entirely adequate. This will inform the design of the questions in the research interviews. In addition to the rules, government guidance will be drawn upon as each stage of the procedure is considered. The chapter, in order to provide some context, will consider certain strategic choices that may be open to authorities under the legal framework where there is discretion, as set out in academic, government and industry publications.

7.2 Pre-dialogue

7.2.1 Technical dialogue

From a legal perspective, the Directive/Regulations do not specifically concern themselves with the pre-procurement stages of competitive dialogue. It is clear that technical dialogue is permitted under the open and restricted procedures: “[b]efore launching a procedure ... authorities may, using technical dialogue, seek or accept advice which may be used in the preparation of the specifications ...” (Recital 8). However, as the term “specifications” is not used with respect to the legal regulation of competitive dialogue, the extent to which technical dialogue may take place prior to a competitive dialogue is not clear. Indeed, it may have been presumed that there was no need for such dialogue due to the explicit scope for wide-ranging dialogue once the procedure in underway.²⁴⁷ Nevertheless, it is evident that technical dialogue can be helpful in

²⁴⁷ Arrowsmith (2005), fn.46, 10.22

competitive dialogue procurement, and there is nothing to suggest that such dialogue is not permitted pre-procurement.²⁴⁸

In accordance with Case C-21/03, *Fabricom*,²⁴⁹ the way in which technical dialogue is carried out must be in line with general principles.²⁵⁰ For instance, it is important that particular suppliers engaging in technical dialogue (potential bidders) are not given an unfair advantage (e.g. in time or information)²⁵¹ over competitors. The most obvious means of compliant technical dialogue would appear to be where it is open to all potential bidders (e.g. advertised EU wide with a PIN). Despite the above, the possibility of potentially more meaningful technical dialogue with a limited number of suppliers where the invitation to take part in the dialogue has not been given to all is uncertain. This practice would risk being seen as discriminatory; however, it may be argued that such allegations can be refuted, for example, if dialogue is well documented and information is made available to all potential bidders.

It is also unclear whether dialogue is permitted (and if so the extent of permitted dialogue) after the publication of the contract notice but before the invitation to participate in dialogue. There is similar uncertainty under the open and restricted procedures. The fact that Recital 8 only refers to dialogue before the procedure has been initiated may be taken as assuming that later dialogue before the dialogue stage is generally not permitted, but this cannot be said with any certainty.²⁵² It seems that in practice at this stage in the UK a

²⁴⁸ Ibid, 10.22

²⁴⁹ *Fabricom*, fn.73

²⁵⁰ See S.Treumer, "Technical dialogue and the principle of equal treatment - dealing with conflicts of interest after *Fabricom*" (2007) 2 *PPLR* 99; S.Treumer, "Towards an obligation to terminate contracts concluded in breach of the E.C. Public procurement rules - the end of the status of concluded public contracts as sacred cows" 6 *PPLR* 371

²⁵¹ Case T-345/03, *Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v. Commission of the European Communities* [2008] ECR II-341

²⁵² Arrowsmith (2005), fn.46, 7.81

conference involving qualifying bidders may be held by authorities. This will be used to provide further information and to clarify areas of concern.²⁵³

7.2.2 Planning and preparation

From a practical perspective, a considerable amount of government guidance and research on UK practice,²⁵⁴ particularly later publications that are more informed by competitive dialogue in practice, stress the importance of sufficient planning and preparation in the lead up to the start of competitive dialogue procurement. The planning and preparatory stages of competitive dialogue are considered necessary to minimise the time and costs of procurement, and evidence of such work (from, for example, well prepared documentation) is considered essential in terms of attracting sufficient competition.²⁵⁵

Despite this, there is evidence to suggest that preparation and planning is often neglected in the UK, and this presented as a reason behind any dissatisfaction with the procedure.²⁵⁶

Prior to the formal start of a competitive dialogue procurement, following the identification of the need for a major project, it is generally the case that a document setting out the business case (the “outline business case”) for PPP or conventional procurement (i.e. setting out the analyses and options appraisals that have been undertaken) will be developed to gain procurement approval. For instance, under BSF an outline business case needs to demonstrate affordability, value for money, market interest and that the authority is sufficiently resourced.²⁵⁷ A BSF outline business case must be approved by Partnerships for Schools and the Department for Education.

²⁵³ 4Ps (2006), fn.164, 12

²⁵⁴ See, for example, CBI, *CBI BRIEF: Actions speak louder than words: unlocking the full potential of competitive dialogue*, (2008, London), 5; NAO (2007), fn.38, 3.10; HM Treasury (2010), fn.198, 3.2-3.9; OGC/HMT (2008), fn.193, section 5; Cabinet Office (2010), fn.199, 27; Cabinet Office (2011), fn.199, 4.4

²⁵⁵ OGC/HMT (2008), fn.183, 5.1.13; NAO (2007), fn.38, 2.10

²⁵⁶ HM Treasury (2010), fn.198, 3.3 ; Cabinet Office (2010), fn.199, 27; Cabinet Office (2011), fn.199, 7

²⁵⁷ PfS, *Outline Business Case Guidance*

(*For approval to procure a LEP to deliver investment in the Secondary School Estate*), (2007, London)

7.2.3 The contract notice and descriptive documents

The procedure is officially started with the publication of an OJEU notice (Art.29(2)/Reg.18(4)) (see chapter four). This document must set out the authority's needs and requirements, with these needs and requirements being defined in the OJEU notice and/or in a descriptive document (see below) (Art.29(2)/Reg.18(5)). There is no requirement for technical specifications (Art.23/Reg.9) under competitive dialogue at any point. The procedure is flexible, enabling an authority to set out its needs and requirements in functional or output terms. There is no required form for the descriptive document. The 2008 OGC/HMT guidance notes that in practice such documents as the invitation to participate in dialogue and requests for solutions will function as descriptive documents.²⁵⁸

It is apparent that the drafting of the needs and requirements is not to be taken lightly, and authorities must strike a difficult balance between flexibility over project scope and the need for accuracy²⁵⁹ to ensure the most appropriate suppliers seek to participate in the procurement.²⁶⁰ A project, as advertised, that changes materially (i.e. the changes would result in different suppliers seeking to participate) over the course of a procurement may under the legal rules need to be re-procured.²⁶¹ For instance, in 2008 the Commission brought infraction proceedings against the UK due to an authority not including in the OJEU notice a reference to all services included in the final PFI contract.²⁶² These proceedings led to the publication in April 2009 of an OGC Policy Note²⁶³ advising authorities to ensure that notices cover the totality of the likely requirement. According

²⁵⁸ OGC/HMT (2008), fn.193, 5.2.3

²⁵⁹ Case C-423/07, *Commission v Spain* [2010] ECR 00

²⁶⁰ See N.Maltby, "Chapter 3 – The PFI procurement process" in Lindrup & Godfrey (eds), *Butterworths PFI Manual: Law, Practice and Procedure Relating to the Private Finance Initiative and Public/Private Partnerships*, (1998, LexisNexis Butterworths), para.3063; see also Roe & Dickinson, "Issues for public procurements resulting from instability in global financial markets" (2009) 3 *PPLR* NA95, NA95

²⁶¹ Commission (2005), fn.190, 3.1; Case C-454/06, *presstext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung* [2008] ECR I-4401, para.33

²⁶² OGC, *Procurement policy note – the need to ensure published contract notices are accurate and cover the complete requirement. Action Note 03/09 08 April 2009* (2009, London)

²⁶³ *Ibid*

to the policy note, “it is better to include ... potential requirements, with suitable caveats, than it is to award a contract which covers material elements not specified in the contract notice. Where the specific details of the requirement are not certain at the time of the contract notice, the contracting authority should provide a suitably broad or generic description ...”.²⁶⁴ In addition, the credit crunch and problems this caused for PPPs involving private finance led to 2009 HM Treasury guidance on the drafting of the OJEU notice.²⁶⁵ The document advises authorities to “draft the OJEU notice and other tender documents as widely as possible to ensure that alternative financing solutions can be accommodated”.²⁶⁶ The note expired on 31 August 2010; however, according to HM Treasury, the above principles remain relevant.²⁶⁷

The OJEU notice must set out any qualification requirements (Art.44(2)/Reg.18(15)) and selection criteria (Art.44(3)/Reg.18(12)), along with the minimum and (where appropriate) maximum number of suppliers that the authority intends to invite to dialogue (Art.44(3)/Reg.18(12)). It is noted that qualification and selection may be problematical in relation to highly innovative projects, as an authority may have little knowledge about how its needs might be met.²⁶⁸ According to an early incarnation of competitive dialogue, it was possible for an authority to require suppliers to submit, with the request to participate, an outline solution, which could be assessed in accordance with the award criteria.²⁶⁹ The provision was not adopted due to fears that it would overly complicate the legal rules and increase the risk of cherry picking (see below).²⁷⁰

²⁶⁴ Ibid, para.8

²⁶⁵ HM Treasury, *Application note – PPP projects in current market conditions*, (2009, London)

²⁶⁶ Ibid, 2.3

²⁶⁷ See HM Treasury, *Public Private Partnerships: Technical Update 2010*, (2010, London), section A6

²⁶⁸ Rubach-Larsen (2005), fn.214, 73

²⁶⁹ COM (2001) 275 final, Art.30(2)(b) and point 3.8 of the Explanatory Memorandum

²⁷⁰ COM (2002) 236 final, comments to amendment 137 of the Parliament

As mentioned in chapter four, the criteria upon which the most economically advantageous tender is to be identified must be stated in the contract notice or descriptive document (Art.29(7)/Reg.18(27)). Award criteria weightings must also be set out in the contract notice or descriptive document (see chapter four) (Art.53(2)/Reg.30(3)). If, for demonstratable reasons, weightings are not possible, the authority may set out the award criteria in descending order of importance (Art.53(2)/Reg.30(5)). It seems that the complexity of a contract may be a sufficient justification for this (Recital 46), and, according to the Commission, “[g]iven that recourse to competitive dialogue presupposes that the contract is ‘particularly complex’, it seems almost tautological that the conditions for not weighting the award criteria should ... be met when the contract is awarded by this award procedure ...”²⁷¹

The case law on award criteria disclosure was set out in chapter four. This case law was made in relation to more straightforward procedures (i.e. the restricted procedure). As competitive dialogue is an iterative process in which authorities need flexibility to achieve value for money, it may be argued that the courts may be inclined to adopt a refined approach in complex procurements under competitive dialogue. The degree to which detailed award criteria (sub-criteria and sub-sub-criteria) must be disclosed at the outset under competitive dialogue is thus unclear. For instance, it is argued that from a commercial perspective ideally authorities would have freedom to set very general criteria (e.g. just headline criteria) that can be applied to a wide variety of solutions that arise out of dialogue, with it being possible to develop and disclose more specific criteria (under the headline criteria) throughout the course of dialogue.²⁷²

²⁷¹ Commission (2005), fn.190, 3.1

²⁷² Rubach-Larsen (2005), fn.214, 75

Some are critical of the requirement for authorities to be committed to award criteria at the latest by the invitation to participate in dialogue when they may have limited knowledge regarding potential solutions.²⁷³ The Commission has stressed that for reasons of equal treatment advertised award criteria cannot be changed during the award procedure.²⁷⁴ As discussed in chapter four, the extent to which advertised award criteria may be varied is not clear. In proposed texts of competitive dialogue, authorities were allowed to amend award criteria if they became inappropriate.²⁷⁵ The risks of manipulation, however, were considered too great.

7.2.4 Qualification and selection

As discussed in chapter four, competitive dialogue is a two stage process, an authority may select from qualifying suppliers a minimum of three to invite to dialogue (provided there are three qualifying suppliers responding to the contract notice) (Art.44(2)/Reg.18(12)); this does not mean that three suppliers should be invited as a general rule, as the authority must try to ensure the number of bidders is sufficient to ensure genuine competition (Art.44(2)/Reg.18(12)). It is recognised that authorities must be wary of inviting too many suppliers to dialogue, as the increased competition will not inevitably lead to more competitive bids; this is because the chances of success for individual bidders are reduced the higher the bidder numbers; thus, bidders may be less inclined to commit to a process with high bidder numbers and if costs mount up may voluntarily withdraw from the process. Partnerships for Schools guidance recommends that a maximum of eight bidders be selected.²⁷⁶

Consortium bidders (chapter two) are a common feature of competitive dialogue procurement. However, consortium bidders do give rise to some legal uncertainty, in

²⁷³ Ibid, 74 and 75

²⁷⁴ Commission (2005), fn.190, 3.1

²⁷⁵ Commission (2000), fn.184, Art.30(4)

²⁷⁶ PfS (2006), fn.108, para.13

particular where the composition of a consortium changes following the invitation to participate in dialogue and where a firm is a member of multiple consortia. In relation to the first issue, Arrowsmith argues that a change should not result in exclusion where it would not have affected any decisions to take the bidder forward, as the bidder is still in substance the same and any other interpretation would be unworkable in practice (i.e. in view of the frequency of such changes in practice).²⁷⁷ If this is not the case and the change would impact upon previous decisions, there is a strong argument that such a change would breach the principle of equal treatment. In relation to the second issue, which may be relevant to rules on minimum bidder numbers and the rules on equal treatment, it may be argued that the acceptability of a firm participating in multiple bidding consortia would depend upon the role of the firm in the consortia (i.e. the nature and extent of the duplication).²⁷⁸

7.3 Dialogue

7.3.1 The invitation to participate in dialogue

The dialogue stage is initiated when the contracting authority sends out invitations to participate in dialogue in writing simultaneously to selected suppliers (Art.40(1)/Reg.18(6)). The invitation must be accompanied by the contract documents or details of how these documents may be obtained, i.e. if through the internet or a third party (Art.40(2) and (3)/Reg.18(16)). The invitation must include the date specified for commencement of dialogue, the address for replies, and the language/s to be used; a reference to the contract notice; a reference to any other information required in relation to proof of financial or technical standing; the relative weighting of award criteria (or award criteria listed in order of importance) (Art.40(5)/Reg.18(18)).

²⁷⁷ Arrowsmith (2000), fn.71, 728

²⁷⁸ Ibid, 729

7.3.2 Dialogue

7.3.2.1 Introduction

The purpose of dialogue is to identify and define the means best suited to satisfying the authority's needs (Art.29(3)/Reg.18(20)). The authority may discuss all aspects of the contract with bidders (Art.29(3)/Reg.18(21)); thus, dialogue may cover, in addition to technical aspects of the project, commercial aspects (e.g. prices, costs and revenues) and legal aspects (e.g. distribution and limitation of risks, guarantees and the possible creation of a special purpose vehicle).²⁷⁹ The authority may continue dialogue until it can identify one or more solutions, if necessary after comparing them, capable of meeting its needs (Art.29(5)/Reg.18(24)).

7.3.2.2 Equal treatment

The general principle of equal treatment was explained in chapter four to underlie all the Directive's procedures. Nevertheless, the legal rules specify that authorities must "ensure equal treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others" (Art.29(3)/Reg.18(21)(b)). The provision would appear to be merely a restatement of the general principle. The extent to which the operation of equal treatment under competitive dialogue differs, if at all, from its operation under the negotiated procedure is not clear.²⁸⁰ The interviews will explore the impact, if any, of the express reference to equal treatment.

²⁷⁹ Commission (2005), fn.190, 3.2

²⁸⁰ Arrowsmith (2005), fn.46, 10.8

7.3.2.3 Confidentiality rules

7.3.2.3.1 The legal rules

According to Art.29(3)/Reg.18(21), “[c]ontracting authorities may not reveal to other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement”. There is no comparable confidentiality provision for the negotiated procedure; it is expected, however, that authorities are under an implied duty not to share bidder ideas under the equal treatment principle.²⁸¹

The explicit reference to confidentiality and ban on “cherry picking” (i.e. authorities unfairly benefiting from innovative aspects of a particular bidder’s solution) is clearly intended to encourage bidder investment and to encourage them to be forthcoming with ideas.²⁸² Indeed, the addition of such protection was motivated by intense lobbying by the private sector.²⁸³ The Commission had originally proposed to limit the prohibition on cherry picking to the dialogue stage only so that after close of dialogue all bidders could tender against a single bidder’s solution or a solution combining aspects of multiple bidders’ proposals.²⁸⁴ It is argued that the ban on cherry picking obstructs the development of serious discussions.²⁸⁵ According to Trepte, by restricting authorities from combining bidder solutions, the rules stand in the way of the purpose of dialogue: to identify and define the means best suited to satisfying the authority’s needs.²⁸⁶ Also, Brown comments that because of the confidentiality rules if the preferred solution comes entirely from one bidder there is a risk that the final tender stage will serve little purpose

²⁸¹ Brown (2004), fn.170, 173

²⁸² CBI (2008), fn.254, 10

²⁸³ Brown (2004), fn.170, 173

²⁸⁴ Commission (2000), fn.184, Art.30(6)

²⁸⁵ Boyle (2001), fn.169, NA67

²⁸⁶ Trepte (2007), fn.166, 7.84

as that bidder is almost guaranteed to be successful.²⁸⁷ Brown suggests that, to guard against particular solutions being claimed as the exclusive idea of one bidder, it is advisable for an authority to conduct thorough preparation in order to foresee as many possible solutions as possible and makes bidders aware of these solutions.²⁸⁸

Despite the rules on confidentiality, there was clear bidder concern over the sharing of confidential information, particularly prior to the introduction of competitive dialogue.²⁸⁹ It is argued that it may be very tempting for authorities to disregard the confidentiality rules.²⁹⁰ For instance, the risk of legal challenge may be limited, as it may be difficult to establish that a winning solution was down to cherry picking due to bidder confidentiality restricting access to the solutions proposed by competing bidders.²⁹¹

7.3.2.3.2 The standard of confidentiality

It is not certain whether the confidentiality requirements refer to confidential information under domestic law (see below) or whether it creates an independent EU law requirement of confidentiality.²⁹² Arrowsmith highlights a number of problems with the latter interpretation.²⁹³ In particular, Arrowsmith highlights the considerable uncertainty over the information to be regarded as confidential under the Directive that will exist until judicial clarification. According to Arrowsmith, it is not clear whether the CJEU will adopt a strict approach, drawing upon the existing confidentiality laws of Member States to fashion a common but narrow definition, or take a broader view of the ideas/information worthy of protection.²⁹⁴ The Commission explanatory note and UK guidance generally are not helpful in relation to this issue.

²⁸⁷ Brown (2004), fn.170, 173

²⁸⁸ Ibid

²⁸⁹ See for instance S.Charveron, "Competitive dialogue threatens PFT" (2007) 18(7) *Construction Law* 29

²⁹⁰ Treumer (2004), fn.206, 181 and 182

²⁹¹ De Schrijver & Van Acker, "New Models of Public Procurement: E-Auction and Competitive Dialogue" in Lodder et al. (eds.), *IT Law – The Global Future: Achievements, Plans and Ambitions*, (2006, Amsterdam, Elsevier), 87

²⁹² Arrowsmith (2006), fn.84, 107

²⁹³ Ibid, 107

²⁹⁴ Ibid, 107

From the perspective of the law in England and Wales, it is not clear to what extent confidentiality under the Directive extends (if at all) beyond domestic intellectual property law, such as copyright and design law, patent law,²⁹⁵ and the common law action for breach of confidence. Under the law of confidence, an objective test is used to determine whether information is confidential; that is, would a reasonable person regard the subject matter as confidential.²⁹⁶ In addition, under the Freedom of Information Act (chapter four) there are exemptions from the duty to disclose requested information for confidential information (i.e. where it would be protected under the above mentioned common law) (S.41); legally privileged information (S.42), trade secrets (S.43(1)) and information the disclosure of which would be likely to prejudice the commercial interests of any person (S.43(2)). The type of information that can be withheld under these sections may be relevant to confidentiality under the Directive. However, there is little certainty over the information protected.²⁹⁷

7.3.2.3.3 Agreement to share

There is an express exception to the ban on cherry picking where bidders agree that their proposed solutions or confidential information can be revealed to other bidders. It is not entirely clear, however, what amounts to an “agreement” in this context.²⁹⁸ This would appear to cover a situation where, for example, in return for payment (Art.29(8)/Reg.18(29)) a participant agrees to waive the cherry picking ban.²⁹⁹ However, could bidder participation be made conditional upon agreement to share (i.e. if made clear at the outset)?³⁰⁰ The Commission accepts such practice as amounting to sufficient

²⁹⁵ See the Copyright, Designs and Patents Act 1988, c.48

²⁹⁶ *Coco v. A.N. Clark (Engineers) Limited* [1968] FSR 415

²⁹⁷ See Information Commissioner's Office, *Freedom of Information Act awareness guidance no.5: commercial interests*, (2008)

²⁹⁸ Arrowsmith (2005), fn.46, 10.59

²⁹⁹ *Ibid*

³⁰⁰ Treumer (2004), fn.206, 182

agreement,³⁰¹ but there are difficulties with this approach. Where a bidder refuses to agree to the condition, the bidder's exclusion would amount to new qualification criteria not listed in the Directive/Regulations (see chapter four).³⁰² To prevent an authority's discretion to use different solutions being unduly constrained, according to Arrowsmith, the objectives of the Directive are best achieved by an interpretation that simply ensures that all bidders are aware of the exact possibilities of disclosure when they choose to participate.³⁰³

Regardless of whether such a condition can be used, from a practical perspective it is suggested that in most situations it is not advisable, particularly if not accompanied by adequate compensation, due to likely bidder hostility to such a course of action.³⁰⁴ As Roe & Verschuur note, "... it is doubtful how much time and money market participants would be willing to invest in the development of a solution and how willing they would be to share their know-how with the contracting authority if confidentiality is not guaranteed ...".³⁰⁵

7.3.2.4 Phased elimination of participants

7.3.2.4.1 The legal rules

The commercial needs for bidder reduction after qualification and selection in complex procurement were discussed in chapter five. As with the negotiated procedure (Art.30(4)/Reg.17(22)), there is express provision for authorities to break dialogue down into "successive stages in order to reduce the number of solutions to be discussed". For an authority to be able to do this it must be stated in the OJEU notice.

³⁰¹ Commission (2005), fn.190, footnote 21

³⁰² Rubach-Larsen, fn.214, 77

³⁰³ Arrowsmith (2005), fn.46, 10.26

³⁰⁴ Treumer (2004), fn.206, 182

³⁰⁵ Roe & Verschuur, *Briefing: competitive dialogue: the EU's new procurement procedure*, (2005, London, Freshfields Bruckhaus Deringer) available at www.freshfields.com/ (accessed 31/10/2011)

Although the Directive/Regulations talks only about the phased elimination of “solutions”, it appears widely accepted in UK guidance that this implicitly allows for the elimination of bidders, for example where bidders are permitted only one solution and that solution is phased out.³⁰⁶

Under the above rules, up until the close of dialogue authorities are free to adopt an approach very similar to PFI procurement practice under the negotiated procedure, i.e. an early outline proposals phase to quickly reduce bidder numbers to a manageable and cost effective level, followed by negotiation leading up to a final bidding stage (sometimes followed by further negotiation and a “best and final offer” stage).³⁰⁷ The OGC/HMT 2008 guidance indicates that this appears to have occurred in practice, with an invitation to submit outline solutions stage replacing the outline proposals stage under the negotiated procedure, and an invitation to submit detailed solutions stage replacing the invitation to negotiate.³⁰⁸

7.3.2.4.2 Application of award criteria

The phased elimination of bidders during dialogue must be carried out by applying the publicised award criteria (Art.29(4)/Reg.18(22)). However, it is not clear how much information a contracting authority needs to have gathered from bidders before it can legitimately dismiss them for not proposing the most economically advantageous offer. Previous UK PFI procurement practice under the negotiated procedure is said to have often involved an early reduction of bidder numbers following little, if any, negotiation on the basis of outline proposals covering mainly technical aspects (e.g. without pricing information).³⁰⁹

³⁰⁶ See OGC/HMT (2008), fn.193, 5.2.17; PFS (2006), fn.108, para.17; 4Ps (2007), fn.197, para.67-68

³⁰⁷ Arrowsmith (2006), fn.84, 103

³⁰⁸ OGC/HMT (2008), fn.193, 5.2.22-5.2.23; 4Ps (2007), fn.197, para.67-94

³⁰⁹ Arrowsmith (2005), fn.46, 8.39 and 10.26

The extent to which past UK PFI procurement practice may continue under competitive dialogue is legally grey, and will need to be the subject of specific questions in the research interviews. There is clearly the potential for unfairness where bidders are dismissed on the basis of limited information about solutions, as if all aspects of the solution were considered it may be that the authority would reach a different decision. Nevertheless, according to Arrowsmith, a flexible interpretation permitting such a practice is necessary in view of commercial necessity (i.e. the commercial need for early bidder reduction in complex procurement).³¹⁰ The Commission notes that dialogue does not need to have covered “all elements required and necessary for the performance of the project” before it can eliminate bidders because “this requirement only applies to tenders that are submitted in the final stage of competitive dialogue”.³¹¹

In addition, if the practice of bidder de-selection on limited information is legally possible, it is unclear whether an authority may vary publicised award criteria or weightings to suit the aspect of the solution being assessed, for example not use financial award criteria at the outline proposals stage when only technical aspects of solutions are being assessed. There is no case law on this specific point; however, if such de-selection is possible it would appear to follow that award criteria variations are also possible, as assessment against irrelevant criteria would be meaningless and potentially unfair. The OGC/HMT 2008 guidance notes the continuation of past practice, with an outline solutions stage usually taking place in the early stages of dialogue.³¹² The guidance notes that even where indicative costs are provided by bidders this will not normally be evaluated.

³¹⁰ Ibid

³¹¹ Commission (2005), fn.190, 3.2.1

³¹² OGC/HMT (2008), fn.193, 5.2.22

7.3.2.4.3 The bidding process

An authority could choose to simply engage in dialogue with bidders instead of structuring the dialogue into a series of bidding phases. If an authority does not structure dialogue into bidding phases, however, it is not clear whether bidder elimination is still possible. This is a further grey area that will need to be explored in the research interviews.

There may be an argument that to comply with equal treatment and transparency principles bidder reduction can only be done through a formal bidding process; this way all bidders are given an equal opportunity and objective review and comparison is facilitated.³¹³ In relation to discussion of similar uncertainty under the negotiated procedure, Arrowsmith concludes that formal bids are not required for bidder reduction due to the need for a reasonable balance between transparency and costs.³¹⁴ It is argued that otherwise authorities may invite fewer suppliers to participate, that a formal objective comparison is often difficult in the early stages of bid development, and that a final bid stage involving formal tenders is a sufficient safeguard against favouritism.³¹⁵

Nevertheless, these arguments may not apply to competitive dialogue, particularly if it is accepted to be a standard procedure and not exceptional (see chapter six). It may also be argued that the wording of Art.29(4)/Reg.18(22), “... to reduce the number of solutions to be discussed during the dialogue stage ...” may indicate that reduction is something separate from dialogue and thus must be done by formal bidding.³¹⁶ On the other hand, the express formal final tender stage may mean that formal comparison is not necessary

³¹³ Arrowsmith (2005), fn.46, 10.27

³¹⁴ Arrowsmith (2005), fn.46, 8.40

³¹⁵ Ibid

³¹⁶ Ibid, 10.27

during dialogue.³¹⁷ The Commission does not express a clear position, merely stating that the application of award criteria be based on written documents.³¹⁸

7.3.2.5 Time limits in dialogue

The time limits for competitive dialogue are set out in chapter four. The legal rules do not specify a time limit for receipt of tenders, but an authority must take account of the complexity of the contract (Art.38(1)/Reg.18(18)). The extent to which this rule applies to bidding stages other than the final tender stage is not clear.³¹⁹ According to Arrowsmith, by an analogy the provision probably applies at all stages of the procedure, and this was not stated explicitly due to the many different ways in which dialogue may be structured.³²⁰

7.3.2.6 Close of dialogue

When an authority can identify the solution or solutions capable of meeting its needs it must close the dialogue and inform bidders (Art.29(5)/Reg.18(24)). Given the limitations placed on further dialogue once dialogue is closed, OGC/HMT guidance notes it as important for contracting authorities to be convinced that there are no outstanding issues not fully covered during dialogue.³²¹ At the same time, however, it is recognised that authorities are under pressure to close dialogue as quickly as possible to keep costs low. According to OGC/HMT 2008 guidance, it may be advisable for a contracting authority to request fully developed and priced draft final bids on an agreed contractual position before ending the dialogue stage in order to avoid any nasty surprises when final tenders are eventually sought.³²²

³¹⁷ Ibid

³¹⁸ Commission (2005), fn.190, 3.2.1

³¹⁹ Arrowsmith (2005), fn.46, 10.28

³²⁰ Ibid

³²¹ OGC/HMT, fn.193, 5.3.15-5.3.19

³²² Ibid, 5.2.27

The close of dialogue in many PPP procurements will dovetail with the need for preparation of an interim full/final business case or appointment business case, which is a document that will need to be approved before a preferred bidder can be appointed.

7.4 Post-dialogue

7.4.1 Formal tenders

Having declared the dialogue closed and informed bidders, the contracting authority is required to request remaining bidders to submit final tenders on the basis of any solution presented and specified during dialogue (Art.29(6)/Reg.18(24)). The invitation to submit a final tender must specify the deadline by which tenders are to be received, the address to which tenders must be sent and the language/s in which tenders must be drawn up (Art.40(5)/Reg.18(25)).

Variant bids were introduced in chapter four. It is not certain whether variant bids are possible under competitive dialogue, as an authority does not need to prepare technical specifications and may set out its needs and requirements in functional or output terms. If the authority does so, there would appear to be scope for bidders to offer alternative solutions, meaning there is little need for variants.³²³ This is reflected in the Commission's explanatory note, where it is recognised that variants are only necessary where a standard solution is prescribed.³²⁴

7.4.2 Minimum number of tenderers

Article 44(3)/Regulation 18(13) requires that at least three firms must be invited to participate in dialogue. In relation to "the final stage" of competitive dialogue, which is presumably the final tender stage, Art.44(4)/Reg.18(23)) does not specify a minimum

³²³ Nagelkerke et al., *Competitive Dialogue: Abyss or Opportunity?*, Paper Presented at the 3rd International Public Procurement Conference Proceedings (2008, Amsterdam) available at www.ippa.org (accessed 31/10/2011), 285

³²⁴ Commission (2005), fn.190, footnote 14

number, but merely states, “the number arrived at shall make for genuine competition insofar as there are enough solutions or suitable candidates”.

It may be that the requirement governing minimum numbers in dialogue also represents the minimum number for final tenders (i.e. three). Alternatively it might be argued that because a minimum number is not expressly stated for the final tender stage, coupled with the fact that dialogue may be used to reduce the number of solutions (and by implication bidders), in certain circumstances it may be possible for as few as two bidders to be invited to submit final tenders.³²⁵

The same rules apply to the negotiated procedure. A minimum of three bidders must be invited to negotiate, but in “the final stage” (presumably when the winner is identified) there need only be enough suitable candidates to ensure genuine competition (Art.44/Reg.17). In the Commission’s London Underground decision no objections were raised where only two bids had been solicited at the final bid stage in a negotiated procedure.³²⁶ Arrowsmith points out that if the Commission has recognised that on some occasions it is possible to have as few as two bidders in the final stage of a negotiated procedure, there is even more reason for them to do so in relation to competitive dialogue due to the need for complete final tenders and the higher bid costs this entails.³²⁷

It is noted that reducing to two bidders for the final tender stage may be necessary in view of the practical realities of PPP. As Brown explains, because of the very high costs involved in preparing detailed final bids, such an interpretation often promotes the most effective competition by giving the two bidders selected a realistic prospect of success and

³²⁵ S.Arrowsmith, “An assessment of the new legislative package on public procurement” (2004) 41 *Common Market Law Review* 1277, 1286; Arrowsmith (2005), fn.46, 10.33

³²⁶ European Commission, *State aid No N 264/2002 – United Kingdom*

London Underground Public Private Partnership (2002, Brussels) (C(2002)3578fin); see also Arrowsmith (2005), fn.46, 8.41

³²⁷ Arrowsmith (2005), fn.46, 10.33

hence the greatest incentive to commit their resources to producing a comprehensive and high-quality tender.³²⁸ The approach to bidder numbers at the final tender stage will need to be considered in the research interviews; however, UK guidance accepts the possibility for as few as two bidders being requested to submit final tenders.³²⁹

7.4.3 The requirement for final tenders containing all elements

Article 29(6)/Regulation 18(25) states that final “tenders shall contain all the elements required and necessary for the performance for the project”. This provision is recognised in the eyes of most commentators as having the potential to impact heavily on UK PPP procurement practice. As outlined in chapter five, before the introduction of competitive dialogue, complex procurements under the negotiated procedure would often involve substantial negotiations following the appointment of a preferred bidder.³³⁰ By leaving certain matters to be discussed with just the preferred bidder, authorities were able to ensure that extraneous costs were not imposed on all. On the face of it, the requirement in Art.29(6)/Reg.18(25) would appear to be seeking to curb such practices; however, the extent to which it does so, as will be discussed, is open to interpretation.

It is generally accepted that it is not practical in complex procurements for all contractual issues to be finalised before the appointment of a preferred bidder.³³¹ The high costs of pulling together the details of a contract at risk (without preferred bidder status) may be unacceptable for bidders. To a certain extent this concern is recognised in the degree of flexibility afforded to contracting authorities in the post tender stages of competitive dialogue. Article 29(7)/Regulation 18(28) provides that “... the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify

³²⁸ Brown (2004), fn.170, 166 and 174

³²⁹ See OGC/HMT (2008), fn.193, 5.4.4; PFS (2006), fn.108, para.17

³³⁰ Arrowsmith (2000), fn.71, 732

³³¹ Arrowsmith (2005), fn.46; Brown (2004), fn.170; C.Kennedy-Loest, “What can be done at the preferred bidder stage in competitive dialogue?” (2006) 6 *PPLR* 316; Burnett & Oder, *Competitive dialogue: a practical guide*, (2009, Maastricht, European Institute of Public Administration); M.Burnett, “Using competitive dialogue in EU public procurement – early trends and future developments” (2009) 2 *EIPASCOPE* 17; M.Burnett, “Conducting competitive dialogue for PPP projects – towards an optimal approach?” (2009) 4 *EPPL* 190

aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspect of the tender or the call for tender and does not risk distorting competition or causing discrimination”. Further discussion of the scope of this provision is provided below in relation to the scope for changes to the tender/call for tender at the preferred bidder stage; however, it is clear that under Art.29(7)/Reg.18(28) there is some limited possibility for finalising the detail of tenders with the preferred bidder. The precise scope is not clear and it is hoped that the interview data gathered will elucidate upon the impact (if any) the provision has had on UK practice and what matters are perceived as generally suitable to be dealt with after a preferred bidder has been identified.

The last sentence of Recital 31 is likely to have a bearing upon the interpretation of Art.29(7)/Reg.18(28); it states that “[competitive dialogue] must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer ...”. In light of the wording of Recital 31, the Commission has adopted a narrow approach to the room for manoeuvre enjoyed by authorities after submission of tenders.³³² The Commission’s view is that negotiations solely with a preferred bidder are not allowed (scope for such negotiations were proposed and rejected during the legislative process).³³³ According to the Commission, the flexibility in Art.29(7) relates to something very limited, specifically “clarification” or “confirmation” of undertakings already appearing in the final tender itself.³³⁴

The OGC/HMT 2008 guidance refuses to give a concrete definition of the meaning of “clarify aspects of the tender or confirm commitments” without legal precedents arising

³³² Commission (2005), fn.190, para.3.3

³³³ Ibid, para.3.3

³³⁴ Ibid

from court rulings.³³⁵ However, the guidance accepts that this would appear to signal a narrowing of the scope for any discussion between the contracting authority and preferred bidder previously enjoyed by UK contracting authorities under the negotiated procedure.³³⁶ In relation to the limited further work that may be undertaken after identification of a preferred bidder, the guidance states, “... it is clear that it is not appropriate to leave issues unresolved beyond the closure of the dialogue because neither the contracting authority nor the bidders have addressed the issue, or considered it necessary to do so, without good cause”.³³⁷ The guidance adds:

*[i]n judging whether issues are suitable to resolve after close of dialogue, contracting authorities may need to consider whether it is practically possible or cost effective to resolve the issue, either wholly, partly or at all, before closure of dialogue. Where the main elements of an issue have been addressed in the final tender but providing further detail (to the level required for contractual close) would be unduly burdensome, it may be valid for the detail to be developed only once a preferred bidder has been appointed.*³³⁸

OGC/HMT guidance gives the following examples of issues that may in certain circumstances need to be left to after the identification of the preferred bidder:

- detailed information on subcontractors;
- complete design detail;
- detailed planning applications; and
- lender financial swap rates.³³⁹

³³⁵ OGC/HMT (2008), fn.193, 5.5.2

³³⁶ Ibid, 5.5.2

³³⁷ Ibid, box 5.8

³³⁸ Ibid, box 5.8

³³⁹ Ibid

The Partnerships for Schools guidance, in the context of BSF procurement, adds the following matters:

- detailed site surveys;
- investigation of legal title;
- full technical lender due diligence and detailed negotiation on the term sheet for financing;
- final calibration of the performance mechanism; and
- finalisation of the financial model.³⁴⁰

The scope for leaving certain issues, lender due diligence, planning applications, and detailed design, to be dealt with at the preferred bidder stage will be considered in more detail below.

According to the Commission, the flexibility in Art.29(7) was provided in particular in order to take account of the reluctance of financial institutions to subscribe to firm undertakings before their client has the certainty of preferred bidder status.³⁴¹ It is noted that in UK private finance procurement it has in the past been common for funders not to carry out and incur the costs of detailed due diligence until their client is identified as the preferred bidder; only at this point are lenders prepared to confirm the terms on which they have offered support.³⁴²

The consensus amongst commentators appears to be that due diligence activities with funders can generally be carried out at this stage, qualifying as merely “confirming

³⁴⁰ PFS (2006), fn.108, para.35

³⁴¹ Commission (2005), fn.190, footnote 35

³⁴² Kennedy-Loest C (2006), fn.331, 319

commitments”.³⁴³ In leaving lender due diligence to a late stage there is the obvious risk that it will throw up issues, as seems to be invariably the case in such complex transactions, that require the winning tender to be changed in certain ways or else the funder will not proceed (see section below). It should be noted that in order to avoid/minimise the scope for such problems UK guidance recommends for funders to have representatives involved throughout the course of a competitive dialogue, so that they may draw attention to any issues which may be of concern before it is potentially legally problematic.

In many UK PPP procurements it is increasingly common (for example under NHS LIFT) for a funding competition to be held after the preferred bidder has been identified. Here, funders are selected on the basis of an open competition, which is intended to ensure that funders lend on the best terms possible.³⁴⁴ Under draft HM Treasury guidance, “Preferred Bidder Debt Funding Competitions”³⁴⁵ are to be the default option where private finance is being secured on projects. It is intended that funding competitions will take place in every instance where a project’s capital value is in excess of £50m (mandatory for projects over £500m). The guidance is only in draft form; however, the Treasury has stated that it corresponds with best practice.

Although clearly not the view of HM Treasury, it might be argued that a competition at the preferred bidder stage to secure funding for a bid stretches the meaning of “clarification” or “confirming commitments”. Nevertheless, as Kennedy-Loest recognises, a funding competition would be held for whichever bid won and the terms on which it will therefore be funded are whatever the market will support.³⁴⁶ Kennedy-Loest

³⁴³ Arrowsmith (2005), fn.46, 10.34; Kennedy Loest (2006), fn.331, 319

³⁴⁴ HM Treasury, *Preferred Bidder Debt Funding Competitions: draft outline guidance for feedback* (2006, London)

³⁴⁵ Ibid

³⁴⁶ Kennedy-Loest (2006), fn.331, 321

describes funding competitions as “competitively neutral” that will not distort competition between bidders. However, it is difficult to see how the commercial terms of a bid can be separated from its funding so that the two can be considered separately. Kennedy-Loest questions whether it would be compatible with competitive dialogue (or even in an authority’s best interests) to consider the funding arrangements separately where different bids would attract different funding terms which could affect the overall evaluation of a project’s cost.³⁴⁷ According to Kennedy-Loest, “if the two have to be considered together then it would seem premature to select the most economically advantageous tender before having carried out the funding competition”.

HM Treasury appears satisfied that funding competitions can operate within the restrictions imposed by competitive dialogue; however, some UK practitioners are not convinced, expressing concern about it being presupposed that the winning funder will accept all documentation as tabled.³⁴⁸

In order to overcome many of the problems identified above with funding competitions, shadow lenders will normally be appointed to oversee the procurement. Their role is to act as an independent commentator on the likely bankability of a deal.³⁴⁹

Planning permission is another issue that is recognised as potentially needing to be finalised after the appointment of a preferred bidder.³⁵⁰ It is sometimes possible for an authority to obtain outline planning permission, which all bidders will base solutions upon, with only the preferred bidder making a detailed planning application. This saves time and costs, and also prevents the planning authority concerned from being inundated

³⁴⁷ Kennedy-Loest (2006), fn.331, 322

³⁴⁸ P.Dzakula, “Dialogue Coach” (2007) 25 *Building* 56; Nabarro, *Projects briefing: debt funding competitions under the competitive dialogue*, (2007, London) available at www.nabarro.com (accessed 31/10/2011)

³⁴⁹ Kennedy-Loest (2006), fn.331, 322

³⁵⁰ PFS (2006), fn.108, para.35

with planning applications for the same site.³⁵¹ Again, it may be that such practices qualify as “confirming commitments”; however, as with due diligence (above), there is the potential for problems to arise where, for example, the planning authority imposes new conditions at the preferred bidder stage requiring changes to the tender.

Requesting the level of design detail required at contract close at final tender stage is noted by OGC/HMT guidance as unnecessary in many circumstances.³⁵² Indeed, during dialogue in a BSF procurement, bidders would not be required to work up the design for all schools in an area’s BSF programme, only “sample schemes”.³⁵³ To do otherwise may be seen as disproportionately costly. In relation to a PFI project involving the design and build of a building, according to Arrowsmith, whilst an authority would need a sufficient degree of detail on the building design to choose the best tenderer, it would be disproportionate to require tenders to cover details, such as the exact layout of particular rooms, that are likely to have no or minimal impact on cost.³⁵⁴ In the opinion of Arrowsmith, the finalisation of such details would seem to constitute a clarification of design.³⁵⁵

In view of the above uncertainty over the scope for leaving matters to be finalised with a preferred bidder, the research interviews will need to examine what types of issues and the degree to which those issues are capable of being left to the preferred bidder stage, and what issues and the degree to which those issues are left to be finalised at the preferred bidder stage in practice.

³⁵¹ Kennedy-Loest (2006), fn.331, 323

³⁵² OGC/HMT (2008), fn.193, box 5.8

³⁵³ See 4Ps and PFS, *An introduction to building schools for the future*, (2008, London), 60

³⁵⁴ Arrowsmith (2005) fn.46, 10.35

³⁵⁵ *Ibid*

7.4.4 Amendments to tenders before identification of a preferred bidder

There are a number of legitimate reasons why bidders and/or a contracting authority may want to allow changes to final tenders before the preferred bidder is identified, e.g. to improve tenders, to correct misunderstandings or errors, and to get bidders to provide further information or additional details.³⁵⁶ However, where the scope for such amendments is not tightly controlled, there are clear risks to transparency and equal treatment.

There is uncertainty in all award procedures over the extent to which changes to final tenders are permitted. In relation to the open and restricted, and negotiated procedures the Directive/Regulations is silent on the matter. It is expected that there is the least amount of room for amendments (albeit some) in the open and restricted procedures; these are standard procedures, where the rules envisage that contracts are awarded on the basis of a formal and transparent tendering procedure.³⁵⁷

There would appear to be more scope for amendments in the negotiated procedure, where it is not even clear that a formal tendering stage to select a preferred bidder is even strictly necessary. Where a tendering stage is held in a negotiated procedure, provided a contracting authority adheres to the basic principles of transparency and equality, there is arguably quite significant scope for amendments.³⁵⁸

With respect to amendments to final tenders in competitive dialogue, Art.29(6)/Reg.18(26) states, “tenders 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

³⁵⁶ Arrowsmith (1998), fn.107, 70; PfS (2006), fn.108, para.32

³⁵⁷ Arrowsmith (1998), *Ibid*

³⁵⁸ *Ibid*, 72

tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect”. Despite this guidance, the vague and abstract wording leaves the extent to which final tenders may be changed in competitive dialogue very uncertain. It is unclear to which types of amendments the concepts of clarification, specification and fine-tuning actually refer.

A narrow interpretation adopted by the Commission,³⁵⁹ is that there is no more room for amendments to tenders in competitive dialogue than there would be in an open or restricted procedure. Indeed, in a competitive dialogue the authority and bidders have had sufficient opportunity during dialogue to discuss all aspects of the contract, seemingly making the need for any amendments to tenders later on very difficult to justify.³⁶⁰ This narrow view seems to stem from a Joint Statement of the Council and Commission addressing the issue in relation to the open and restricted procedures under the 1993 Public Works Directive, which used similar wording to that of Art.29(6):³⁶¹

... all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purposes of clarifying or supplementing the content of their tenders of the requirements of the contracting authorities and provided this does not involve discrimination.

The joint statement is not legally binding, although it was referred to with approval by Advocate General Tesouro in the *Storebaelt* case.³⁶² The 2008 OGC/HMT guidance notes the narrow interpretation of the Commission and concludes that “there is no scope for

³⁵⁹ Commission (2005), fn.190, 3.3

³⁶⁰ Arrowsmith (2005), fn.46, para.10.44; and S.Verschuur, “Competitive Dialogue and the Scope for Discussion after Tenders and Before Selecting the Preferred Bidder-What is Fine-Tuning Etc?” (2006) 15 PPLR 327, 330

³⁶¹ Council and Commission, *Statement concerning Article 7 (4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts*, (1994, Brussels) (OJ L111/114)

³⁶² *Storebaelt*, fn.47

the contracting authority to seek to change any of the final bids due to them being unacceptable, or to respond to later changes in its requirements. Bidders cannot reopen discussions with the contracting authority at this stage and non-compliant bids will not be acceptable”.³⁶³

An alternative interpretation to that of the Commission, presented by Arrowsmith, is that Art.29(6)/Reg.18(26) should be interpreted with the complex projects for which it was designed in mind.³⁶⁴ According to this argument, Art.29(6)/Reg.18(26) should be read more flexibly so that competitive dialogue is able to adequately cater for complex procurements, where errors, inconsistencies and ambiguities in tenders are more likely to occur.³⁶⁵ The Partnerships for Schools guidance endorses this view of the law.³⁶⁶

In relation to the scope for clarification under the open and restricted procedures, the High Court of Northern Ireland judgment, *Natural World Products v. ARC 21*³⁶⁷ addressed the lawfulness of questions put to a tenderer after submission of tenders. The case concerned the award of a contract for organic waste services (which included the construction of waste compaction facilities). The claimant’s tender was considered to lack required levels of capacity. In order to establish this, after receiving tenders the defendant authority had put various questions to the claimant that dealt, inter alia, with the question of whether the claimant’s approach could cope with demand at peak times (e.g. to clarify the capacity of the plant and obtain details of the methodology behind certain calculations in the bid). It was held that under the open and restricted procedures such questions were lawful. According to Deeny J., “both fairness, and ... consistency, requires that the authority takes into account matters in favour of the [claimant] that are learnt after the bid

³⁶³ OGC/HMT (2008), fn.193, 5.4.9

³⁶⁴ Arrowsmith (2005), fn.46, 10.43; Arrowsmith (2004), fn.325, 1289

³⁶⁵ Ibid, Arrowsmith (2005), 10.43

³⁶⁶ PfS (2006), fn.108, para.31

³⁶⁷ *Natural World Products Ltd v ARC 21* [2007] NIQB 17

process as well as matters adverse to the [claimant]. It seems to me ... that, strictly speaking, the authority could, subject to one point, take this information into account. The qualification is that it constituted information which was clarification or supplementary ... rather than a wholly new departure”.³⁶⁸

Article 29(6)/Regulation 18(26) clearly states that amendments can only be made when a contracting authority requests them. However, it would seem unlikely that this means it is only the authority who can take the initiative to have tenders amended.³⁶⁹ Rather, as Arrowsmith explains, this phrase is probably intended to indicate that it is within the discretion of the authority to permit clarification, specification and fine-tuning, and that tenderers have no general right to make amendments. It follows that there is nothing to stop an authority from requesting amendments where a tenderer has flagged up the need.³⁷⁰

Both Art.29(6)/Reg.18(26) and the Council and Commission joint statement allow tenders to be clarified. According to Advocate General Lenz in the *Walloon Buses* case, “... the concept of ‘clarifying’ used in the joint statement by the Council and the Commission must be understood as the communication of details which describe the object in question more clearly or more precisely”.³⁷¹ “Supplementing” in the Council and Commission joint statement arguably corresponds to the concept of specification. This was understood “... to mean the addition of details previously not available”.³⁷² In the opinion of Advocate General Lenz common to both concepts, clarifying and supplementing, “is the fact that they are not intended to replace information previously given, but to render it more concrete in some way or other”.

³⁶⁸ Ibid, para.39

³⁶⁹ Treumer (2004), fn.206, 184

³⁷⁰ Arrowsmith (2005), fn.46, 10.49

³⁷¹ Opinion of Mr Advocate General Lenz delivered on 12 September 1995, *Walloon Buses*, fn.60, para.37

³⁷² Ibid

The concept of clarification would seem to allow for the possibility of amendments to correct inconsistencies, ambiguities and other errors where the true intention is obvious.³⁷³

For example, where a decimal point or zero has been omitted and it is clear from surrounding figures what the correction should be.³⁷⁴ In such cases it is argued there is little opportunity for abuse or unfair advantage.³⁷⁵

It is more difficult to say whether amendments would be permitted where it is not obvious what the correction should be. An example might be where there are inconsistencies in prices in a tender, and one of two figures could have been what was intended.³⁷⁶ In such instances, there is scope for abuse, as the tenderer may have the possibility of improving the original tender.

The Court of First Instance has held in Case T-19/95, *Adia Interim SA v. Commission*³⁷⁷ that a tenderer could not insist upon being allowed to make a numerical correction when the nature of the error and intended figures were not clear. This was because contact between the authority and the tenderer on this point involved a risk that the tender might be adjusted, violating the equal treatment principle. The reasoning of the Court might be taken as implying that adjustments should not be allowed even if an authority wishes to permit it because this would give an opportunity to improve the tender. Alternatively, Arrowsmith notes that the ruling may be interpreted more narrowly as merely precluding a *right* to correct errors of this kind.³⁷⁸ In addition, Arrowsmith points out that it is not clear whether the Court based its conclusion on the Directive or on a separate equal treatment principle under different procurement rules applicable to the Commission.

³⁷³ See *Resource Management Services v. Westminster City Council* [1999] 2 CMLR 849

³⁷⁴ Arrowsmith (2005), fn.46, 7.148

³⁷⁵ Ibid

³⁷⁶ Arrowsmith (2005), fn.46, 7.50

³⁷⁷ Case T-19/95, *Adia Interim SA v Commission* [1996] ECR II-321

³⁷⁸ Arrowsmith (2005), fn.46, 7.151

Arrowsmith's view is that it does not necessarily violate equal treatment to allow a correction: a tenderer that has made a genuine error, for example, is in a different position to one that has not.³⁷⁹ According to Arrowsmith, the opportunities for abuse, both by the tenderer alone and through collusion between the tenderer and the contracting authority, are quite limited, and some control over unilateral abuse by the tenderer is provided by the fact that amendment is subject to the discretion of the contracting authority.

Arrowsmith opines that to eliminate every small possibility of abuse from the tendering process is unrealistic, and to refuse any amendments that could give rise to this possibility would be seriously detrimental to contracting authorities' interests, given that many tenders include minor errors and omissions.³⁸⁰

If "specification" does, as many commentators assume, correspond to supplement in the Commission and Council joint statement it would appear that there is some scope for authorities to allow bidders to provide additional or more detailed information after submitting their tenders but before a preferred bidder is selected; for example, this may be because information was omitted from the tender, not originally requested by the authority, or because the tender is not sufficiently detailed.³⁸¹ The extent to which this is permitted, according to Arrowsmith, is probably a matter of degree taking into account the overall context of the procedure, such as complexity of the contract.³⁸² Arrowsmith argues that as the contracts procured under competitive dialogue will invariably be complex there should generally be significant flexibility in competitive dialogue in this

³⁷⁹ Ibid, 7.150

³⁸⁰ Ibid, 7.152

³⁸¹ Ibid, 10.46

³⁸² Ibid, 10.46

respect. According to Brown, the ambiguous term “specification” may refer to scope for confirming or adjusting the technical specifications.³⁸³

After submitting its final tender a bidder may wish to make amendments that improve upon it; for example, they may wish to make the tender more economically advantageous, or may simply want to make the tender compliant. An authority may wish to allow such amendments, as improved tenders enhance the authority’s chances of getting the best tender and hence value for money from the procurement. The Council and Commission statement, with its ruling out of negotiations on “fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on price”, would appear to rule out in the context of the open and restricted procedures changes to improve prices or other aspects of tenders that are referred to in the award criteria. The Commission suggests that this is also the position in relation to competitive dialogue³⁸⁴; however, the issue is not certain. The concept of “fine tuning”, which appears in Art.29(6)/Reg.18(26), is absent from the Council and Commission joint statement. This has led some to suggest that there is more flexibility in competitive dialogue for amendments to tenders than in open and restricted procedures, and that in order to give effect to the concept of fine tuning there may be some scope for improving amendments to tenders.³⁸⁵

Nevertheless, it is accepted that the phrase “fine tuning” probably implies qualitative and quantitative limitations on the nature of permitted changes that are separate from the controls imposed in the final sentence of Art.29(6)/Reg.18(26).³⁸⁶ Arrowsmith notes that, although the concept of “fine-tuning” may, for example, cover changes called for by an

³⁸³ Brown (2004), fn.170, 175

³⁸⁴ Commission (2005), fn.190, 3.3

³⁸⁵ Arrowsmith (2005), fn.46, 10.44

³⁸⁶ *Ibid*, 10.44

authority to bring a non-compliant tender into compliance, it is very difficult to say how far the concept permits an authority to request changes to features that are to be compared in the evaluation (e.g. to seek improvements to price).³⁸⁷ It must be emphasised that even if qualifying as fine tuning, if improvements are to be allowed they will also need to satisfy the safeguards in the final sentence of Art.29(6)/Reg.18(26), which disallow any changes to the basic features of a tender that are likely to distort competition or have a discriminatory effect.

There is an obvious risk of violation of the equal treatment principle where not all bidders are given the same opportunity of making changes to their final tenders.³⁸⁸ In the context of an open procedure, the CJEU found this to be the case in *Walloon Buses*.³⁸⁹

It is unclear whether it would be permissible to seek amendments to final tenders from all tenderers on an informal basis. However, this may be unlikely considering the “... dangers of discrimination in such a discretionary and non-transparent process, which violates the transparency principle”.³⁹⁰ It may be that the only way to sufficiently negate the risks of distorting competition and of discrimination by allowing amendments to final tenders, particularly if such amendments are improvements, is to hold a revised formal tendering phase. This could be on all aspects of tenders or specific aspects only; however, as Arrowsmith recognises, if only allowing revision of limited issues there is a risk that matters may be specified to favour particular bidders.³⁹¹

Formal resubmissions, as opposed to informal discussions, offer a transparent process providing equal opportunities for revisions to all tenderers. However, there remain

³⁸⁷ Ibid, 7.151

³⁸⁸ Arrowsmith (2005), fn.46, 10.44

³⁸⁹ *Walloon Buses*, fn.60

³⁹⁰ Arrowsmith (2005), fn.46, 7.150

³⁹¹ Arrowsmith (2004), fn.325, 1288

opportunities for abuse. For example, the authority may call for revisions merely to improve the position of a favoured bidder (even though it is difficult to ensure the favoured bidder will succeed).³⁹² To prevent such risks it might be argued that “distortion of competition” should be interpreted as referring to distortion of the final tender stage itself; this would rule out any improving amendments after the submission of final tenders that might affect the result, regardless of whether the authority were to warn tenderers of the possibility in advance.³⁹³ Arrowsmith concludes that the better view is that as a general rule authorities may not call for resubmissions after the final tendering stage:

*[s]ince the [authority] has had opportunities through earlier dialogue and tendering phases to ensure that bids are adapted to its requirements, it is not problematic to identify in advance that a particular stage will be final with no room for further adjustments.*³⁹⁴

Arrowsmith goes on to note, however, that there may be an exception to this general rule where resubmissions are needed to adjust tenders for changes arising from external circumstances that are within the limits of “fine-tuning”.³⁹⁵ In support of this argument, Arrowsmith highlights that it would not be reasonable to require the whole competitive dialogue to be started again from scratch (a possibility no less open to abuse), and that formal resubmissions are more transparent than having the authority negotiate revisions with a preferred bidder.³⁹⁶

7.4.5 Amendments to the call for tender

The contracting authority may wish to make changes to the “call for tender” (because of, for example, changed circumstances). This was the case in the Commission’s London Underground decision where changes were made to take account of an increased terrorist

³⁹² Arrowsmith (2005), fn.46, 7.153

³⁹³ Arrowsmith (2004), fn.325, 1288

³⁹⁴ Ibid, 1289

³⁹⁵ Ibid, 1289

³⁹⁶ Ibid, 1289

threat following the September 11 2001 New York terrorist attacks.³⁹⁷ It appears that some changes are permitted. However, equal treatment requires that where an authority makes a “material” change, a change likely to have impacted upon the identity of participants, the authority must go back to the point in the procedure necessary to ensure no one has been excluded that would otherwise have been included.³⁹⁸

The possibility for changes to the call for tender after the deadline for tenders is not clear. It is arguable that in competitive dialogue it is possible to do this, for example, with a second round of tendering regardless of whether it is possible under the open and restricted procedures. According to Arrowsmith, even if under the legal rules an authority cannot hold a second tendering round in open and restricted procedures to take account of changes, it may still be possible in competitive dialogue because this is consistent with the procedure’s flexibility, and, because the procedure concerns more complex projects with contract awards happening over longer periods of time, there is much greater potential for a need for change.³⁹⁹ Arrowsmith also suggests that there may be some limited room for changes within the concept of “fine tuning”.⁴⁰⁰

7.4.6 Identification of a preferred bidder

Under Art.29(7)/Reg.18(27) authorities are to assess the tenders received on the basis of award criteria laid down in the contract notice or descriptive document and must select the most economically advantageous tender.

Following the identification of the preferred bidder when the parties are ready to conclude the contract, PPP procurements in the UK (such as BSF procurement) will generally require the contracting authority to prepare a final/full business case, which will

³⁹⁷ London Underground, fn.326, 88

³⁹⁸ Arrowsmith (2005), fn.46, 10.51

³⁹⁹ Arrowsmith (2005), fn.46, 10.52

⁴⁰⁰ Ibid, 10.52

need to be approved for the procurement to proceed to financial close. This document will reference any changes to the project as set out in the outline business case.

7.4.7 Changes at the preferred bidder stage

It was mentioned above that under Art.29(7)/Reg.18(28) there is some possibility for leaving certain details of a contract to be finalised after identification of a preferred bidder when there is only one bidder left in the process. A related, but separate, issue concerns the extent to which actual changes to a preferred bidder's tender or the call for tender can be made under Art.29(7)/Reg.18(28). There are a number of reasons that the need for changes may arise at a late stage in long, complex procurements. It is apparent that a common reason for the need for changes to be made at the preferred bidder stage in private finance procurement comes from the involvement of debt funders (e.g. banks) following detailed due diligence.⁴⁰¹ It is suggested that at this late stage in a process funders can find themselves in a strong position, able to dictate revised terms upon which they are prepared to lend. This is said to be because, having invested considerable resources in the procurement to progress it to a point near to financial close, a contracting authority is likely to want to avoid any further delay to the project, particularly if there is the threat of having to restart the procurement (see below). There are reports that the above difficulties have been exacerbated by the late-2000s global banking crisis.⁴⁰² For example, some UK authorities have found that very close to contract conclusion, the sources of funding upon which the preferred bidder is reliant have disappeared or funders have sought to substantially change the terms upon which funding was available (e.g. funders may want to limit exposure to legal risk). As explained in chapter two, in view of the banking crisis in March 2009 HM Treasury created the Treasury Infrastructure Finance Unit, which could lend on the same terms as commercial funders in the event that insufficient private funding was available.

⁴⁰¹ Burnett (2009), fn.331, 195; Kennedy-Loest (2006), fn.331, 319

⁴⁰² Burnett (2009), *Ibid*

There is great uncertainty over the degree to which changes may occur at the preferred bidder stage under the legal rules on competitive dialogue. Prior to the introduction of competitive dialogue, from the reported practice of UK contracting authorities procuring PPP contracts under the negotiated procedure there were not generally perceived to be any great restrictions upon the changes to the contractual arrangements that could be made with a preferred bidder. As it is expected that use of competitive dialogue will replace the use of the negotiated procedure for many complex PPP projects, the interpretation of Art.29(7)/Reg.18(28) is of critical significance for UK authorities which will need to know how far they may persist with past practices. As will become evident from the discussion below, in addition to exploring in the research interview how interviewees interpret the law and how the law is applied in practice, the research interviews will need to look into the factors behind contracting authority decision-making at this critical stage of the process.

The legal uncertainty flows from the phrasing of Art.29(7)/Reg.18(28), which is not consistent. Article 29(7)/Regulation18(28) restricts the work that can be done with the preferred bidder to clarifying aspects of the tender or confirming 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. As many suspect, it is likely that the inconsistent wording is a deliberate fudge due to difficulties reaching agreement.⁴⁰³ Firstly, the provision limits any discussions with a preferred bidder to clarifying and confirming commitments. On its own, this gives the impression that there is very little scope for changes to the tender or call for tender. The second part, however, states that clarifications or confirmations must not have the

⁴⁰³ Arrowsmith (2004), fn.325, 1290

effect of modifying substantial aspects. Logically, therefore, there is some scope for clarifications or confirmations which have the effect of modifying non-substantial aspects of tenders or call for tenders.⁴⁰⁴ The Directive/Regulations fails to elaborate upon what might amount to a substantial modification.

The Commission adopts a narrow interpretation of the scope for change, concentrating upon the words “clarify” and “confirm”: “... this does not entail any negotiations solely with this economic operator – amendments aimed at authorising such negotiations were proposed and rejected by the [EU] legislative process. It relates to something much more limited, specifically “clarification” or “confirmation” of undertakings already appearing in the final tender itself. This provision should also be interpreted in the light of the last sentence of Recital 31 ...”.⁴⁰⁵

The 2008 OGC/HMT guidance states that it is not possible to define the meaning of “clarify aspects of the tender or confirm commitments” without legal precedents arising from court rulings.⁴⁰⁶ However, according to the 2008 guidance, “it seems clear that this represents a further narrowing of the scope for a discussion between the contracting authority and the preferred bidder”.⁴⁰⁷ The guidance goes on to note that a degree of pragmatism is needed in the application of the legal rules, recognising that the challenge for contracting authorities is, “... to balance the legal requirements with the need to achieve contract signature while operating in a world where change can occur between the closure of the dialogue phase and contract signature”.⁴⁰⁸

⁴⁰⁴ Ibid, 1290

⁴⁰⁵ Commission (2005), fn.190, 3.3

⁴⁰⁶ OGC/HMT (2008), fn.193, 5.5.2

⁴⁰⁷ Ibid, 5.5.2

⁴⁰⁸ Ibid, 5.5.8

Although, as the OGC/HMT 2008 guidance makes clear, there is unlikely to be the same flexibility at the preferred bidder stage under competitive dialogue as there is at the corresponding stage of the negotiated procedure, the scope for change at the preferred stage under the negotiated procedure may provide some guidance on the approach to the scope for change under competitive dialogue.⁴⁰⁹ Article 30/Regulation 17, which governs the conduct of the negotiated procedure, is silent on the extent to which negotiations can permissibly take place once a preferred bidder has been identified. However, in the Commission's London Underground PPP decision, the Commission accepted significant scope for changes to both the preferred bidder's tender and the call for tender (potentially relating to all aspects of a project) at the preferred bidder stage of a negotiated procedure regulated under the 1993 Utilities Directive.⁴¹⁰ The London Underground decision suggests that a lawful change is potentially one in which the preferred bidder remains the bidder with the most economically advantageous tender; there may be some scope for change even where the change/s make the contract more valuable for the preferred bidder; and changes must not result in the project being substantially different from that advertised at the outset in the OJEU notice (it would not attract different bidders). The London Underground PPP was a highly complex and lengthy procurement and the Commission emphasised this fact in its decision. As Arrowsmith comments, the inherent complexity of the contracts to be procured under competitive dialogue means that, although the wording of Art.29(7)/Reg.18(28) suggests less flexibility than under the negotiated procedure, there needs to be reasonable flexibility for competitive dialogue to be of any use.⁴¹¹

⁴⁰⁹ Ibid, 5.5.2

⁴¹⁰ London Underground, fn.326

⁴¹¹ Arrowsmith (2005), fn.46, 10.54; see also T.Kotonis, *Taking stock: competitive dialogue four years on*, (2010) available at www.nortonrose.com (accessed 31/10/2011)

In addition, guidance on the scope for change comes from the CJEU Case C-454/06, *Presstext* judgement,⁴¹² which concerned changes to a concluded contract. Adopting a more restrictive approach than that advocated by the Commission (above), the CJEU held that there is a new contract that must be re-advertised where a contract is changed so that it is “materially different in character”. The CJEU gave the following examples of potential “material” contractual amendments:

- an amendment that introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted;
- an amendment that extends the scope of the contract considerably to encompass services not initially covered; or
- an amendment that changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.⁴¹³

There is little guidance as to the specific application of these principles or the extent to which these principles apply to changes occurring whilst a procurement is ongoing.

The Commission took into account a number of considerations in accepting the lawfulness of quite significant changes in the London Underground decision. It follows from the decision that the justifications given for changes are likely to have a strong

⁴¹² *presstext*, fn.261

⁴¹³ *Ibid*, 34-37

bearing on the Commission's view of whether or not they are acceptable.⁴¹⁴ Likewise, UK guidance (OGC/HMT 2008 guidance and Partnerships for Schools guidance) and commentators consider the reasons for changes at preferred bidder stage to be important under competitive dialogue.⁴¹⁵ The OGC/HMT 2008 guidance distinguishes between reasons for changes that are within the control of the authority and those outside the control of the authority.⁴¹⁶ With respect to the former, the guidance confirms that, "it is inappropriate for a contracting authority to undertake any changes to bids received after the closure of dialogue, if changes could have been anticipated and dealt with during the dialogue stage. Any change of requirement or circumstance that was reasonably predictable, or directly under the contracting authority's control, is unlikely to be a satisfactory reason, from a legal perspective, to change bids during the post dialogue phase".⁴¹⁷ Where the reason for making changes is necessary for external reasons, which the contracting authority could not have predicted or anticipated the position is not clear. According to the OGC/HMT 2008 guidance, "provided that the contracting authority and the preferred bidder could not have better managed things to avoid this situation, it would not be in anyone's interests for the procurement to fail because of such an event. So, for practical reasons, the contracting authority may decide to allow some consequential change, provided the change results directly from such an event and is limited to that which is needed to respond to the event".⁴¹⁸ The above approach advocated by the 2008 OGC/HMT guidance is necessary to ensure that competitive dialogue provides an adequate procedure for complex contracts, like complex PPP contracts, where external reasons for varying the contract terms commonly arise in practice.

⁴¹⁴ London Underground, fn.326, 88

⁴¹⁵ OGC/HMT (2008), fn.193, 5.59; PfS (2006), fn.108, 38; Arrowsmith (2005), fn.46, 10.54

⁴¹⁶ OGC/HMT (2008), *ibid*, 5.5.9

⁴¹⁷ *Ibid*, 5.5.9

⁴¹⁸ *Ibid*, 5.5.15

A clear limitation on the scope for change is that changes must not be substantial.

According to Arrowsmith, this may imply an independent qualitative and quantitative limit to allowable changes.⁴¹⁹ This reasoning, for instance, would seemingly rule out a major change to the size of a project, even if there would have been no effect on the choice or preferred bidder and the change is for legitimate external reasons, such as changed demand for service.⁴²⁰

In addition, it follows from *London Underground and Presstext* that, following any changes, in accordance with the principle of equal treatment, the preferred bidder must remain the bidder with the most economically advantageous tender. Thus, a change would be non-compliant with the legal rules, for example, where restrictions imposed following a detailed planning application resulted in a feature of a building design, which had given the preferred bidder the edge over its competition, being removed. This principle will not just be relevant to the final tendering stage; an authority will need to look back at all decisions made over the course of the whole procurement process (e.g. qualification and selection decisions) and ensure that decisions would be unaffected by the changes made with the preferred bidder. It may be that a formal evaluation to assess the possible impact of changes on other bids may be advisable. The authorities in London Underground carried out such an evaluation and the results were accepted by the Commission.⁴²¹ According to Arrowsmith, it is a useful exercise for authorities to undertake, both to ensure value for money and to reduce the risk of successful legal challenge.⁴²²

⁴¹⁹ Arrowsmith (2005), fn.46, 10.55; and Arrowsmith (2004), fn.325, 1290

⁴²⁰ Arrowsmith (2005), *ibid*, 10.54

⁴²¹ *London Underground*, fn.326, 85

⁴²² Arrowsmith (2005), fn.46, 8.44

Regardless of the impact on award decisions, it is not clear whether it is possible under Art.29(7)/Reg.18(28) to make changes that mean the project is more valuable to the preferred bidder than it was when the preferred bidder was first identified. Following the CJEU judgment in *Pressestext* that a material change is one that shifts the economic balance of the contract in favour of the contractor it would seem likely that such changes are not permitted in the preferred bidder stages of competitive dialogue; however, as noted above, in *London Underground*, under the negotiated procedure, the Commission appears to accept that such changes may be made to a contract.⁴²³ In the opinion of Arrowsmith, changes making a contract more valuable to the preferred bidder should be permitted under competitive dialogue, as, given that the legal rules expressly recognise that some changes may be needed when there is no competition, the possibility may be necessary so that it is possible for authorities to secure agreement in the event of renegotiation.⁴²⁴

In accepting changes in *London Underground*, the Commission noted that the modifications were not so substantial, individually or collectively, as to be likely to have attracted prospective participants which did not consider participating following publication of the original contract notice.⁴²⁵ It follows that under competitive dialogue where changes occur to the project itself at a minimum the authority concerned must ensure the project is materially the same as that advertised in the OJEU (i.e. it would not have attracted different bidders). As *London Underground* concerned the preferred bidder stages of a negotiated procedure, it may be that in relation to competitive dialogue the test is stricter⁴²⁶; thus, certain changes to a project may not be allowed under the legal rules even if the changed project would not have attracted different potential bidders.

⁴²³ *London Underground*, fn.326, 103

⁴²⁴ Arrowsmith (2005), fn.46, 10.54

⁴²⁵ *London Underground*, fn.326, 89

⁴²⁶ Kennedy-Loest (2006), fn.331, 321

In a situation where substantial changes are needed at the preferred bidder stages of competitive dialogue to proceed to contract close (e.g. a preferred bidder may not be willing to agree to a contract without substantial changes), there are limited alternative options available to contracting authorities. The safest option from a legal perspective is for the authority to restart the procurement with a new contract notice; indeed, where a change would result in a different set of potential bidders expressing an interest in the project this may legally be the only option open to the contracting authority. However, despite the minimised legal risk, to restart a competitive dialogue procurement having reached the late stage of preferred bidder negotiation is an expensive option, in terms of wasted time and money. A second option is for the contracting authority to go back in the process and, for example, hold the final tendering stage again. It is noted, however, that this option is not always practical for authorities, as previously rejected bidders may no longer be prepared to take part. A further option potentially available is for a contracting authority to formally initiate a new negotiated procedure without a contract notice on grounds of extreme urgency brought about by unforeseeable events (Art.31(c)/Reg.14(a)(iv)). This will enable the authority concerned to proceed with the preferred bidder's tender; however, the grounds for using the negotiated procedure without a notice are narrow and the circumstances invoked to justify extreme urgency must not be attributable to the authority. Therefore, this option will only be available where the reasons for substantial modifications to the preferred bidder's tender are completely outside the control of the authority and unforeseeable.

It appears to have been relatively common in the UK, particularly in PFI procurement, for a contracting authority to keep a bidder in reserve ("the reserve bidder") when it

appoints a preferred bidder.⁴²⁷ There is nothing in the Directive prohibiting such practices, and therefore if a contract with a preferred bidder falls through it may be possible for an authority to award the contract instead to the reserve bidder. In this respect, 2006 OGC guidance draws attention to Recital 31, which states that competition should not be distorted or restricted by involving any tenderer other than the one selected as the most economically advantageous tender. The guidance considers this to discourage the practice of keeping a reserve bidder in play,⁴²⁸ but, as Arrowsmith explains, it seems more likely that Recital 31 is indicating that once negotiations begin with the reserve bidder, even if those negotiations fail it is not possible to revert back to the original preferred bidder.⁴²⁹ Guidance issued by 4Ps recommends the appointment of a reserve bidder “wherever possible”.⁴³⁰

In view of the disproportionate impact of restart and the problems being faced by UK contracting authorities at the height of the late-2000s credit crunch, Arrowsmith developed an argument based on the fundamental EU principle of proportionality, i.e. the burdens imposed by regulation must be proportionate to the object in view.⁴³¹ According to Arrowsmith, under this principle in certain exceptional circumstances (such as where private funders have disappeared very late on in a process) there should be some scope for certain “substantial” changes to the preferred bidder’s tender or the call for tender. Arrowsmith argues that where the authority would need to start again with a new procedure that involves significant time and costs for all involved and means a serious delay, and this is caused by external events not within its control, then it is permitted to go ahead and conclude the contract with the preferred bidder despite the impact of the changes. As Arrowsmith explains, “whilst transparency and undistorted competition is

⁴²⁷ Arrowsmith (2005), fn.46, 10.55

⁴²⁸ OGC (2006), 10.1

⁴²⁹ Arrowsmith (2005), fn.46, 10.55

⁴³⁰ 4Ps (2006), fn.164, 18

⁴³¹ S.Arrowsmith, Achilles lecture, Using competitive dialogue II, 24 April 2008, London

important, these principles can only be followed to the extent that they do not involve disproportionate costs. The need for proportionality in applying these principles is reflected elsewhere in the directives e.g. in the possibility for using the negotiated procedures without a contract notice in certain cases”.⁴³²

The Commission’s view of the proportionality argument is not clear; however, the persisting financial crisis has meant the Commission has come under considerable political pressure not to let strict application of the procurement rules to stand in the way of efforts to kick start the economy. In December 2008 the Commission issued a press release stating that the current economic situation was enough to justify contracting authorities using the accelerated restricted procedure for procuring goods, works and services “for all major public projects”.⁴³³ This relaxation of the rules is designed to speed up the execution of major public projects and thus help member states through the EU-wide economic downturn. Similarly, the Commission took a proactive approach in relaxing the EU state aid rules to help member states support their banking sectors. With this in mind, it may be that the Commission is and will take a lenient view of substantial changes to contracts after identification of a preferred bidder under the legal rules on competitive dialogue, where these are the result of external events flowing from the current financial and economic crisis.

7.4.8 The *Alcatel* information and standstill requirements

The rules implementing the EU *Alcatel* information and standstill requirements into UK law (Reg.32 and Reg.32A) were set out in chapter four. As explained in chapter four, as soon as possible after the award decision a contracting authority must notify bidders of the decision in writing by the most rapid means of communication practicable. The

⁴³² Ibid

⁴³³ Commission (2008), fn.109

contracting authority must then refrain from entering into the contract until the expiry of 10 or 15 days (depending upon how the notice is sent).

In competitive dialogue there is some debate over when the award decision for the purposes of Reg.32 can be said to have occurred.⁴³⁴ It can be seen from the above discussion that in practice in the UK the bidder submitting the most economically advantageous final tender is given the status of preferred bidder. This is the earliest point at which the award decision could be said to have been made. It is questionable, however, whether holding the standstill period at this point gives effect to the *Alcatel* judgement. The purpose of the standstill period is to ensure that the remedies system is effective by giving aggrieved bidders the opportunity to challenge award decisions before the contract is concluded when the set aside remedy is still available. If the standstill period is held only at this point then there is a risk that would-be complainants will struggle to find out about subsequent violations of the procurement rules (e.g. substantial changes disallowed by Art.29(7)/Reg.18(28)), and so are be unable to challenge them before the contract is concluded. In addition, it is pointed out that holding the standstill period at the point when the preferred bidder is identified has the practical advantage of avoiding delay to the procurement process, since the standstill period will be subsumed into the significantly longer period during which due diligence and contract finalisation takes place with the preferred bidder.⁴³⁵

Despite earlier inconsistent advice,⁴³⁶ the OGC/HMT 2008 guidance states that, “under competitive dialogue, the 10 day standstill period should happen when all matters that are material to the decision to award the contract to the winning tenderer have been resolved i.e. there will be no further changes that will modify the terms under which the contract

⁴³⁴ A.Brown, “Applying *Alcatel* in the context of competitive dialogue” (2006) 6 PPLR 332

⁴³⁵ *Ibid*, 335

⁴³⁶ OGC 2006, fn.187, p.8

will be concluded”.⁴³⁷ Because it is so common in complex procurements for certain issues to be negotiated once a preferred bidder has been identified, in accordance with the above guidance, UK contracting authorities may be holding the standstill period at a point much closer to contract close; this could possibly be when the full/final business case is approved or when the authority’s board has met formally to approve the transaction.⁴³⁸

In view of the uncertainty surrounding the correct application of the *Alcatel* requirements under competitive dialogue, it is important that the research interviews investigate this uncertainty, looking at how practitioners interpret the legal rules, how they apply the legal rules in practice, and the reasons for this.

7.5 Payment to participants

Article 29(8)/Regulation 18(29) states that authorities may specify prices or payments to participants in competitive dialogue. It is suggested that this could be, for example, to compensate a participant who has agreed to waive its confidentiality rights under Art.29(3)/Reg.18(21), or it may be that a payment could be made simply to encourage participation.⁴³⁹ There is no equivalent to Art.29(8)/Reg.18(29) for any of the other procedures; however, this is not because such payments are not allowed in those procedures.⁴⁴⁰

It appears that, although not strictly necessary, the provision was included to signal that payments may be particularly appropriate in competitive dialogue,⁴⁴¹ which involve complex contracts requiring lengthy procurements and engendering significant bid costs.⁴⁴² It is noted that another possible purpose of having such an express provision

⁴³⁷ OGC/HMT (2008), fn.193, 5.5.6

⁴³⁸ Brown (2006), fn.434, 334

⁴³⁹ Trepte (2007), fn.166, 7.199

⁴⁴⁰ Commission (2005), fn.190, footnote 26

⁴⁴¹ Ibid, footnote 26

⁴⁴² OGC (2006), fn.187, 12

may be to prevent, in the specific case of competitive dialogue, Member States disallowing payments by their own individual contracting authorities.⁴⁴³ Arrowsmith notes that payments were not usually made by UK contracting authorities procuring PFI contracts under the negotiated procedure.⁴⁴⁴ Government policy in the UK has consistently been that bid costs as a general rule should not be reimbursed.⁴⁴⁵

7.6 Concluding remarks

Chapter seven has reviewed the procedural rules governing competitive dialogue. The chapter has highlighted numerous legal grey areas, for example concerning bidder reduction during dialogue, the confidentiality rules, and, critically from a UK perspective, the scope for amendments to tenders and negotiations following the close of dialogue. The chapter has drawn upon the Commission's explanatory note and guidance on competitive dialogue issued by UK government; however, as this guidance is of limited legal value and also because in many circumstances it is itself not conclusive, the research must go further to fully appreciate the law by exploring the application of the legal rules in practice.

⁴⁴³ Arrowsmith (2005), fn.46, 10.60

⁴⁴⁴ Arrowsmith (2006), fn.84, 108

⁴⁴⁵ OGC/HMT (2008), fn.193, box 5.1

8 Compliance with regulation

8.1 Introduction

It would be wrong for the drafters of the Directive to assume that compliance with the new legal requirements would be an inevitable consequence of their coming into existence.⁴⁴⁶ As Baldwin emphasises, “[i]n virtually all fields of regulation ... there are large numbers of rules that are regularly ignored or disobeyed. In spite of statutes, regulations and codes, rivers continue to be polluted, discrimination still takes place and many workplaces remain unsafe”.⁴⁴⁷ These claims, which are substantiated by numerous empirical studies,⁴⁴⁸ have led scholars to consider and develop ideas as to why in many situations regulatory compliance is far from self-evident. In order to understand authority behaviour under the legal rules, chapter eight will explore the literature on regulatory compliance, relating it as far as possible to compliance with the EU procurement rules.

Much of the literature on compliance discusses it from the standpoint of individual members of the public or private corporations. For the purposes of this thesis we are concerned by what factors influence compliance by public authorities under the Regulations. With this in mind, one must be cautious in relating the findings of studies mostly concentrating on private sector compliance to the circumstances of public

⁴⁴⁶ T.Amodu, *The determinants of compliance with laws and regulations with special reference to health and safety: a literature review*, (Research Report (RR638)) (2008, London, Health and Safety Executive), p.v; Snellenberg & Peppel, “Perspectives on compliance: non-compliance with environmental licences in the Netherlands” (2002) 12 *European Environment* 131, p.131

⁴⁴⁷ R.Baldwin, “Why rules don’t work” (1990) 53(3) *Mod.L.Rev.* 321, p.321

⁴⁴⁸ See, for instance, Edelman et al., “Legal ambiguity and the politics of compliance: affirmative action officers’ dilemma” (1991) 13(1) *Law & Policy* 74; Fairman & Yapp, “Enforced self-regulation, prescription, and conceptions of compliance within small businesses: the impact of enforcement” (2005) 27(4) *Law & Policy* 491; Gray & Shadbegian, “When and why do plants comply? Paper mills in the 1980s” (2005) 27(2) *Law & Policy* 238; Kagan et al., “Explaining corporate environmental performance: how does regulation matter?” (2003) 37(1) *Law & Society Review* 51; P.May, “Compliance motivations: perspectives of farmers, homebuilders, and marine facilities” (2005) 27(2) *Law & Policy* 317; Thornton et al., “General deterrence and corporate environmental behaviour” (2005) 27(2) *Law & Policy* 262

authorities who are not guided by the same profit seeking motives as private sector corporations⁴⁴⁹; nevertheless, there remains a lot that can be learned and developed.

8.2 The classical deterrence approach

Traditionally, the dominant view of compliance has stemmed from “free market” economic literature whereby regulatory compliance is seen as the result of a calculated decision motivated by economic factors. Here, it is assumed that regulated corporations, due to profit maximisation motives, will comply with regulation only to the extent that it is in their rational self-interest to do so.⁴⁵⁰ The main economic theories view compliance as the result of a cost-benefit analysis, where the expected detriment to the corporation from non-compliance and the likelihood of that detriment occurring (e.g. in the case of contracting authorities this might include financial loss due to having to pay out damages, the costs involved in defending legal actions, delays to projects, and even negative publicity) exceed the expected benefits deriving from violation (e.g. this may be cost savings or enhanced value for money from using the negotiated procedure over competitive dialogue or from making substantial changes at the preferred bidder stage).⁴⁵¹

Empirical research carried out by Braun in 2001 revealed that authorities in deciding between procedural options will usually weigh the benefits and risks.⁴⁵² This led Braun to rely upon deterrence theories to understand UK contracting authority behaviour.⁴⁵³ For example, Braun found authorities to be using the negotiated procedure even where it was not clear that the derogations for its use were satisfied. According to Braun, this was

⁴⁴⁹ Note, however, A.Reich, “On procurement, protectionism and protests: a survey among Canadian procurement officers” (1994) 23(1) *Canadian Business Law Journal* 107; Gelderman et al., “Public procurement and EU tendering directives? Explaining non-compliance” (2006) 19(7) *International Journal of Public Sector Management* 702; Gelderman et al., “Explaining non-compliance with European Union procurement directives: a multidisciplinary perspective” (2010) 48(2) *Journal of Common Market Studies* 243

⁴⁵⁰ See Amodu (2008), fn.446, p.6; Parker & Braithwaite, “Regulation”, in Cane & Tushnet (eds.) *The Oxford handbook of legal studies* (2003, OUP), 130; Snellenberg & Peppel (2002), fn.446, 133

⁴⁵¹ G.Becker, “Crime and punishment: an economic approach” (1968) *Journal of Political Economy* 169; R.Posner, *Economic analysis of Law* (2011, New York, Aspen); D.J.Pyle, *The economics of crime and law enforcement* (1983, London, Macmillan); G.Stigler, “The optimum enforcement of laws” (1970) 78 *Journal of Political Economy* 526

⁴⁵² Braun (2003), fn.172, 595

⁴⁵³ *Ibid*, fn.172, 595

because authorities reaped significant benefits from the procedure's greater flexibility coupled with a widely held perception that there was very little threat of legal challenge.⁴⁵⁴ Braun concluded that, due to an inadequate enforcement regime, authorities assessing the risks of procurement decisions could be confident that non-compliant/risky behaviour would not be the subject of sanctions.

Research by Pachnou in 2003 into enforcement of procurement law in the UK highlighted the reasons for the inadequacies.⁴⁵⁵ These include high litigation costs; the uncertainty of trial outcome and low chances of success; and characteristics specific to the UK, not present in other Member States (e.g. a non-confrontational legal culture and a generalised trust in the integrity of the public sector). More specific reasons for litigation avoidance in the UK include bidders' commercial approach to winning contracts (to accept losing some contracts as a natural commercial risk) and the fear of future reprisals. Pachnou also found that many bidders were not sufficiently aware of their legal rights. In addition, at EU level, the Commission could only justify enforcement action in cases of systematic and severe breaches.

To remedy the above situation, a proponent of economic theories would say that in order to secure greater compliance all that is required is to increase the probability of cases of non-compliance being apprehended and punished and/or increase the severity of punishments so that compliance with the Directive becomes the economically rational response. It is arguable that since Braun's research in 2001 a change in circumstances may have occurred impacting upon an authority's cost/benefit analysis. For example, unsuccessful bidders may be more inclined to challenge under competitive dialogue

⁴⁵⁴ Ibid, fn.172, 596

⁴⁵⁵ D.Pachnou, "Bidders remedies to enforce the EC procurement rules in England and Wales" (2003) 12(1) *PPLR* 35; D.Pachnou, *The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece* (2003, Nottingham, University of Nottingham)

because the procedure is more prescriptive than the negotiated procedure and participation is potentially more expensive for them. There has also been a strengthening of the system of procurement review and remedies.⁴⁵⁶ In addition, it is arguable that the courts in the UK are demonstrating an increasingly robust attitude toward the availability of remedies in procurement disputes.⁴⁵⁷ Also, over time, particularly following the publicity the 2004 directives and remedies amendments attracted, suppliers may be more familiar with the procurement rules and more aware of their rights, and there are signs of a change in culture (for example public procurement cases reaching the courts have increased in number year on year).

8.3 The shortcoming of deterrence approaches

There are difficulties with understandings of compliance based solely upon economic deterrence models.⁴⁵⁸ This is primarily due to several assumptions upon which these explanations tend to be based, which much empirical research indicates rarely hold true in practice.⁴⁵⁹

First, economic deterrence models assume that those being regulated are fully-informed rational utility maximisers. This free market economic conception is rarely encountered in reality. A more realistic conception is provided by behavioural economics, which emphasises the limited abilities of economic actors to achieve their desired goals, recognising that they suffer from bounded rationality.⁴⁶⁰ It is noted that those busy individuals in charge of corporations (or authorities) “have neither the time, capability, knowledge, nor information required to maximise corporate utility, but rather ‘satisfice’ by

⁴⁵⁶ Directive 2007/66/EC, fn.6

⁴⁵⁷ See, for example, *Harmon*, fn.150

⁴⁵⁸ J.Scholz, “Enforcement policy and corporate misconduct: the changing perspective of deterrence theory” (1997) 60 *Law and Contemp. Probs.* 253, 254

⁴⁵⁹ See Gunningham & Kagan, “Regulation and business behavior” (2005) 27(2) *Law & Policy* 213, 216

⁴⁶⁰ See generally H.A.Simon, “Models of bounded rationality” (1982, Cambridge Mass, MIT Press)

choosing familiar alternatives that are good enough for the current situation”.⁴⁶¹ Thus, in the words of Baldwin, rather than compliance being a deliberate financial choice, “[t]hose who are reasonably well disposed to comply with rules tend not to follow them because they do not know about them, because they are unwilling to find out about them or because they cannot or will not process the information necessary for compliance”.⁴⁶²

A second assumption forming the basis of economic deterrence models is that legislation unambiguously defines misbehaviour. However, unlike say criminal law, administrative regulation tends to be associated with the management of activity as opposed to its absolute prohibition, and this leads to an inherent flexibility in the application and enforcement of regulation.⁴⁶³ This is a pertinent issue in relation to the topic of competitive dialogue and will be looked at in more detail in the next section.

A further assumption is that legal punishment provides the primary incentive for regulatory compliance. Deterrence models though fail to account for findings of high levels of compliance even when the threat of legal enforcement and sanctions appear remote⁴⁶⁴ and also situations of over-compliance.⁴⁶⁵

In view of these shortcomings, it is apparent that, whilst deterrence ideas are an important part of the design of any regulatory system, on their own they do not adequately explain compliance.⁴⁶⁶

⁴⁶¹ Scholz (1997), fn.458, 256

⁴⁶² Baldwin (1990), fn.447, 329

⁴⁶³ Amodu (2008), fn.446, 1

⁴⁶⁴ Thornton et al. (2005), fn.448, 264

⁴⁶⁵ Kagan et al. (2003), fn.448, 52

⁴⁶⁶ See Amodu (2008), fn.446

8.4 Regulatory design failure

The way in which regulations are designed can impact upon compliance levels.⁴⁶⁷ EU procurement regulation is roundly accepted as complex, uncertain and fast moving, making it difficult for even experienced practitioners to ensure compliance: it is “difficult to understand and apply, not least because of its complexity, because of the poor drafting of [EU] legislation, and because of the creative role played by the Court of Justice, whose decisions are not always accessible or easy to understand”.⁴⁶⁸ This situation raises the possibility of unintentional non-compliance.

As is particularly relevant to the discussion of competitive dialogue where there are numerous legal grey areas it is difficult to say whether the behaviour of contracting authorities is compliant. Uncertainty can lead to accidental breaches of the law (e.g. due to authorities not knowing what compliant behaviour is) and also deliberate breaches, where actors interpret the rules so as to comply with the letter but not the spirit of the rules (e.g. creative compliance).⁴⁶⁹ It is further noted that lack of clarity can make effective policing of the rules problematic.⁴⁷⁰ For example, aggrieved bidders considering legal action have a similar uncertainty in relation to their chances of success. Also, aggrieved bidders may appreciate the commercial importance of a flexible reading of the rules and so not want to risk having the courts limit this flexibility, which could be of benefit to them when competing for future contracts.⁴⁷¹

Legal certainty is not helped by the fact that the Regulations merely replicate the drafting of the Directive. As a consequence, the ambiguous EU provisions have “become equally

⁴⁶⁷ See OECD, *Assuring Environmental Compliance: A Toolkit for Building Better Environmental Inspectors in Eastern European, Caucasus and Central Asia*, (2005) available at www.oecd.org/dataoecd/61/62/34499651.pdf (accessed 31/10/2011)

⁴⁶⁸ Arrowsmith (2006), fn.84, 88

⁴⁶⁹ See Edelman et al. (1991), fn.448

⁴⁷⁰ Gordon et al., “The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO” (1998) 21(2) *The World Economy* 159, 170

⁴⁷¹ Braun (2003), fn.172, 596

ambiguous national rules”.⁴⁷² It is suggested that, in cases of ambiguous regulation, soft law, is important for encouraging compliance. According to Gordon et al., “[w]ilst this would not provide a conclusive interpretation, it would provide operators with a framework to think in a constructive way about problems of interpretation and to make intelligent judgments”.⁴⁷³ This may explain the key role Braun observed UK soft law to play in the development of PFI procurement practice before 2004.⁴⁷⁴ Braun’s empirical study revealed that authorities procuring PFI projects came to regard non-binding guidance from UK government as authoritative interpretations of the law.⁴⁷⁵ This was so even where the guidance was not compatible with Commission interpretations⁴⁷⁶; for example, guidance encouraged the general practice of using the negotiated procedure. Although in the past offering a more flexible interpretation of the EU procurement rules, UK guidance in relation to PFI procurement is now much more in line with Commission guidance. Thus, the qualitative interviews in the current study will be able to build upon Braun’s findings, providing a greater insight into the role of soft law.

It is noted that compliance rates are lower when regulation does not fit well with existing market practices or is not supported by cultural norms and civic institutions.⁴⁷⁷

Competitive dialogue is said to correspond closely to the practices adopted by UK contracting authorities for procuring complex projects under the negotiated procedure.⁴⁷⁸ To the extent that this is the case compliance should not be problematic. Compliance is likely to be an issue, however, where changes are required to existing practices, particularly where the commercial benefits of these changes are debateable. As was discussed in

⁴⁷² Gordon et al. (1998), fn.470, 170

⁴⁷³ Ibid, 179

⁴⁷⁴ Braun (2003), fn.172, 582

⁴⁷⁵ See Treasury Taskforce (1998), fn.171; Treasury Taskforce (1999), fn.175; Treasury Taskforce, *Step by step guide to the PFI procurement process* (1999, London)

⁴⁷⁶ Pimlico, fn.179

⁴⁷⁷ OECD (2005), fn.467, 28

⁴⁷⁸ OGC (2006), fn.187, 1.2

chapter seven, this may be relevant in relation to restrictions on the work that can be done with the preferred bidder.

A 2005 report by the OECD notes that “... sometimes the whole point of introducing regulation is to counter a market or cultural practice”. It might be said that this was the reason for introducing competitive dialogue. The report goes on to note, however, that “if regulation cuts across existing cultures and fails to build support through education [and] market incentives ... it is unlikely to be effective at eliciting compliance”.⁴⁷⁹ There is little evidence of the benefits of competitive dialogue being promoted to the procurement community, particularly bidders.

There may also be market incentives upon authorities to limit the exposure of themselves and suppliers to the risk of legal challenge. Braun’s interview data revealed that often banks funding PFI deals would require warranties that all statutory obligations had been complied with.⁴⁸⁰

Competing government policies may be a factor behind poor compliance.⁴⁸¹ In relation to the conduct of competitive dialogue, authorities must observe the rules, which promote equal treatment, transparency and competition, but also ensure that they obtain value for money, which they are under increasing pressure from government to achieve. A rigid application of the rules may in certain circumstances conflict with an authority’s goal of running an efficient procurement process that maximises value for money. In these situations it might be argued that there is the greatest risk of non-compliant/legally risky) conduct.

⁴⁷⁹ OECD (2005), fn.467, 28

⁴⁸⁰ Braun (2001), fn.172, 326

⁴⁸¹ OECD (2005), fn.467, 28

8.5 Alternative and complimentary explanations

In seeking to provide a more complete picture of compliance, scholars have sought to integrate economic models with ideas from the disciplines of psychology and sociology.⁴⁸² According to these theories, other factors such as moral and social values and opinions on the legitimacy of regulations will play a part in compliance.

A regulated actor's normative values may lead to voluntary compliance with regulations, irrespective of cost.⁴⁸³ The reason for this is that individuals make choices for a wide variety of reasons, and not just because of the economic utility they derive: "they choose to do things out of a sense of duty, altruism, or because they have been taught to do a job in a particular way".⁴⁸⁴ Thornton et al. similarly emphasise the importance of norms on compliance, stating that "... in democratic societies with a strong rule of law tradition, most business managers have 'internalised' (or agree with) the social norms that undergird many regulatory rules".⁴⁸⁵

Tyler distinguished between two types of so called "internalised obligation" (i.e. normative factors).⁴⁸⁶ First, regulated actors may comply with the law because they view the legal authority they are dealing with as having a legitimate right to dictate their behaviour. There is an argument that legitimacy depends largely on the regulating authority's ability to provide favourable outcomes.⁴⁸⁷ Sutinen & Kuperan state that "people perceive as legitimate and obey the institutions that produce positive outcomes

⁴⁸² See Amodu (2008), fn.446, 7-15; Kagan & Scholz, "The 'criminology of the corporation' and regulatory enforcement strategies", in Hawkins & Thomas (eds.) *Enforcing Regulation* (1984, Boston, Kluwer-Nihoff); Sutinen & Kuperan, "A socio-economic theory of regulatory compliance" (1999) 26(1/2/3) *International Journal of Social Economics* 174; T.Tyler, "Why people obey the law", (1990, New Haven, Yale University Press); van Snellenberg & van de Peppel, "Perspectives on compliance: non-compliance with environmental licences in the Netherlands" (2002) 12 *European Environment* 131

⁴⁸³ See P.Cartwright, *Consumer protection and the criminal law: law, theory, and policy in the UK*, (2001, Cambridge, CUP), 216

⁴⁸⁴ See B.J.McCormick, *Introducing economics*, (1977, 2nd ed., London, Penguin), 176, cited by Cartwright (2001), *ibid*, 216

⁴⁸⁵ Thornton et al. (2005), fn.448, 64

⁴⁸⁶ Tyler (1990), fn.482, 25

⁴⁸⁷ Sutinen & Kuperan, fn.482, 6

for them”.⁴⁸⁸ A difficulty with respect to the EU procurement rules is that the benefits of regulated procurement are predominantly macroeconomic in nature (i.e. the benefits of an open market); the direct benefits for an authority on individual procurements from observance of EU procurement rules may not be obvious.⁴⁸⁹

The second type of internalised obligation relates to the regulated actor’s desire to behave in accordance with personal moral standards. The greater the degree to which personal moral values are interlined with the regulatory requirement, the greater the chance of voluntary compliance. The difficulty for regulators in securing compliance with administrative rules may in part be down to the fact that, unlike criminal law for example, they have no basis in what is usually referred to as “unwritten law”.⁴⁹⁰ As Snellenberg & Peppel explain: “[n]orms in administrative law were first established by the law itself. Even worthy ideals and objectives must first become part of the legal consciousness before compliance itself becomes natural”.⁴⁹¹ Kagan & Scholz add that arbitrary or unreasonable burdens imposed by regulation (such as excessive compliance costs) may lead certain actors who are generally disposed to obey the law to adopt a strategy of selective non-compliance.⁴⁹²

As previous chapters have shown, in complex procurements there is often a need for flexibility if procurement objectives, such as value for money, are to be achieved. It is in these cases that a rigid EU requirement emphasising transparency and competition can stand in the way of efficient procurement and prevent a contracting authority from obtaining value for money for the benefit of taxpayers (whose support may be necessary for the leaders of authorities to be re-elected). To the extent that competitive dialogue

⁴⁸⁸ Ibid, 6

⁴⁸⁹ See Braun (2001), fn.172, 325-326.

⁴⁹⁰ Snellenberg & Peppel (2002), fn.482, 131

⁴⁹¹ Ibid, 131

⁴⁹² Kagan & Scholz (1984), fn.482, 75

matches best practice in the long run compliance should be high. Contracting authorities will have no need to take on legal risk. However, where the legal requirements are perceived by authorities as disproportionate or unfair compliant behaviour is less guaranteed. In the context of competitive dialogue this situation may arise, for example, where in the latter stages of the process a change to a preferred bidder's tender (which may be completely out of the contracting authority's control) means the only perceived legally compliant course of action is the disproportionate act of restarting the procurement (see chapter seven).

Social environmental influences may also have an impact on the internalisation of behavioural norms.⁴⁹³ For instance, the opinions of peers (other similar contracting authorities) on the acceptability of legally risky practices are likely to influence behaviour. According to Sutinen & Kuperan, the available evidence indicates that "a given individual is more non-compliant the more his community and peer groups are non-compliant".⁴⁹⁴

It is noted further that the effectiveness of new regulation can also be down to psychological factors. For example, one of these factors is a dislike of change, i.e. the belief that familiar ways of operating are safe and new ways are risky.⁴⁹⁵ It may be that this is one of the factors behind any negativity towards competitive dialogue. If so, in time, as authorities become more familiar with the process, it may found that any teething problems iron themselves out. Also, it is highlighted that fear of change is closely related to inertia. Many people are said to tend to naturally resist change because of the perceived effort it will require.⁴⁹⁶

⁴⁹³ See Sutinen & Kuperan (1999), fn.482, 4

⁴⁹⁴ Sutinen & Kuperan (1999), fn.482, 5, citing Geerken & Gove, "Deterrence: some theoretical considerations" (1975) 9 *Law and Society Review* 495; J.Vogel, "Taxation and Public Opinion in Sweden: an interpretation of recent survey data" (1974) *National Tax Journal* 499; Witte & Woodbury, "The effect of tax laws and tax administration on tax compliance: the case of the US individual income tax" (1985) *National Tax Journal* 1

⁴⁹⁵ See OECD (2005), fn.467, 31

⁴⁹⁶ *Ibid*, 31

In seeking an explanation of compliance that reflects its multifaceted nature, Kagan & Scholz discern three distinct “images” of the regulated corporation.⁴⁹⁷ The first image is that of the “amoral calculator”, which corresponds to the economic deterrence theory view of the motivations behind non-compliance. The next image sees the regulated corporation as a “political citizen”. This image is similar to the psychological and sociological perspectives of compliance, where corporations are viewed as “ordinarily inclined to comply with the law, partly because of a belief in the rule of law, partly as a matter of long term self-interest”. Under this image, “law breaking stems from principled disagreement with regulations”.⁴⁹⁸ The final image is the “organisationally incompetent entity” where rule breaking is down to organisational failure. Each of these different forms of non-compliance calls for a different enforcement strategy. According to Kagan & Scholz, indiscriminate reliance on any single theory of non-compliance is likely to be wrong, and when translated into an enforcement strategy it is likely to be counterproductive.⁴⁹⁹

In relation to EU public procurement law, in addition to enforcement, the above discussion emphasises that other measures such as steps aimed at simplification (e.g. standardisation and guidance) and education (e.g. knowledge sharing) are all needed for an effective compliance strategy.

8.6 Concluding remarks

It would seem from the discussion in this chapter that different UK authorities are likely to be influenced to differing degrees by a multitude of factors when it comes to their approach to compliance (legal risk) with competitive dialogue. It is hoped that the

⁴⁹⁷ Kagan & Scholz (1984), fn.482

⁴⁹⁸ Ibid, 75

⁴⁹⁹ Ibid, 85

findings from the qualitative interviews in this study will build upon the findings of Braun to provide an enhanced understanding of compliance with the public procurement rules.

9 Methodology and method

9.1 Introduction

The aims of the research project are to examine the way in which competitive dialogue is applied in the UK and perceptions of the legal framework. It has not been possible to meet these research aims through the analysis of the legal rules on competitive dialogue that has preceded chapter nine (chapters three-seven); this has served to highlight the uncertainty of the law. In order to meet the research aims a robust empirical investigation of competitive dialogue was necessary. Chapter nine will detail the empirical approach adopted.

The research project involves the infusion of a socio-legal perspective on regulation into an empirical study of the law in action. It will be seen that the research builds upon the analysis of the legal rules (chapters three-seven) and the consideration of regulation theory (chapter eight) with semi-structured interviews with individuals with experience of UK competitive dialogue procurement practice, exploring the reality of competitive dialogue in the UK. The chapter will thus begin by explaining the reasons why a socio-legal perspective was adopted. The chapter will next move on to consider empirical research methods. It will be explained why qualitative interviews were considered the most suitable method. The chapter will then discuss the details of the research interviews that took place.

9.2 The research design

9.2.1 The socio-legal perspective

Historically, doctrinal scholarship has dominated research in law. It is therefore appropriate to explain why the research project was conducted under the heading “socio-legal” and not “doctrinal”.

The doctrinal method is concerned with the discovery and/or development of legal doctrines (systematic formulations of the law in particular contexts) through the analysis of legal rules.⁵⁰⁰ The doctrinal method is commonly associated with the jurisprudential approach of legal positivism. For this reason, doctrinal scholarship has tended to regard the law as an autonomous discipline, distinct from other social sciences (e.g. sociology).⁵⁰¹ Doctrinal work is unlikely to venture much further than an analysis of primary sources of law (i.e. constitutions, legislation and case law). This may be seen as a limitation upon the types of research questions that can be effectively addressed by doctrinal scholarship.

The research project has involved an element of what might be termed doctrinal analysis, whereby in the preceding chapters the EU procurement rules have been examined in order to identify as far as possible what the law is. However, such an analysis fails to provide a complete picture of competitive dialogue in the UK. Any discussion of competitive dialogue in practice on the basis of solely legal texts is not possible other than in a purely speculative way.

⁵⁰⁰ C.McCruden, “Legal research and social sciences” (2006) 122(Oct) *LQR* 632; P.Chynoweth, “Legal research” in Knight & Ruddock (eds.) *Advanced research methods in the built environment*, (2008, Chichester, Wiley-Blackwell)

⁵⁰¹ B.Bix, “Law as an autonomous discipline” in Cane & Tushnet (eds.), *Oxford handbook of legal studies* (2003, OUP); R.Posner, “The decline of law as an autonomous discipline: 1962-1987” (1987) 100 *HLR* 761

For several reasons, it is important that in the context of competitive dialogue a practical perspective (“law in action”) is obtained.⁵⁰² First, until the CJEU interpret the legal grey areas, any discussion of how the legal requirements are to be applied in practice on the basis of solely the legal texts is not possible. It is often the case that the way in which legal rules are applied in practice, particularly legal grey areas, to some extent shapes what the law is (in the sense of what the courts (or soft law) are likely to say about it).

According to Donald Black, “... law is not what lawyers regard as binding or obligatory precepts, but rather, for example, the observable dispositions of judges, policemen, prosecutors, or administrative officials”.⁵⁰³

A second reason, as the chapter eight highlighted, is that legal rules prescribe how individuals ought to behave; they do not define how individuals behave in reality. The research project aims to ascertain the reality of UK practice under competitive dialogue. The research seeks to understand human behaviour to explain decision-making under the legal rules. It is unlikely that the information provided by a purely doctrinal analysis would enable this type of investigation.

As previously mentioned, non-binding government guidance has been seen to play a significant role in shaping UK procurement practice. A third reason for the lack of suitability of a doctrinal approach is that a consideration of just the legal rules would neglect the impact of this soft law. In order to obtain an accurate and complete picture of competitive dialogue it is necessary, in addition to merely recognizing the existence of guidance from government, to find out how much weight is attached to the guidance in practice.

⁵⁰² R.Pound, “Law in books and law in action” (1910) 44 *Am.L.Rev.* 12

⁵⁰³ D.Black, “The boundaries of legal sociology” [1971-72] 81 *Yale Law Journal* 1086, 1091

In contrast to the positivist assumptions underlying certain doctrinal scholarship, socio-legal research is a form of interdisciplinary research that places considerably more stress upon the social context.⁵⁰⁴ The approach opens up different types of questions that a black letter law approach may struggle to answer. Socio-legal research is seen to be of most benefit for two main types of study: “gap studies”, which focus on the way in which the law in action deviates from the law in books, and “impact studies”, which aim to help us understand more about the effects of particular interventions.⁵⁰⁵ It will be apparent that the research project to some extent falls within both types of study.

9.2.2 Empirical research methods

Empirical research methods are considered the most suitable means of learning about practical aspects of competitive dialogue. “Empiricism” is used to denote “a general approach to reality that suggests that only knowledge gained through experience and the senses is acceptable”.⁵⁰⁶ Empirical research in law involves the study, through direct methods rather than secondary sources, of the operations and effects of the law.⁵⁰⁷ In terms of the benefits provided by empirical legal research it has been stated that it “helps to build our theoretical understanding of law as a social and political phenomenon and contributes to the development of social theory... empirical research helps us understand the law better and an empirical understanding of the law in action helps us understand society better”.⁵⁰⁸ Whilst some areas of law, such as criminal law, have been transformed by empirical research, others, particularly commercial areas like public procurement which can be technically intricate and so not as accessible to non-lawyers, have been comparatively untouched by it.⁵⁰⁹

⁵⁰⁴ Banakar & Travers, “Theory and method in socio-legal research” (2005, Oxford, Hart)

⁵⁰⁵ See Black (1971), fn.503, 1085-1086

⁵⁰⁶ A. Bryman, *Social research methods*, (2004, 2nd ed., Oxford, OUP), 7

⁵⁰⁷ Baldwin & Davis, “Empirical research in law” in Cane & Tushnet (eds.), *The Oxford handbook of legal studies*, (2003, Oxford, OUP), Chapter 39, 880

⁵⁰⁸ Genn et al., *Law in the real world: improving our understanding of how law works: final report and recommendations* (2006, London, Nuffield Foundation) available at www.ucl.ac.uk/laws/socio-legal/empirical (accessed 31/10/2011), para.4

⁵⁰⁹ Baldwin & Davis (2003), fn.507

There are a range of different empirical research methods, the choice of which will likely depend upon the nature of the research problem. It is common to distinguish between quantitative and qualitative methods.⁵¹⁰ Quantitative research in the social sciences will involve the testing of hypothesis/theory (deductive theory) through the collection and measurement of objective, quantifiable and statistically valid data. The aim is to produce scientifically valid and reliable findings that are generalisable. A quantitative approach, being focused only upon externally observable social action (patterns of behaviour), would, in the context of the research project, be best suited to research that wanted to provide the perspective of an external observer of UK legal practice under competitive dialogue, rather than the perspective of a participant. A qualitative study is usually of an exploratory nature, i.e. hypothesis/theory generating (inductive theory), where researchers seek in-depth description of social behavior (typically focusing on a modest number of interactions).⁵¹¹ Qualitative researchers tend not to be interested in central tendencies (e.g. some measure of what is typical or average) but in syntheses of understandings that come about by combining a variety of perspectives.⁵¹² In the context of the research project, a qualitative approach would seek an internal perspective of UK legal practice under competitive dialogue, which means viewing practice in consideration of the understandings of participants involved.⁵¹³ The research project is in-depth exploratory research into competitive dialogue. The type of data wanted is of a qualitative nature. The project seeks to understand, describe and explain behaviour “from the inside” by obtaining the internal perspectives of those involved in the practical application of competitive dialogue (data not capable of being reduced to numbers).

⁵¹⁰ Bryman (2004), fn.506; S.Sarantakos, *Social research*, (2005, New York, Palgrave Macmillan); J.Creswell, *Research design: qualitative & quantitative approaches* (1994, Thousand Oaks, Sage)

⁵¹¹ See Baldwin & Davis (2003), fn.507

⁵¹² Rubin and Rubin, *Qualitative Interviewing: The art of hearing data*, (2005, Thousand Oaks, Sage), 28

⁵¹³ Braun (2001), fn.172, 75

9.2.3 Interviews

9.2.3.1 Introduction

There are numerous data collection methods.⁵¹⁴ In deciding between data collection methods it is suggested that a data collection method should be chosen based upon its capacity to yield maximal access to the information sought, and to yield information of maximal accuracy and relevance. However, practical considerations, such as the cost of acquiring information, will also have a bearing on the choices.⁵¹⁵

The research project employed interviews as the primary means of gathering data. Interviews, “the favourite ‘digging tool’ of the sociologist”,⁵¹⁶ are “a ... verbal interchange in which one person, the interviewer attempts to elicit information or expressions of opinions or belief from another person ...”.⁵¹⁷ The research project wants to obtain the “inner perspectives” of actors with experience of the practical application of competitive dialogue.⁵¹⁸ Interviews with these actors are considered the ideal means of accessing the data required by the research project, as it allows actors to directly contribute descriptions of personal experiences, understandings, attitudes, values, and opinions, (things that cannot be observed) enabling the author to gain a picture of the “living law” of competitive dialogue.⁵¹⁹

In terms of accuracy, it is recognised that the author’s identity, values and beliefs will play a role in formulating interview questions and interpreting interview responses.⁵²⁰ With this

⁵¹⁴ Bryman (2004), fn.506, 265

⁵¹⁵ Richardson et al., *Interviewing: its forms and functions* (1965, New York, Basic Books), 21-30

⁵¹⁶ NK.Denzin, *The research act: a theoretical introduction to sociological methods* (1989, Englewood Cliffs, N.J., Prentice Hall), 102

⁵¹⁷ Maccoby & Maccoby, “The interview: a tool of social science” in Gardner (ed.), *Handbook of social psychology*, vol.1 (1954, Reading, Mass., Addison-Wesley), 449-487, quoted in Denzin (1989), *ibid*, 103

⁵¹⁸ M.Patton, *Qualitative research and evaluation methods*, (2002, Thousand Oaks, Calif, Sage)

⁵¹⁹ D.Silverman, *Interpreting qualitative data: methods for analyzing talk, text, and interaction* (2006, London, Sage), 109

⁵²⁰ M.Denscombe, *The good research guide: for small-scale social research projects* (2007, Maidenhead, Open University Press)

in mind, it was necessary for the author be on guard against preconceptions and to suspend judgments on issues for the duration of the research.

The majority of the research interviews were carried out face-to-face. This was the preferred format (over telephone interviews or written questionnaires), as, in terms of accuracy, the author was present to witness non-verbal communication (e.g. facial expressions) and to ensure the accuracy and relevance of responses by probing for more specific answers and by repeating or explaining questions when there may have been a misunderstanding. Also, the interviewer was able to record spontaneous answers, which had not been prepared. In addition, face-to-face interviews are beneficial in terms of building rapport and trust with interviewees. In situations where it was not possible to arrange face-to-face interviews, interviews were conducted over the telephone (18 interviews were telephone interviews), which was deemed an acceptable substitute.

A recognised disadvantage of the face-to-face interview is that they can be very costly and time consuming.⁵²¹ For the research project the time available for collection and analysis of data was 19 months. The author was also generously funded by the Economic & Social Research Council and Bevan Brittan LLP.

9.2.3.2 Structure

Interviews are often classified according to their degree of structure or standardisation. These range from structured (schedule standardised) interviews at one end of the scale to unstructured (non-standardised) interviews at the other, with semi structured (non-schedule standardised) interviews falling somewhere between the two.

⁵²¹ K.Bailey, *Methods of Social Research* (1978, New York, Free Press), 175; B.Gillingham, *The research interview* (2000, London, Continuum), 9

A structured interview format requires the interviewer not to deviate from the wording or ordering of a predetermined set of questions. The problem with such interviews is that they confine respondents to a discussion of what the interviewer considers important. For this reason, such a format was wholly unsuitable for the research project. In comparison to the interviewees, the author has little knowledge about competitive dialogue in practice. It is important therefore that the interviews elicit data on the issues interviewees consider to be of greatest importance to them in using competitive dialogue.

The unstructured interview involves no predetermined set of questions. This format was not appropriate because, although the research wanted to approach public procurement from the interviewee's perspective, there are certain specific topics and issues that need to be covered, e.g. regarding the identified legal grey areas.

Semi-structured interviews are a combination of the above mentioned formats. Here, interviewers will have reference to an interview guide, which lists topics that need to be covered with each interviewee, but there is no set wording or ordering of questions and interviewees are not restricted in the answers they may give. A semi-structured interview format was used for the research project. The author was able to ensure that certain topics were covered, and interviewees also had freedom to express themselves in their own words, to assess the importance and relevance of questions asked to them, and to raise issues and views which had not been foreseen.⁵²²

9.2.3.3 Interview questions

A general structure was followed in the interviews. There were three stages, an introductory stage, the main body of the interview (where themes were developed), and a concluding stage (which sought to gradually conclude the interview rather than end it with

⁵²² S.Kvale, *Interviews: an introduction to qualitative research interviewing* (1996, Thousand Oaks, Calif, Sage)

an abrupt halt).⁵²³ Keats suggests that the topics move from the more general to the more particular, and begin with the least threatening aspect.⁵²⁴ Thus, following an introduction to the research, the interviews started with general questions, such as on the interviewee's experience with competitive dialogue (sectors, types of authority, for instance); the issues that immediately sprang to mind when speaking about the practical application of competitive dialogue; and whether or not the legal rules struck an appropriate balance between transparency and the need for flexibility. The interviews would generally then go through each stage of the competitive dialogue process concentrating upon issues raised in the legal analysis. Following this, unless it had already been satisfactorily covered, interviewees were asked questions pertaining to perceptions of legal risk. The interviews concluded with general questions on how the legal rules or legal practice under competitive dialogue might be improved and whether or not there were any issues that the interview had not touched upon or not dealt with in sufficient depth that the interviewee considered required further attention.

Although the precise wording of questions was not determined before each interview, before going out into the field the author did need to consider how best to elicit the information required from the research participants. It was felt that certain questions, such as regarding the scope for negotiation post-dialogue, may be sensitive, e.g. if practice did not match the legal requirements. In these questions there was a risk that interviewees may be reluctant to divulge accurate information. For example, interviewees may distort the truth because they are worried about the interviewer's personal opinion of them, they want to protect their professional reputation, or it may also be that, if they (or clients) are benefiting from a flexible reading of the procurement rules, they do not want to risk drawing attention to it (e.g. Commission attention). Assurances as to anonymity were

⁵²³ D.Keats, *Interviewing: a practical guide for students and professionals* (2000, Sydney, University of New South Wales Press),

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⁵²⁴ *Ibid*, 49

expected to go some way in making interviewees feel more comfortable about answering questions freely. However, it was also necessary for the author to phrase questions so as to avoid formalistic responses, i.e. where interviewees answer how something should be done rather than how they actually do things.⁵²⁵ Rubin & Rubin suggest that “[i]f what you are asking about might involve violation of rules, laws, or norms, you should probably work out an indirect way of approaching the matter”.⁵²⁶ This may involve asking for stories on a topic and then analysing them for themes they contain, or another approach would be to provide a concrete incident of the topic under discussion and ask for comments about it.⁵²⁷ This method was employed in relation to post-dialogue flexibility and confidentiality questions.

9.3 Ethical considerations

According to Fontana & Frey, “[b]ecause the objects of inquiry in interviewing are human beings, researchers must take extreme care to avoid any harm to them”.⁵²⁸ Before undertaking any aspect of the research that had the potential to raise ethical concerns, the author sought ethical approval pursuant to the procedures established within the School of Law, University of Nottingham.

The research interviews did not raise any ethical issues likely to cause harm (physical, emotional, or any other kind) to participants. Nevertheless, high importance was attached to interviewee confidentiality. Interviews only took place where the informed consent of participants had been obtained, i.e. the author received the consent of participants after accurately informing them about the research.⁵²⁹ At the start of each interview, interviewees were asked if the interview could be recorded; all but four agreed to this.

⁵²⁵ Rubin & Rubin (2005), fn.512

⁵²⁶ Ibid, 74

⁵²⁷ Ibid, 74-75

⁵²⁸ Denzin & Lincoln, *Handbook of qualitative research* (1994, Thousand Oaks, Sage), 88

⁵²⁹ Ibid

The interview data was securely stored in password protected files on the author's computer and in a locked desk at the University of Nottingham. In accordance with the terms of the School of Law's ethical approval of the project, the data will be destroyed following seven years from completion of the PhD. The interview transcripts were written up to ensure the identity of interviewees was protected. Great care was taken to ensure that interviewees and specific experiences were not identifiable in any way.

9.4 The interview sample

9.4.1 Introduction

Section four will explain the type and number of cases selected to be interviewed. The aim of the research project is to examine the way in which competitive dialogue is applied in the UK, and perceptions of the legal framework. A "good informant" for the purposes of the interviews is an individual with the necessary knowledge and practical UK experience of competitive dialogue.⁵³⁰ Thus, for the purposes of the research project, the population of cases that are of interest (the target population) is made up of those who have played a key role in practice in the UK in the decision-making process on the application of the legal rules on competitive dialogue.

The project could have aimed for complete coverage of the target population. However, this was not practical (i.e. due to time and financial constraints), not always possible (e.g. we may not be able to locate all potential interviewees), and also not necessary.⁵³¹ It is common therefore in empirical research for researchers to study only a sample of the target population. Following an introduction to sampling in qualitative research, this section will proceed to explain how the sample in the research project was selected.

⁵³⁰ See JM.Morse, "Designing funded qualitative research" in Denzin & Lincoln (eds.) *Strategies of qualitative research* (1998, London, Sage), 73

⁵³¹ See Murphy et al., *Qualitative research methods in health technology assessment: a review of the literature*, (1998, Alton, Core Research, on behalf of the NCCHTA), Chapter 14, 90

9.4.2 Sampling strategy

A number of different sampling strategies have been developed for researchers to select samples for study. The focus of quantitative empirical research tends to be upon ensuring the sample represents statistically or in a statistically relevant way the target population (e.g. probability sampling strategies are commonly used).⁵³² This approach was not suitable for the research project, for instance, because the precise number of individuals with UK experience of competitive dialogue could not be ascertained and hence not every unit of the target population can be given an equal and known opportunity of being chosen for the sample. As of December 31 2009, there were 1,380 UK OJEU notices specifying that the procurement was to be conducted under competitive dialogue; however, it is not possible, at least not without considerable expense (time and money) to ascertain all individuals sufficiently involved in the application of the legal rules.

Many regard all sampling in qualitative research to be “purposive”.⁵³³ By “purposive” it is meant that the sample units are chosen because they have particular features or characteristics which enable in-depth exploration and understanding of the issues of central importance to the purpose of the inquiry.⁵³⁴

9.4.3 The sample

9.4.3.1 Introduction

Subjects from the target population (see above) were purposefully selected in order to put together a theoretically meaningful sample, in terms of developing full explanations and understandings of UK procurement practice under competitive dialogue.

⁵³² See Ritchie et al., “Designing and selecting samples”, Chapter Four in Ritchie & Lewis (eds.), *Qualitative research practice: a guide for social science students and researchers*, (2003, London, Sage), 77-78; Sarantakos (2005), fn.510, 154-166.

⁵³³ Patton (2002), fn.518, 230

⁵³⁴ Bryman (2004), fn.506, 334

The practical application of competitive dialogue in the UK must be considered from as many different angles as are feasible. The credibility of findings is enhanced when qualitative explorations reflect a variety of perspectives.⁵³⁵ No one view is entirely accurate. As Rubin & Rubin explain, "... reality is complex; to accurately portray that complexity, you need to gather contradictory or overlapping perceptions and nuanced understandings that different individuals hold".⁵³⁶

The full range of views and opinions on the practical application of competitive dialogue were considered to be represented by the following groups:

- (1) procurement officers and in-house legal advisors within UK contracting authorities that have held competitive dialogue procurements;
- (2) external legal advisors that have advised contracting authorities involved in UK competitive dialogue procurements; and
- (3) representatives from policymaking organisations in the UK responsible for overseeing the application of competitive dialogue.

For the reasons outlined below, it is considered that these three viewpoints are of sufficient variety to enable a comprehensive examination of the application of competitive dialogue in the UK.

⁵³⁵ Rubin & Rubin (2005), fn.512; Strauss & Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (1998, Thousand Oaks, Sage); Glaser & Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (2008, New Brunswick, Aldine Transaction)

⁵³⁶ Rubin & Rubin (2005), *ibid*

The rules on competitive dialogue are primarily addressed to contracting authorities, so interviews with group one, procurement officers and in-house legal advisors, may appear to be of most relevance to the research objectives. However, because this group was not considered to play a leading role in the application of the procurement rules, the views and opinions of procurement officers and in-house lawyers did not feature in Braun's similar qualitative investigation into UK PFI procurement practice.⁵³⁷ Braun's research was concluded in 2001; at that time, UK authorities were seen as lacking the necessary in-house expertise, and therefore assumed largely dependent on the advice of external experts.⁵³⁸ Over a decade has passed since Braun went out into the field of study to conduct his qualitative research. Authorities in the UK are now much more familiar with EU public procurement regulation and complex arrangements, such as PFI. It is also the case that steps have (are) being taken to raise public sector procurement skill levels.⁵³⁹

The second group, legal advisors with experience and expertise in advising UK contracting authorities on the conduct of competitive dialogue procurements, made up the entirety of Braun's sample.⁵⁴⁰ In the opinion of Braun, PFI procurement practice was predominantly influenced by legal practitioners. Braun states, "[l]egal advisors can be perceived as key managers in the process of applying the law in books to real life situations".⁵⁴¹ It was observed that the role of legal advisors was to acquaint authorities with the procedural options open to them and to assess the risks associated with these options. Although authorities have complete discretion in how they respond to legal advice, Braun's interview data found that public sector clients generally followed legal advice on procurement law.⁵⁴²

⁵³⁷ See Braun (2001), fn.172

⁵³⁸ Ibid, 88

⁵³⁹ See, for instance, HM Treasury, *Transforming Government Procurement* (2007, London)

⁵⁴⁰ Braun (2001), fn.172, 87

⁵⁴¹ Ibid, 87

⁵⁴² Ibid, 88

It was considered important to assess whether Braun's assumptions in 2001 hold true today, particularly as, if some authorities are attempting competitive dialogues without the help of external lawyers, their input will be necessary to provide a full and accurate picture of competitive dialogue procurement practice. A scoping survey was therefore carried out between 26 October 2009 and 18 November 2009 in order to establish the extent of the role of legal advisors in competitive dialogue procurement. The details of this study can be found below.

A different perspective of the legal rules in practice will be provided by representatives from UK policymaking organisations. These organisations and their roles was set out in chapter two. Although, in this capacity as policymakers, these organisations are not responsible for applying the legal rules in practice, they will commonly advise contracting authorities and issue guidance on the conduct competitive dialogue. It has already been highlighted on several occasions the extensive role that soft law has been found to play in UK public procurement practice, and therefore it may be that these organisations provide an interesting viewpoint. In addition, these organisations may be more aware of pressures coming from the Commission.

9.4.3.2 *The scoping survey*

It was decided that the most appropriate way to find out about the role, if any, played by external legal advisors was to ask contracting authorities with experience of competitive dialogue themselves. Asking external legal advisors would not have been a reliable approach, as they were unlikely to know about authorities that had held competitive dialogue procurements without external legal advice.

As of 18 November 2009, Tenders Electronic Daily⁵⁴³ displayed 1,331 OJEU notices for UK contracts to be award by competitive dialogue (three in 2005, 277 in 2006, 367 in 2007, 375 in 2008, and 309 in 2009). In view of the time constraints upon the study it was not possible, nor was it strictly necessary for the study to cover all competitive dialogue notices. It was therefore decided that only contracts advertised in 2008 would be included in the scoping study; the busiest most recent full year of notices (2008) was considered most likely to be sufficiently representative of the current approach.

A questionnaire was drawn up with questions on the role of external legal expertise on the authorities' 2008 competitive dialogue procurement and future competitive dialogue procurements. The option of surveying all authorities advertising in 2008, approximately 282 different authorities, was rejected; not only would this have been a considerably laborious task, but it was felt that this approach would get a poor response rate and might also lead to biased findings as a result of a self-selecting sample (i.e. the findings would be accurate only in relation to responding authorities). It was decided that, for these reasons, a more efficient way of getting the desired information would be to survey a limited random selection by telephone.

There were 375 competitive dialogue notices in 2008 involving approximately 282 different contracting authorities. In order to gain a general impression about whether external legal advice was the norm for authorities using competitive dialogue, it was decided that 10% of the 282 authorities (28 rounded up to 30) would be a sufficient and workable sample. To ensure that a sufficient variety of authorities were included in the sample, the 282 authorities were divided into categories:

⁵⁴³ <http://ted.europa.eu/TED/main/HomePage.do> (accessed 31/10/2011)

- (i) health (61);
- (ii) local government (106);
- (iii) central government (25);
- (iv) housing and regeneration (21);
- (v) education (25);
- (vi) emergency services (nine); and
- (vii) miscellaneous (35).

The survey was conducted by telephone and took place between 02 November 2009 and 18 November 2009. In certain instances it was not possible to make contact with individuals with sufficient knowledge of their authority's competitive dialogue procurements, for example because those with responsibility for the procurement had left the authority or were on leave. In these circumstances, the authority was replaced with an authority randomly selected from its same category. The telephone survey was completed by 30 authorities in total. The final sample included four health authorities, six local government authorities, five central government authorities, three housing and regeneration authorities, two education authorities, three emergency services authorities, and seven miscellaneous authorities.

21/30 authorities surveyed had obtained external legal expertise to advise for the conduct of the 2008 competitive dialogue procurement. The names of 11 different law firms were given, which informed the make-up of the main sample. 17/21 authorities that obtained external legal help stated that they would do so again for future competitive dialogue procurements. 4/21, however, stated that they were not sure whether or not external legal advice would be obtained for future competitive dialogue procurements, for example because the internal team had developed sufficient expertise. In line with Braun's findings, 0/21 authorities obtaining external legal expertise admitted to ever disregarding clear unequivocal legal advice provided by external legal advisors; thus, for these 21 it would seem that, in terms of gaining an in-depth understanding of UK competitive dialogue practice, the external legal advisors would make the most worthwhile interviewees.

9/30 authorities surveyed stated that they had not obtained external legal advice on the conduct of the competitive dialogue procurement, relying on internal expertise. In relation to future competitive dialogue procurements, 8/9 stated that it was possible they may obtain external legal advice on the application of the legal rules, whilst only 1/9 could not foresee needing external legal help.

The results from the scoping study make it clear that it would be wrong for the research to proceed according to the assumption (based on Braun's 2001 findings) that only external legal advisors are suitable interviewees. It is important for the research to provide a thorough analysis of competitive dialogue in the UK that the interview sample incorporates the views and opinions of procurement officers, in-house legal advisors, as well as external legal advisors.

9.4.3.3 *The interview participants*

At the outset it was projected that 60 qualitative interviews would provide for a sufficiently robust examination of competitive dialogue procurement in the UK. The figure was considered a realistic estimate in view of the time and funding available (see above). Nonetheless, a flexible approach was taken to the interview sample. For example, if incoming data revealed that further interviews within a particular group were necessary, attempts would be made to cater for this. In addition, where incoming interview data from particular groups became sufficiently repetitive it may be that a point of saturation had been reached and further interviews within the group were not needed. In total 58 qualitative interviews were carried out in the planned timeframe, as it was decided that a point of saturation had been reached.

Specifically, the interview sample included 41 interviews with external legal advisors (54 requests for participation were sent out). In order to ensure that a full range of views and opinions were represented this group was made up of:

- i. 22 legal advisors from law firms operating throughout the UK;
- ii. 12 legal advisors from smaller medium sized law firms based and operating predominantly in England and Wales;
- iii. seven legal advisors from smaller medium sized law firms based and operating predominantly in Scotland and/or Northern Ireland.

Law firms with sufficient expertise were mainly identified using *Chambers & Partners UK Guide to the Legal Profession*.⁵⁴⁴ A list of 66 different law firms was compiled from the *Chambers & Partners* law firm rankings for the practice areas “Public Procurement: UK-wide”, “Projects & Energy: PFI/PPP: London & UK-wide”, “Projects & Energy: PFI/PPP: Northern Ireland”, “Projects & Energy: Projects: Scotland”, “Local Government: London & UK-wide”, and “Local Government: Scotland” (law firms identified by the scoping study were automatically included in the list).

The websites of the listed law firms were accessed and specific legal advisors with the necessary expertise and experience were identified. Interviewees in this group were selected who had experience of complex procurement pre and post the introduction of competitive dialogue to enable them to compare and contrast the two regimes. In addition, individuals were selected to ensure the representation of a range of experiences of procurement sectors (e.g. education, health, justice etc.) and also experience of different types of complex contract (e.g. infrastructure and ICT).

In order to ensure a full representation of views on competitive dialogue procurement practice and that the sample of legal advisor interviewees was not limited to firms recommended by Chambers & Partners, further interviewees were identified using the Law Society of England & Wales, Law Society of Scotland and Law Society of Northern Ireland websites,⁵⁴⁵ and the internet search engine, Google⁵⁴⁶ (11 external legal advisors in the interview sample were identified through this method). Decisions about whether or not to include the law firms identified in this way were based on the information provided on the firm’s website and based upon the area in which the firm was located (i.e. attempts were made to ensure representation of all UK regions).

⁵⁴⁴ See <http://www.chambersandpartners.com> (accessed 31/10/2011)

⁵⁴⁵ <http://www.lawsociety.org.uk/home.law>; <http://www.lawscot.org.uk/>; <http://www.lawsoc-ni.org/> (accessed 31/10/2011)

⁵⁴⁶ <http://www.google.co.uk/> (accessed 31/10/2011)

The second group of interview subjects was made up of high level employees in contracting authorities responsible for applying the legal rules on competitive dialogue. This group of interviewees was predominantly made up of procurement officers and internal legal advisors at authorities that took part in the scoping survey where external legal advice on the application of the legal rules was not sought or where external expertise was not considered necessary in future procurements. In addition, five of the contracting authorities in this group were included due to them being referenced in other interviews. A further interview in this group was arranged with a procurement officer who attended the Executive Public Procurement Programme run by the University of Nottingham. The procurement officer conveniently had the necessary experience of playing a key role in the application of the legal rules in practice.

As discussed above, individual representatives were approached from different UK policymaking organisations. Five interviews were sought with policymaker interviewees; however, despite repeated attempts, responses and interviews only occurred with three of the main policymaking organisations. The most important policymaking organisations are included in the research; thus the research is not hindered by the lack of interviewees in this category. In fact, in view of the difficulties experienced by others, such as Eyo,⁵⁴⁷ in getting policymaker participation in PhD research, three is a successful outcome.

9.5 Data analysis

The interviews were conducted intermittently from January 2010 to March 2011. After each interview or block of interviews (depending upon scheduling) the sound recording or notes (in the case of four interviewees who did not want to be recorded) were transcribed

⁵⁴⁷ A.Eyo, *The adequacy of the European Union rules on the use of electronic reverse auctions in regulated procurement*, (2009, University of Nottingham)

in a manner that ensured interviewee anonymity. In accordance with the method described by Rubin and Rubin, the analysis of interviews was ongoing throughout the interview process, i.e. after each interview the contents of the interview were reviewed and questions were refined and modified (if necessary) to ensure all avenues were fully explored.⁵⁴⁸ Using the computer software, NVivo, the interpretations, experiences and perceptions of interviewees were repeatedly systematically labelled (“coded”) and grouped. Having done this, the author was able to look for patterns and linkages in the data in order to develop a descriptive narrative that met the research aims and objectives.⁵⁴⁹

9.6 Concluding remarks

Chapter nine has described the research approach and the reasons for the approach. The analysis of the legal rules in the context of competitive dialogue could only take the research so far. In order to understand the reality of the law, it was necessary to compliment the legal analysis with an exploration of the law in practice using empirical research techniques, specifically qualitative semi-structure interviews with individuals with experience of playing a lead role in the application of the legal rules in practice. In addition, the research project wants to understand the decision-making process under the legal rules; this would not be achievable in this context through a legal analysis alone.

⁵⁴⁸ Rubin & Rubin, fn.512

⁵⁴⁹ Ibid

10 Findings: grounds for using competitive dialogue

10.1 Introduction

Chapter 10 will present the findings of the qualitative interviews in relation to the questions asked about the decision to use competitive dialogue. To begin with the chapter will briefly touch upon findings for questions to external legal advisors regarding the stage in the process that they are first called upon by authorities to give legal advice. This was important because, if external legal advisors lacked experience of advising upon the decision whether or not to use competitive dialogue, their responses would not carry much weight in relation to this aspect of the research. As it turned out, the legal advisors interviewed were in the main called upon to advise authorities on the application of the EU procurement rules at this stage in the procurement process.

The chapter then moves on to present the interview findings on the availability of the competitive dialogue, in particular responses to questions, such as, “how complex is a ‘particularly complex contract?’” and “what is it about the contracts you have procured by way of the competitive dialogue that you consider make them ‘particularly complex?’”. In line with the format of the analysis of the grounds for using competitive dialogue in chapter six, the chapter first considers whether interviewees regard competitive dialogue to be a standard procedure or an exceptional procedure. After this, findings on when under the legal rules competitive dialogue is to be used are set out. A number of issues are considered: the meaning of “particularly complex contract”, the practical meaning of technical complexity, the practical meaning of legal and financial complexity, and the issue of commoditised PPPs. Finally, the paper considers certain other factors which were found to guide contracting authorities in choosing whether or not to use competitive

dialogue. These factors are discussed under headings, such as, avoidance of competitive dialogue, soft-law, and risk of challenge.

10.2 The provision of external legal advice

As explained in chapter nine, in the main external legal advisors play a key role in advising on procedural decisions for competitive dialogue procurements. The external legal advisors interviewed were all experienced in providing such advice. However, in order to ensure that the external legal advisors were able to provide accurate and meaningful information on pre-procurement issues, they were asked to clarify the stage at which their services are generally first called upon. The vast majority of external legal advisors responded that, although this was not necessarily the case with less significant procurements under open and restricted procedures, it was usual in competitive dialogue procurements for them to be brought in to provide legal advice pre-OJEU notice, prior to the choice of procedure being made. It was explained that external legal advisors are often brought in early because competitive dialogue procurements are not a common occurrence for most authorities and the projects are often large scale and of great importance to the authority concerned. It was also noted that for certain projects, notably major projects like BSF (see chapter two), authorities are being strongly advised to get external legal advisors on board at a suitably early stage by central organisations like Partnerships for Schools and Local Partnerships.

It was generally accepted by external legal advisors, however, that the approach to legal advice varies from authority to authority, depending upon the size of the authority (e.g. internal resources available) and experience. Where a procurement was an authority's first use of competitive dialogue, external legal advisors tended to play a much greater role, "holding the authority's hand" guiding it through all aspects of the procedure. This was the case with a contracting authority interviewed; they had heavily relied upon external

legal advisors at all stages for its first competitive dialogue procurement with the hope that over time they would acquire sufficient knowledge to conduct complex procurements in-house. Other authorities (possibly with cost savings in mind) sought external legal advice as and when needed (i.e. when they encountered difficulties, such as a complaint or legal challenge). There were 14 accounts of authorities that had turned to their external legal advisors after choosing an inappropriate procurement procedure, which led to compliance issues later on.

All external legal advisors interviewed had advised on the decision whether or not to use competitive dialogue. The additional views of procurement officer/internal legal advisor interviewees are representative of situations where legal advisors did not perform a central role in the procurement (see scoping survey in chapter nine at 9.4.3.2). Thus, responses to questions on the availability of the procedure are considered to provide a reliable picture of UK practice.

10.3 The availability of competitive dialogue

Interestingly, when asked about the grounds for using the competitive dialogue, five interviewees gave the impression that they had given this issue little thought. This is not necessarily surprising, as the reaction was mainly found amongst legal advisers in London law firms who tended to deal with higher end work (e.g. complicated defence procurements) where perhaps complexity is more clearly apparent:

... people do not spend too much time agonising over whether their project is sufficiently complex if they think competitive dialogue is suitable. That may be an optical illusion, however, because I work for a very large firm which does very big deals. On the whole, the threshold question is not one I have paid much attention to (Lawyer 5, UK).

Interviewees were asked to comment upon whether in their opinion the competitive dialogue was to be regarded as a standard procedure in line with the Directive's underlying principles of equality and transparency, where the grounds for using the procedure are to be interpreted broadly, or to be regarded as an exceptional procedure that derogates from fundamental principles, necessitating a narrow reading of the competitive dialogue's availability (see chapter six). 25/39 interviewees preferred to view competitive dialogue as a standard procedure, to be interpreted broadly. Procurement officer 12 (NHS Trust) went as far as saying that the authority had a free choice whether or not to use competitive dialogue, but it was just that you would only want to use it to procure complex contracts as it is these to which the procedure is best suited.

These 25/39 interviewees were not of the opinion that competitive dialogue was being overused in the UK, as competitive dialogue was not simply introduced for PFI as a substitute for the negotiated procedure, but also to provide a more flexible and suitable procedure for certain contracts that might pre-2006 have been awkwardly procured under a restricted procedure (some ICT projects, for example). Thus, competitive dialogue may be seen as plugging a gap. In the words of Lawyer 1 (Scotland):

... anything that you could have used the negotiated procedure for, you can fairly safely use competitive dialogue for, and I would go even further than that and say that I would even lump more in under the competitive dialogue than under the negotiated procedure ...

It appears that this flexible reading of the grounds for using competitive dialogue is often based on practical reasons (for example, the need to get the best deal possible). Lawyer 19 (UK) considered this in more detail than other interviewees:

[t]he Commission is saying that we should not take it as read that because it is a major contract it is a complex contract. I am not sure that is valid. You need the flexibility to discuss with bidders, to change your requirement if necessary, to adapt to the specifics of each case. The Commission is speaking from a completely legalistic non-real perspective. The reality is that discussions are almost always productive, always leading you to improve the terms of the deal etc., and designing into the specificity of a case. My interpretation is considerably more generous than that of the Commission. A strict interpretation may lead you to say that a lot of these contracts are not complex in the way that the Commission understands it. I would say, 'so what?'. We should interpret it more loosely.

14/39 interviewees (all legal advisors mostly based outside London) questioned the above flexible reading of the legal rules, suggesting that the procedure was being greatly overused by UK contracting authorities. According to Lawyer 18 (UK):

400 competitive dialogues per year, it can't be the case; it wasn't supposed to be the procedure of choice, it was supposed to be something specific. I am sure it is being interpreted too widely.

For these legal advisors, competitive dialogue is being used where the contract could and should have been procured under the restricted procedure. These claims are supported by recent research by HM Treasury⁵⁵⁰ and the Cabinet Office.⁵⁵¹ For instance, from a sample of 210 competitive dialogue procurements, Cabinet Office research identified 60 cases (29%) of potentially inappropriate use.⁵⁵²

Also, the author encountered the complaint amongst these interviewees that some authorities are using bidders during dialogue essentially as unpaid consultants in order to

⁵⁵⁰ HM Treasury 2010, fn.198, 2.34-2.37

⁵⁵¹ Cabinet Office (2010), fn.199, 6; Cabinet Office (2011), fn.199, 4.5

⁵⁵² Cabinet Office (2011), *ibid*, 12

avoid incur expense pre-procurement. This may imply that a reasonable amount of preparatory work into the solution is seen to be required of authorities to satisfy the complexity threshold.

It was evident that interviewees' views on the breadth of the grounds for using competitive dialogue quite often depended upon their interpretation of the flexibility of the restricted procedure. That is to say, those who favoured a broad reading of availability tended to see the scope for negotiation in a restricted procedure as very narrow, whereas the opposite was the case for those that took a narrow view on availability. For instance, Lawyer 37 (Scotland) stated, "competitive dialogue was chosen because they thought they would not be able to speak to bidders in a restricted procedure ... I think that is a misunderstanding of the restricted procedure".

It is important to point out that an interviewee's general perceptions of competitive dialogue tended to cloud interpretations of the procedure as standard or exceptional. For example, if an interviewee viewed competitive dialogue in a negative light (e.g. due to advising bidders who saw the procedure as too expensive), this would often influence views on whether it should be used as standard/exceptional by authorities.

Although Lawyer 14 (England & Wales) argued there was no uncertainty surrounding the availability of competitive dialogue, the remaining interviewees did not share this view. The lack of clarity surrounding when competitive dialogue can and cannot be used gave interviewees flexibility to interpret "particularly complex contract" narrowly or broadly depending upon the needs of the procurement. As Lawyer 20 (UK) stated, even where the complexity of a project is not evident, "as legal advisors, if need be, it is our role to find the necessary complexity".

10.4 The grounds for using competitive dialogue

10.4.1 The use of the open or restricted procedure will not allow for the award of the contract

Under the legal rules, according to UK soft law,⁵⁵³ a contracting authority must first consider whether or not the open and restricted procedures allow for the award of the contract, and second, if they will not, whether the contract to be procured is a “particularly complex contract”. Three legal advisors (others not commenting) either expressly stated or gave the impression that despite the introduction of competitive dialogue there remained a procedural gap, i.e. the open and restricted procedures do not allow for the award of the contract, but the contract is not sufficiently complex to amount to a “particularly complex contract”. For example, according to Lawyer 24 (England & Wales):

I sometimes think there is a bit of a gap there ...; there should be a restricted plus. Sometimes the restricted procedure is too restrictive because you need to discuss issues post-tender, but the contract is not in the particularly complex bracket. There are aspects of competitive dialogue that would be useful to apply but you can't use them in a competitive dialogue if you don't come within the definition of particularly complex contract.

Adopting an apparently more flexible approach to the availability of competitive dialogue than those interviewees who concentrated upon the definition of particularly complex contract, 13 interviewees suggest that the key to deciding whether or not the competitive dialogue is available is the question, “are the open and restricted procedures appropriate?”, not, “is this or is this not a particularly complex contract?”. In the words of Lawyer 23 (England & Wales), “[t]he part of the definition, that you couldn't get there

⁵⁵³ PFS (2006), fn.167

with the open or restricted procedures ... that is the practical test”. It seems, in accordance with the statements of these interviewees, that where the freedom to dialogue certain issues will, or may, lead to a better result for the authority, the open and restricted procedures are not appropriate and so competitive dialogue is available.

10.4.2 A particularly complex contract

It was clear from 10 interviews (others not commenting) that a complex contract varied from authority to authority depending upon the type of project and the personnel involved in the procurement (i.e. depending upon expertise and experience). For example, if for an ICT procurement, an authority obtains the services of an ICT specialist then it may be more difficult to justify the complexity threshold being met (Procurement Officer 5, local government). Lawyer 37 (Scotland) gave the following example:

... if an authority's in-house procurement team is used to small contracts (like stationary supplies), they are more likely to interpret the complexity grounds satisfied if they are presented with a big contract (like a building). Where a procurement team encounters major contracts on a regular basis, or has the resources to bring in external expertise, the same contract may be procured under a restricted procedure. ... The complexity requirement comes down to someone's interpretation of whether or not something is complex; it depends on one's own personal experience ... It can be argued that there is a lot of subjectivity in the test.

Also, Procurement Officer 2 (body governed by public law) explained how, due to a loss of internal ICT expertise, software contracts, which previously the authority would procure under a restricted procedure, needed to be procured under competitive dialogue, and Procurement officer 8 (body governed by public law) described how, where the authority undertook a number of similar procurements, the first procurement was conducted under competitive dialogue (a “pathfinder”), but the knowledge and experience

gained meant that future procurements needed to be conducted under a restricted procedure. These comments on complexity varying according to resources, experience etc. are interesting considering they stand in contrast to the views of some commentators (chapter six).

10.4.3 Technical complexity

In conformity with the Commission's explanatory note (see chapter six), interviewees almost unanimously agreed that the competitive dialogue was available where an authority has an output requirement but does not know how or how best to meet that requirement: "it may have a good idea but it does not know which the best is" (Lawyer 21, UK). It appears these uncertainties may relate to the whole solution or more specific aspects of solutions.

According to Lawyer 41 (Scotland), if following dialogue all bidders come up with the same result, this suggests that competitive dialogue was the wrong procedure to use. If on the other hand bidders produce different answers, then Lawyer 41 (Scotland) argues the only practical method of procurement is through competitive dialogue. Lawyer 41 (Scotland) gives the aesthetic design of a building as an example: "bidders will have their own architects so logically all designs are going to be different. You could run a restricted procedure where bidders put in different designs, but ... clients and bidders want comfort that when these things come in through the door they are on the right lines. This fits exactly with competitive dialogue, and rules out the use of the restricted procedure".

In relation to most PPP infrastructure contracts, three interviews suggested that technical complexity was not always the most obvious justification. According to Procurement Officer 3 (local government):

normally with most construction projects the client knows what they want, two reception rooms, a conference room and four toilets, for example. It is not quite so technically demanding, as it may be financially complicated.

The interviewee went on to add that complexity may be found due to the different construction techniques available, however. Lawyer 33 (Scotland) put forward the example of a building that was designed by the authority and to be built by the private sector. Here, according to Lawyer 33, there was technical complexity due to issues around buildability and translating drawings by architects and engineers to metal and cement. With a major regeneration of a town, it may be easier to argue technical complexity. For example, “although we know we need 350 housing units, we do not know precisely what it should look like” (Procurement Officer 4, local government).

The technical complexity ground, according to four interviewees, is most relevant in high technology areas like ICT and waste. According to Lawyer 20 (UK), “with ICT projects there is inevitably going to be a sufficient amount of bespoke, e.g. the need for interfacing, interconnectivity with other complex systems”.

10.4.4 Financial and legal complexity

In relation to financial/legal complexity, 23 interviewees explained how this ground was quite easily satisfied where a contract was for a PPP. This fits in with the Commission’s statement that financial/legal complexity “arise very, very often in connection with projects of [PPPs]”.⁵⁵⁴ Aspects of a PPP contract said to give rise to complexity include:

- funding models;

⁵⁵⁴ Commission (2005), fn.190, 2.3

- risk allocation;
- high value;
- long contractual durations;
- multiple phases (e.g. DBFO);
- consortium bidders;
- sub-contracting issues (including finance packages with debt funders); and
- Transfer of Undertakings (Protection of Employment) Regulations 2006⁵⁵⁵ issues.

In relation to non-PPP complexities, it was suggested by Procurement Officer 2 (body governed by public law) that legal complexity may arise simply where you do not know enough to have agreed contractual terms. It was argued that this situation should be dealt with before formally commencing the procurement; that is to say, road testing documentation in order to obtain comments and feedback from the market.

Lawyer 34 (England & Wales) set out why regeneration work of regional or sub-regional significance may be complex:

it is self-evident that there are a number of ways for the authority to achieve its objective of getting investment into an area or getting obsolete or redundant land or assets back into economic

⁵⁵⁵ SI 2006, No.246

circulation. There could be different blends of end user, different configurations of infrastructure, different constructional techniques (all of which have their respective pros and cons), different contractual models, different funding models, and different commercial models. The possibilities are numerous and that is what competitive dialogue was invented to deal with.

Procurement Officer 6 (central government) noted contractual complexities in relation to a textiles supply contract: the need to have a robust supply chain with contingencies built in and the need to ensure supplies are ethically and environmentally sound. These issues do not relate to the product specification, but as noted by the interviewee, “there may be wider issues that we want to investigate, and the restricted procedure is not always able to do this, particularly if the authority is not up-to-date with best practices”.

It was also explained how complexity may arise due to the lack of a central strategy and performance targets:

[w]e started a competitive dialogue for a waste management contract on the basis that there was no known national strategy. Our approach was let's go and see what the market can do to make the best of what we have got. After [post qualification questionnaires], the Scottish Government came out with a central waste strategy with targets that needed to be hit. Due to this, we could define quite clearly what the problem was, meaning competitive dialogue was invalidated. We cancelled the procedure and started again under a restricted procedure (Lawyer 40, Scotland).

It was also suggested by one interviewee that as the number of stakeholders in a project increases so does the level of complexity, as, amongst other things, the needs of each one must be catered for in the contractual documentation.

10.4.5 Commoditised PPP procurements

Despite the above comments that the very nature of many PPP arrangements can lead to an almost inevitable conclusion of legal/financial complexity, 14 interviewees raised the issue of, what was termed, commoditised PPPs, e.g. PPPs for schools (BSF) (see Chapter two). Whilst these PPP procurements may have involved sufficient complexity to warrant the use of competitive dialogue when the schemes were first brought in, could this still be said now, several years later, considering the level of standardisation and the greater familiarity of authorities? For instance, Lawyer 12 (UK) stated

... if someone was to do an entirely standardised PFI (we do not really do NHS LIFT anymore, but something of that nature), I am not actually sure you can justify using competitive dialogue. This is because you are imposing on people entirely standard documents, entirely standard contract forms, entirely standard commercial models, and, yes, it appears all big and complex but actually it is all pre-set. In reality I think anything which has got a sort of PPP descriptor gets seen as something which should go through competitive dialogue.

Lawyer 2 (England & Wales) argued, that although s/he had once been concerned that standardisation could destroy the grounds for using competitive dialogue, but, was now convinced this could not happen:

on every large scale PPP you do something always seems to crop up that you could not have planned for in advance. We thought XXX project would be a walk in the park, but it proved to be a very complex and difficult procurement. I think for any PFI/ PPP project, you have always got grounds to say it is particularly complex.

Five other interviewees pointed out that, although legal and financial complexity was becoming difficult to argue for commoditised PPPs, this did not remove other forms of complexity, i.e. technical, upon which to justify competitive dialogue. Policymaker 2 suggested that due to mandated financial and legal structures, if the infrastructure element of a PFI were to be designed in-house it may be the case, from a legal perspective, that the restricted procedure would need to be used.

10.5 Other factors relevant to the choice of procedure

10.5.1 Introduction

The interviews revealed that interpretations of the substantive legal provisions on the availability of competitive dialogue were often not central to the decision whether or not to use the procedure. In many cases interviewees suggested that the choice of procedure was driven by other factors. These factors will be presented in order of importance (i.e. most mentioned to least mentioned).

10.5.2 Avoidance of the competitive dialogue procedure

Competitive dialogue may in many cases be the most appropriate procedure by which to procure complex contracts; however, it is not obligatory for complex contracts to be awarded under competitive dialogue. A total of 29 interviewees (including 25 external legal advisors and four procurement officers) stated that for various reasons they or certain clients would try to avoid using competitive dialogue wherever possible and award what they considered to be complex contracts under the restricted procedure (26/29) or the negotiated procedure (3/29). As put by Lawyer 21 (UK):

[t]here is a tendency to avoid competitive dialogue if possible, a tendency to squeeze things in under the restricted procedure ... I can think of several examples where quite complicated PPP arrangements went out under the restricted procedure in circumstances where I would say they would have been better going the competitive dialogue route because there wasn't sufficient flexibility to do what they wanted to do later on in the process. They were just so keen to avoid this perception of bureaucracy and reluctant bidders; it is dangerous ...

The findings here do not appear to relate to the larger more sophisticated contracting authorities that may procure complex contracts on a frequent basis, for example central government and local government in major UK cities.

A key reason for this was a “fear” of the unfamiliar competitive dialogue held by some authorities derived from negative past experiences or from hearing of the negative experiences of others (e.g. via the legal press). It was suggested that many perceived competitive dialogue as overly complex, expensive and time consuming, and therefore only to be used as a last resort. According to Lawyer 24 (England & Wales):

... there is still a lot of fear and misunderstanding of competitive dialogue. I had one large project where the authority was dead against it because they had all these misconceptions. To have even suggested running a project of such scale under the restricted procedure was quite surprising. If there is a feeling that they can do the procurement under the restricted procedure, they will stick to that because it is what they know and it has not got the bad press along with it ...

Procurement Officer 1 (body governed by public law) was so dissatisfied with the one competitive dialogue the authority had run that they were adamant the authority would not go down this route again, even if this meant changing the nature of the contract to be

procured. For example, rather than procuring the regeneration of a town, it was suggested that the authority might conduct multiple smaller procurements. As accepted by the interviewee, this would not be the most efficient means of procurement, but their desire to avoid the rigours of competitive dialogue was so great that it was considered a viable option.

Also, competitive dialogue is new and for many authorities complex procurements are not encountered on a regular basis; for these reasons, it was suggested that some authorities prefer the familiarity of the restricted procedure, even where the grounds for using competitive dialogue are clearly satisfied. Lawyer 10 (Northern Ireland) stated that “some clients just default into the restricted procedure; they do all their procurement with it. Looking at smaller public sector bodies, they probably don’t even consider the competitive dialogue”.

A further reason given for avoiding competitive dialogue related to the need to maximise bidder participation. According to some, rather than taking steps to demonstrate to the market that they are capable of running an efficient competitive dialogue that minimises bid costs, certain authorities will simply procure under a different procedure. It was suggested that in some cases, such as major regeneration projects where developers are reluctant to commit to the high levels of resource and expense that is needed to agree a development agreement whilst still in competition, the market dictates that the competitive negotiated procedure is used (Lawyer 24, England & Wales; and Lawyer 13, England & Wales).

It was also mentioned (two interviewees) that, following the Court of Justice's judgements in Case C-220/05, *Roanne*⁵⁵⁶ and Case C-451/08, *Helmut Muller*⁵⁵⁷ which gave rise to great uncertainty over the application of the Directive to land development agreements (see Chapter two), because of the poor suitability of competitive dialogue for such procurements and a perceived lack of availability of the negotiated procedure, authorities were, where possible, seeking to classify these contracts as concessions so as to give themselves greater flexibility over the choice of procurement process.

10.5.3 Soft-law

Interviewees, particularly external legal advisors, in relation to most legal issues tended to play down the importance and role of government guidance (see chapter 14). This was not so, however, in relation to the decision to use competitive dialogue. In 19 interviews soft-law (mainly the OGC 2006 guidance and OGC/HMT 2008 guidance) was cited as being a key reason for the decision to use competitive dialogue over the negotiated procedure. This was so even where the interviewee did not necessarily agree with the interpretation of the law put forward by soft-law. According to Lawyer 7 (UK), since 2006 lawyers have simply been recycling the message from the OGC.

The strong OGC policy statement in 2006 appears to have played a key role in shaping UK procurement practice away from the use of the negotiated procedure for PPP procurement, such that interviewees stated that they “don’t even look at it anymore” and termed it “a redundant procedure”. The example of the London Underground PPP was recognised by legal advisors as a “stratospherically” complex contract, and hence few could recall instances of use of the negotiated procedure for PPP projects outside the utilities sectors since 2006. The policy steer from the Commission and government has meant that in practice for complex PPP procurement competitive dialogue is being used

⁵⁵⁶ Case C-220/05, *Roanne*, fn.42

⁵⁵⁷ Case C-451/08, *Helmut Muller*, fn.42

in place of the negotiated procedure. It was suggested that UK authorities had been scared off using the negotiated procedure, such that even when Lawyer 20 (UK) advised that a project was sufficiently complex to warrant use of the negotiated procedure the authority refused to because they were worried about defending the decision and concerned about the scrutiny such a decision would attract.

6/19 interviewees (external legal advisors) admitted that in 2006 they were “surprised at the firmness of the OGC’s message”; however, it was only recently that, in view of the difficulties to complex procurement posed by the credit-crunch and recession, they have begun to question whether they had abandoned the negotiated procedure too readily. In the words of Lawyer 19 (UK):

[a]ll of us bought the Commission’s message that the negotiated procedure is exceptional, but if you look at what the legislation says there is an argument to say that some of the grounds can be interpreted so that it is not exceptional. ... We should have queried the Commission’s message.

Although not stated explicitly, the author also got the clear impression from two policymakers interviewed that there was a greater role for the negotiated procedure to play and that perhaps steps would be taken in the future to soften the signal against its use. The 2010 HM Treasury review states awareness of the implications of its strong policy steer towards competitive dialogue, which, according to the review, “may have been interpreted as an implied ban on everything but competitive dialogue”.⁵⁵⁸ The 2010 review notes that to remedy the problem guidance is being produced on the availability of all procedures.⁵⁵⁹

⁵⁵⁸ HM Treasury (2010), fn.198, 2.36

⁵⁵⁹ Ibid, 2.40

In the case of PFI procurement (particularly for major investment programmes like BSF) it was suggested by 10 interviewees that an authority will have little choice but to procure under the competitive dialogue if it wants to keep its PFI credits and/or wants its outline business case approved. In addition, standard BSF procurement documents are drafted on the assumption that competitive dialogue will be used.⁵⁶⁰

10.5.4 Risk of challenge

Interviewees were asked how they perceived the risk of challenge from the Commission or aggrieved bidders for using competitive dialogue on the basis that the conditions for use were not met. Being a threshold test, there is obviously some legal risk for using the competitive dialogue inappropriately; however, a significant 33 interviewees suggested that the threat of challenge from an aggrieved bidder was not a major worry at this early stage. These interviewees highlighted that any challenge to the choice of award procedure would need to be made early, as the aggrieved supplier would be on notice from the time of publication of the contract notice and would therefore have limited time to challenge (see chapter four). As argued by the 33 interviewees, the risk of legal challenge grows as you proceed through a procurement process and bidders incur greater costs. At the beginning of a procurement process, bidders have not invested much time and money; so, not only will it be difficult for them to establish that the choice of procurement procedure caused them or risked causing them damage, but also at this stage in the process they are not going to want to risk doing anything that upsets the procuring authority and are likely to be unwilling to incur the expense and uncertainty of legal challenge. Although a technical breach has occurred, as Lawyer 30 (England and Wales) stated, “challenging a procurement procedure is not an academic exercise, it is a big commercial step. What would you be expecting/hoping to get out of it?”.

⁵⁶⁰ See, for instance, PfS, *Standard form BSF contract notice*, (2009) available at www.partnershipsforschools.org.uk/ (accessed 31/10/2011)

Although none of the interviewees could point to instances where they had needed to consider legal challenge at this stage, it was suggested by four interviewees as a theoretical possibility that if the inappropriate use of competitive dialogue acted as a bar to a supplier taking part in the procurement then a challenge may be conceivable, for example where a small supplier lacked the resources to participate (Lawyer 7, UK). A further theoretical possibility might be where in a competitive dialogue the contracting authority has invited the minimum of three bidders to dialogue, and a firm that has been de-selected seeks to argue that had it been a restricted procedure it would have been one of the five invited to tender for the contract (Lawyer 41, Scotland).

With the above in mind, it was stated by Lawyer 23 (England & Wales) that “realistically [the decision to use competitive dialogue] is an open choice”. It was mentioned by Lawyer 13 (England & Wales) that a bidder’s objection to the inappropriate use of the competitive dialogue, regardless of whether or not the complexity threshold is met, will be a commercial and not legal:

[a] bidder is not going to say to an authority, it is illegal that you are using the competitive dialogue because this is not a complex contract, the bidder is going to say, I don't want to bid for this because if procured under competitive dialogue it is going to be too expensive. It is not going to ... challenge the decision.

The majority of interviewees were aware of the Pimlico Schools case,⁵⁶¹ where the Commission challenged use of a negotiated procedure for a PFI schools project; however, in relation to the decision to use competitive dialogue, 36/40 (others disagreed) interviewees did not perceive there to be a high risk of Commission challenge. According

⁵⁶¹ Pimlico, fn.179

four external legal advisor interviewees, competitive dialogue is a transparent process and as such the Commission is unlikely to challenge even if there is a question mark over complexity. For these interviewees, the Commission tends to be worried about flagrant breaches, such as direct awards, and, provided a robust and transparent competitive dialogue is delivered, whether a contract fits within a procedure is not a sufficiently serious.

In view of the perceived low risk of legal challenge for the decision to use competitive dialogue, 19 interviewees (including all three policymakers) suggested that, being more flexible than the restricted procedure, from a legal risk perspective the competitive dialogue was often the procedure of choice even in cases where complexity was questionable. This is because, if a restricted procedure was attempted in a situation that subsequently turns out to be complex, there is a strong possibility that a need to dialogue certain issues might arise and attract a comparably much higher risk of legal challenge. As Lawyer 13 (England and Wales) commented:

what I say to clients is, 'if you are going to have to negotiate, use [competitive dialogue] because, if you negotiate in a restricted, it is very obvious and incredibly risky'. I can't be bothered going into the definition of a particularly complex contract with them because it is just not relevant in practice ...

The same might be argued in relation to the negotiated procedure; that is to say, the risk of an aggrieved bidder challenging under the negotiated procedure are less than the risks around using competitive dialogue because again the negotiated procedure presents even greater flexibility and the period for challenge for wrongly using the negotiated procedure would expire at an early stage in the procurement. Who is going to challenge as they are

likely to expect to benefit from lower bid costs? Here, however, a clear threat of Commission challenge was felt by 11 interviewees (others not commenting). The 11 interviewees were concerned that the use of the negotiated procedure in the UK was being closely scrutinised by the Commission, and therefore if it were to be used there needed to be high certainty over the justification.

15/24 interviewees highlighted the need to document reasons justifying use of competitive dialogue as being good procurement practice (“it is good procurement practice to back up your decision making at all stages of the process” (Lawyer 15, UK)). However, 9/24 did not place such great emphasis on this practice: “[w]e don’t do many competitive dialogues; if it was on the edge, we would definitely document the justification for using it” (Procurement Officer 9, local government).

10.5.5 Miscellaneous

Other factors raised in interviews noted as having been relevant to the decision whether or not to use competitive dialogue include contract value (i.e. so that procurement costs outweigh the value of the contract); wanting to or liking to dialogue regardless of need; the “thrill” of a new procedure; limited resources and timescales; and to delay authority decisions over the requirement. The frequency with which these factors were mentioned was very low in comparison to the above categories.

10.6 The relationship between the competitive dialogue and other procedures

Interviewees disagreed about the impact made by competitive dialogue on projects that pre-2006 would have been procured under the restricted procedure (see above).

However, despite the wording of the grounds for using the negotiated procedure not changing, interviewees were virtually in unanimous agreement about the impact of

competitive dialogue on the interpretation of the availability of the negotiated procedure. For most, they had not used the procedure since January 2006 for complex PPP projects and regarded it as “redundant” in this respect. The following are examples of phrases used to describe the availability and role of the competitive negotiated procedure post-2006:

- it is on the top shelf now (Procurement Officer 8, body governed by public law);
- it has got to be really, really out of market, i.e. very unusual (Procurement Officer 5, local government);
- it is dead in the water (Lawyer 26, UK);
- we completely ignore it (Lawyer 30, England & Wales);
- [a]s a rule of thumb, I don't even look at it (Lawyer 32, England & Wales); and
- although it is still there, it may as well not be. ... We just don't touch it. We shy away from using it (Lawyer 2, England & Wales).

For complex contracts it seems competitive dialogue is seen as the “default” procurement procedure. According to eight interviewees, it was questioned why, bearing in mind the fact that if you meet the conditions for using the negotiated procedure you almost certainly meet the required level of complexity for using competitive dialogue, anyone would want to use the negotiated procedure. For these interviewees, the legal rules on competitive dialogue facilitate best practice. So, essentially, why conduct a procurement

under a negotiated procedure when you would want to run it along the same lines as a competitive dialogue anyway? Indeed, as was discussed in the legal analysis, it is not entirely clear what can be done under a negotiated procedure that cannot be under competitive dialogue, particularly regarding post-tender work with bidders.

In relation to PPP procurement, although several interviewees argued that for all practical purposes the negotiated procedure may as well not be there, the procedure does still remain. This leaves the question: in what situations can it lawfully be used? Many interviewees failed to elaborate upon this point, as there is no clear criterion which can be used to say from this level of complexity and above the negotiated procedure can be used. Thus, the decision to use the negotiated procedure instead of competitive dialogue is more likely to come down to commercial factors, such as whether its use is needed to attract sufficient competition. As mentioned in chapter six, it appears anecdotally that in practice the negotiated procedure is now mainly used for the procurement of intellectual and financial services.⁵⁶²

Procurement Officer 11 (local government) speculated that where a procurement is “so complicated and technical that you couldn’t possibly get the answer through using competitive dialogue” the negotiated procedure is to be used. Lawyer 21 (England & Wales, London) disagreed: “... the test is not that it is impossible to do the procurement with competitive dialogue; it is something less than that”.

Interviewees are in complete disagreement about pre-2006 whether the negotiated procedure was to be regarded as an exceptional procedure, such that no clear pattern emerges from the data. Post-2006, all now regard (or at least treat) it as exceptional. Two

⁵⁶² See T.Kotsonis, *Should the competitive negotiated procedure ever now be used and if so when?*, (2009) available at www.whitepaperdocuments.co.uk (accessed 31/10/2011)

interviewees (others not commenting) spoke about how on first reading the legal rules this was not the case, but it was the strong policy steer from government which influenced behaviour (see above).

10.7 Concluding remarks

Chapter 10 addressed legal issues raised by the legal analysis in chapter six. In its presentation of the findings on availability of competitive dialogue the chapter highlighted the legal uncertainty surrounding the decision to use competitive dialogue that exists. It can be seen that in practice competitive dialogue has very much replaced use of the negotiated procedure for PPP procurement, and has also been used by many where previously they might have procured under the restricted procedure. A number of practical considerations were found to have played a significant role in the choice of procedure; key amongst them are the limited legal risk a decision to use competitive dialogue is seen to attract and the clear policy statements from UK government. These non-legal aspects are similar to the findings of Braun's 2001⁵⁶³ research into UK PFI procurement practice in the context of the negotiated procedure (see chapter eight).

⁵⁶³ Braun (2001), fn.172, 334

11 Findings: contract notice to close of dialogue

11.1 Introduction

Chapter 11 will set out interview findings for the stages of competitive dialogue leading up to the close of dialogue. Corresponding with the legal analysis in chapter seven, chapter 11 will present the findings in the sequence the legal rules to which they relate are likely to be encountered in practice. However, issues relating to bidder confidentiality, a general rule equally relevant at all stages of the process, will be presented on their own at the outset in section two. Section three will look at interview findings relating to the pre-dialogue stages of competitive dialogue. This includes the scope for technical dialogue, issues relevant to the OJEU notice and descriptive documents, and also qualification and selection issues. The main body of the chapter presents the interview findings for the dialogue stage (section four). This part of chapter 11 is broken down into sub-sections looking at the structure of the dialogue stage, the application of the equal treatment principle, and bidder reduction. As with the rules on confidentiality, equal treatment applies generally at all stages of the process; however, it is included at this stage due to its particular relevance. In addition to this section, issues raising equal treatment concerns will be flagged as and when they are encountered in different areas. As there were only two comments on single bidder situations, chapter 11 concludes with a brief consideration of this issue.

11.2 Confidentiality and cherry picking

11.2.1 Introduction

The rules on bidder confidentiality and the ban on cherry picking give rise to a number of questions (chapter seven). For instance, the standard of confidentiality is not clear: do the legal rules refer to domestic confidentiality law or do they create an independent EU law

confidentiality requirement? Also, it is not clear what amounts to sufficient “agreement” to share bidder solutions or confidential information. These issues, along with other practical approaches and considerations, were explored with bidders; the findings are presented below.

It was clear from interviews that confidentiality and cherry picking were a key issue, particularly for bidders; however, for 28 interviewees (others not commenting), the high level of concern pre-2006 over the difficulties competitive dialogue would present in terms of maintaining confidentiality had not materialised to any serious degree: “[t]here is an element of concern, but it has not been as big a deal as I thought it was going to be” (Lawyer 38, England & Wales).

It may be that a key reason concerns over bidder confidentiality have not materialised in the way many prior to the introduction of competitive dialogue feared they might is the apparent way in which dialogue is most commonly conducted in the UK, particularly for procurements under established PPP programmes, which have been influenced by past UK practice under the negotiated procedure and central government guidance. That is to say, during the dialogue stage bidders will generally meet with the contracting authority separately and work up their own individual solution/s. 26/27 interviewees described conducting the dialogue stage in such a way (only 1/27 contrary view was expressed). It seems that this practice is seen as the best way to encourage bidders to be forthcoming with ideas, questions and issues, due to a concern that if meetings are conducted with bidders altogether, bidders may be fearful of inadvertently helping competitors. This was stated in five interviews. In the words of Procurement Officer 7 (central government), “[w]hen they all meet they are very careful about what they say; no one will ask a question;

they will not want to give away where they are coming from or look ignorant in front of their competitors; there is silence unless you meet with them separately”.

It is usually the case that, after the formal close of dialogue in the final tendering stage, remaining bidders will be invited to tender against an outline specification which is of sufficient scope to accommodate each bidder’s different solution. This aspect of the procedure will be looked at in greater depth in chapter 12; however, it is mentioned here because, although this method presents risks in relation to breaches of the rules on confidentiality and cherry picking, there is less scope for such violations than a situation where the authority draws up a single detailed technical specification (a “best of breed” solution (Lawyer 12, UK)). According to Procurement Officer 12 (NHS Trust):

we do not want to compromise confidentiality with a combined specification or create something that does not exist because it is cobbled together from various proposals. We try to be more generic, offer it with an output based specification ...

Comparing the UK approach to the approach thought to be taken in other EU Member States, Lawyer 39 (UK) stated:

some people have very different ideas about what competitive dialogue involves; some people think it is to work up a common solution that you then put back out to the market; that is not how it works in the UK ... I do not think businesses would be interested in a model where you are feeding together to work up some common specification; that seems quite altruistic.

Lawyer 13 (England & Wales) expressed some criticism of the UK approach and the reluctance to share aspects of solutions:

[i]t is interesting because as an authority you would like to very much be able to cherry pick and ... develop one overall best solution. Bidders do not want that obviously and they want to keep their information confidential; this means that as a contracting authority you are running parallel solutions instead of synthesising them; that ... increases your bid costs and costs of procurement.

A general view flowing from 12 interviews appears to be that, particularly in highly innovative fields (e.g. ICT and waste), if cherry picking was an expected part of procurement, bidder participation and/or investment would suffer.

Alternative approaches to the conduct of dialogue were suggested by a handful of interviewees (three) in relation to non-PPP competitive dialogue procurements. This suggests that outside of PPP authorities may feel greater freedom to experiment. For instance, the seemingly quite rare approach of Procurement Officer 8 (body governed by public law) was as follows:

... we would deal with [bidders] in isolation ... taking ideas from each of them until we reached the point [where we are taking final priced proposals]. Then we will produce ourselves a detailed specification which we will present to all three bidders and say price and tender against this requirement. On average each supplier will see 30% of their proposal in the specification; some will see more some will see very little. There is going to be a lot of common ground ... A supplier who has put forward 60% of the requirement, yes they have more ideas seen by competitors, but the upside is it is their idea, they priced it, they know how to actually deliver the solution; in a way the final specification favours them.

This approach relies on bidders agreeing to share information. Here, such agreement was a condition of participation (see below).

There appears to be an interesting relationship between the rules on confidentiality and the rules on equal treatment, whereby, it seems, practitioners must strike a careful balance between these two (sometimes conflicting) requirements. This will be addressed in the discussion of the equal treatment rules below.

11.2.2 Approach to confidentiality

A common approach to confidential information was discernable from 20 interviews (no alternative approaches were put forward). The descriptive documents will explain that bidders must mark documents submitted during dialogue as confidential if they do not want information to be shared with other bidders. It was remarked by 4/20 interviewees (others not commenting) that a consequence of this is that bidders may mark everything as confidential regardless of whether or not the information merits such a label: “one of the problems you do have is that certain bidders assume that everything is a supremely brilliant idea and confidential” (Lawyer 12, UK). Where a contracting authority disagrees with a bidder about the confidentiality of information and wants to share the information, the authority will warn the bidder. The two parties will try to reach agreement, but if this is not possible the bidder is given the option of withdrawing the information. Lawyer 26 (UK) explained his/her experience of reaching agreement to share bidder information where its confidential nature is disputed:

[w]e have ... asked bidders to propose efficiencies or discounts and one bidder has come up with a fairly novel way ... We have had to say to them, ‘so that we can evaluate on an equal footing we have to divulge that methodology to both bidders’. They have been prepared to have those sorts of conversations.

This, however, does not appear to be the prevalent experience, with most interviewees describing how authorities are often highly respectful of bidder confidentiality claims: “I take the view that anything I am told should remain with that side” (Procurement Officer 3, local government).

Because disagreements over confidentiality tend to be resolved amicably, few interviewees could speak in great depth about their understanding of the standard of confidentiality under the Directive/Regulations. Indeed, five legal advisors commented that this would be a matter for intellectual property experts:

[a]s a procurement lawyer, I do not know to be honest what is confidential and what is not. So, where necessary we have spoken to our intellectual property guys and got them to give a bit of advice on it (Lawyer 13, England & Wales).

For this reason, coupled with the findings presented below on the standard of confidentiality in practice, it is very difficult to say with any certainty on what basis from a legal perspective the standard against which confidentiality under the Directive/Regulations must be assessed against; however, the application of these EU rules in practice strongly indicate that more information is regarded as confidential than would be under domestic UK law.

According to 18/30 interviewees, bidders are likely to view confidentiality in the Directive/Regulations as being a higher standard than that of domestic law, and in practice contracting authorities tend to take a similar outlook:

[i]t ends up being wider than domestic law. Information is just treated as confidential. There is not normally an assessment of the merits of what is commercially confidential (Lawyer 24, England & Wales).

8/30 interviewees stated that in a situation of disagreement over confidentiality they would rely on domestic rules, e.g. the law of confidence and confidentiality under the Freedom of Information Act 2000. According to Lawyer 22 (UK):

[t]here are a number of things going on, the common law of confidentiality, [contractual] confidentiality restrictions, and then there is the Freedom of Information Act. I think within the UK context probably the narrowest of that is under the Freedom of Information Act; so I think the generally accepted view from bidders is that very little is going to be regarded as confidential from a freedom of information perspective. So, in terms of what they are telling contracting authorities, they regard most of it as possibly coming out.

4/30 interviewees spoke of the assessment of confidentiality coming down to a practical judgment:

... there is ... a grey area ... At what point when somebody comes up with an individual solution is it considered to be a proprietary solution that is commercially particular to that company? ... [Or] is it something generic that can be shared? At either extreme it is clear that one is one and the other is the other, but at what point do you cross the line? There is no guidance, and because of that it is down to procurement professionals in the spirit of openness and fairness to self govern that type of thing and I think in a practical sense that is necessary. [I]t comes down to a judgment call on a case by case basis (Procurement Officer 6, central government).

Seven interviewees (others not commenting) mentioned how the private sector often insists upon the contracting authority and staff signing up to a confidentiality agreement. According to Lawyer 32 (England & Wales), “lots of authorities are now entering into quite complex confidentiality protocols ... I think that the private sector will rely on these”. The enforceability of such agreements was, however, questioned in 2/7 interviews.

Despite the approach to maintaining confidentiality outlined above (e.g. separate bidder meetings and bidders required to identify information as confidential upfront), there are situations that arise where bidder confidentiality can be difficult to maintain. For example, where dialogue meetings are conducted in front of an audience involving individuals not involved in the procurement process on a day to day basis, it was noted by three interviewees, that it can be problematic keeping, for instance, a school headmaster from suggesting improvements to bids based on previous bids he/she had seen.

A further difficult situation mentioned by Procurement Officer 10 (local government) was where a bidder was bidding on behalf of itself and also a consortium; here the authority felt it right to disclose to bidders the names of all firms participating in the competitive dialogue. There are also accidental breaches; for example, three interviewees recalled cases where documents had been sent to the wrong bidder.

11.3 Agreement to share

The approach taken to maintaining bidders' confidentiality during the dialogue stage (described above) will often mean that, regardless of the confidential nature of the information, information supplied will not be shared without a bidder's consent. The Directive/Regulations (see chapter seven) allow a contracting authority to share confidential information where it has obtained the agreement of the bidder concerned.

However, few interviewees had experience of situations where such agreement had been obtained where it was accepted that the information was of a confidential nature. 17/30 interviewees specifically stated that they had never needed to seek such agreement. This suggests that this situation is a relatively rare occurrence in the UK. For example, according to Procurement Officer 5 (local government), “[w]e have not been able to get bidders to share; why would they?”. Lawyer 20 (UK) explained that he/she has “always managed to win the argument that the particular piece of information is allowed to be shared without any need for agreement” and Lawyer 6 (UK) stated that because of the lack of clarity over what is and is not confidential the approach taken is to not discuss any aspects of one bidders bid with other bidders.

A small number of interviewees (five), including one policymaker, questioned the levels of innovation seen in PPP procurement and this may go some way to explain the lack of agreements: “I do not think [confidentiality issues] have been too bad; to be entirely cynical about it, you do not see anything that is that innovative despite all the hype ...” (Lawyer 8, England & Wales). It may be that confidentiality is only likely to become an issue in high technology areas, e.g. ICT and waste, which was suggested by Lawyer 32 (England & Wales): “I think in terms of high technology stuff, like waste solutions, confidentiality issues are probably more of a concern”.

Nevertheless, 13 interviewees did have some experience of obtaining agreement to share confidential information. 5/13 interviewees spoke about doing this through straightforward negotiation with the bidder. For example, according to Lawyer 8 (England & Wales), “... it ... depends on what you are trying to share, but it is usually a question of demonstrating to the disclosing party that it is not going to harm them commercially”. 4/13 interviewees spoke about bidders sharing confidential information

or intellectual property in exchange for payment. Also, in accordance with the suggestion in the Commission's explanatory note, 2/13 interviewees had made the sharing of confidential information a condition for participation: "they participate knowing that their best ideas are likely to be shared" (Procurement Officer 8, body governed by public law). It should further be mentioned that 2/13 interviewees spoke about holding a public open day where during the dialogue stage bidders' solutions were on public display alongside each other. In both these situations the bidders were made aware of this requirement at an early stage and did not object to it.

11.3.1 Risk of legal challenge

Although a number of interviewees argued that some seepage from one bidder's bid to another was inevitable, in the main it appears that authorities are highly respectful of bidder confidentiality. The key driver behind this, alluded to by five interviewees, appears to be commercial, i.e. the need to encourage bidders to be as full as possible during dialogue. The risk of legal challenge was not mentioned as a reason, and cherry picking was in fact noted by two interviewees as low risk in certain circumstances:

cross fertilisation is inevitable and it is very difficult to police. If you are a buyer charged with buying the best thing you can buy, inevitably you are going to take some of the best bits of different bidders' bids and introduce them into the dialogue. ... Other than in very clear cut cases, it is very difficult for anyone to know what has gone on. It would be difficult for a complainant to get the evidence. So, with those ... rules you wonder who is actually going to enforce them (Lawyer 39, UK).

11.4 Pre-dialogue

11.4.1 Technical dialogue

Only 24 interviewees spoke in detail about the scope for technical dialogue prior to publication of the OJEU notice. The main reason for this was simply because the bulk of

interviewees, external legal advisors, tended not to be involved in such early stages of procurements. Nevertheless, no interviewees expressed any doubts about the legal possibility for technical dialogue in competitive dialogue procurements. For instance, according to Lawyer 29 (England & Wales):

[technical dialogue] is possible provided you maintain the principles of transparency and equal treatment and you do not give an advantage in time or information to one specific bidder; it is recommended. I think it is even possible to do this with one private sector firm; there is no rule forbidding this. There is a slight risk, but if managed properly it should be fine.

Although not all agreed about the legality of technical dialogue with just one supplier (depending on the size of the market), the overwhelming view from interviewees was that in most competitive dialogue procurements pre-OJEU notice technical dialogue is worthwhile practice, i.e. in terms of warming up the market, finding out what the market can offer, finding out about the ways and means of procuring a particular project etc. (Lawyer 16, Northern Ireland).

Certain interviewees stressed the difficulty of conducting useful technical dialogue within the rules. For instance, Lawyer 15 (UK) stated, "... it is a balance. In principal you want participation to be reasonably open, but you do not want everyone involved because it is just chaotic".

Due to the limited number of interviewees commenting upon technical dialogue one must be cautious in drawing conclusions over any common patterns in the approach.

However, there appear to be two distinct methods: one is to dialogue with as wide a segment of the potential market as is possible and the second is to dialogue with only a

handful of potential suppliers. It seems that the route taken in a specific case will often depend on a number of factors: the assessment of legal risk, the reason for engaging in technical dialogue, the particular project being procured, the supplier market (e.g. size), the time available etc.

8/24 suggested that they would commonly issue a Prior Information Notice (PIN) and follow this up with meetings with those expressing an interest (or a selection of those expressing interest) in the project, for example in the form of bidder open days.

According to interviewees a PIN is a way to “cast the net wide” (Lawyer 1, Scotland) to involve firms who are likely to bid for a project and reduce the risk of being seen to favour any one firm. Lawyer 10 (Northern Ireland) commented:

... if you hold an open day in Northern Ireland the chances are that only people from Northern Ireland are going to come. Do they get any sort of advantage over anyone else outside the jurisdiction? Possibly; they get better access to the purchaser; they might get a better insight as to what is involved; they might even have an opportunity to influence that. But, ... I think legally as long as you are advertising [the technical dialogue] on an EU wide basis and affording everyone the opportunity to do that it should be okay.

7/24 signalled a preference for the conduct of technical dialogue with a limited selection of private sector suppliers. According to Lawyer 8 (England & Wales):

in reality this happens because it is the most sensible way of going about it. There is a risk of lack of transparency, but the best way of doing it is to heavily document the process and have the information released made available to all.

13/24, however, expressed doubts over this approach, highlighting the need for great caution and the legal difficulties in conducting technical dialogue with a small selection of potential suppliers. On the basis of these figures, it is not possible to say with any degree of certainty whether or not a common UK approach exists in relation to this issue.

Questions on the uncertainty surrounding the scope for dialogue post-OJEU notice pre-dialogue highlighted in the analysis of the legal rules (see Chapter seven) were put to a very limited number of interviewees. It became apparent very early on that, due to the scope for dialogue in the dialogue phase, in practice this was not seen as an issue. No interviewees commented in any meaningful way on this; indeed, some appeared quite surprised by the question. For this reason, with the need to maximise the time available on what interviewees perceived to be the most pertinent issues, this question was dropped for most interviews, with the hope being that if interviewees viewed it to be an issue they would raise it themselves in response to the general opening and closing questions.

11.5 OJEU notice and descriptive documents

Few interviewees raised any particular legal concerns in relation to the OJEU notice and descriptive documents. Five interviewees flagged up the difficult balance involved in drafting the OJEU notice, which must be of a sufficiently wide scope to cater for a degree of change later on in the process but also targeted in such a way that the most appropriate firms for the contract seek to participate (see discussion in chapter seven).

Procurement Officer 13 (local government) described how she/he had learned the importance of a well drafted OJEU notice:

[c]ertain clients did not get on board with the process until probably a good year into it. Once we had got buy-in from these clients, all of a sudden they were going, 'we could add this, we could add

that, and do this and that'... So the specification was getting wider, but the scope of the OJEU notice was only half of what they wanted it to be. ... If you have not specified the right CPV codes and you have not got the right wording in around the types of services or goods or whatever then you can really fall foul of the good intention of having put that contract notice out in the first place. It is important you get legal advice to run it past somebody ... Also, with contract values, if you say it is in this range and it ends up being something piffingly disappointing the market may feel you have lied to get them on board. You do not want it to be so far above the range that it is unadvertised spend that you have got to re-procure. I do not think procuring entities really understand the importance of OJEU notices.

Specific issues, such as the extent to which award criteria must be set out in the descriptive documents, will also be looked at in greater depth below.

11.5.1 Qualification and selection

The only real issue that was raised in relation to qualification and selection relates to the changes in circumstances that can occur in the potentially lengthy period from bidder selection to contract award. For example, a bidder's financial standing may deteriorate (a real risk in view of the 2008-2009 recession), there may be a change in the make-up of a consortium (e.g. because a member becomes insolvent) that may impact upon, for instance, financial standing or technical ability, or a bidder may be convicted of a criminal offence. According to 18 interviewees (others not commenting) it is necessary to keep the qualification and selection situation under review throughout the procedure; for example, documentation issued at each stage of dialogue might require bidders to notify the authority of any material changes in its circumstances.

11.6 Dialogue

11.6.1 Structure

From the descriptions of 31 interviewees, for PPP competitive dialogue, in particular, the structure of the procedure most often resembles past UK procurement practice under the negotiated procedure. It is apparent from certain interviewees that in this regard PPP programmes (e.g. Building Schools for the Future) have played a significant role in shaping practice. Typically in a PPP procurement a limited number of bidders (three-seven) will be invited to participate in dialogue, and these numbers will be progressively reduced throughout dialogue over the course of one or more formal bidding phases so that only two or three bidders will be involved in detailed dialogue and submit final tenders. For example, Procurement Officer 4 (local government) described the approach taken in a waste management PFI procurement: “There were 15 qualifying firms; we invited six to participate in dialogue. There were three rounds of bidding and so at final call we only had three bidders submit tenders”.

The interviews present no discernable general structure for complex contracts other than those procured under PPP programmes. It seems that structure very much depends upon the specifics of the procurement, e.g. market size, likelihood of bidders dropping out, cost of bidding, complexity of dialogue, etc. For example, in two competitive dialogue procurements conducted by Procurement Officer 6 (central government) one was structured into four bidding stages due to a need for a series of design developments and the other was structured into two bidding stages, which was said to be because of the complicated nature of the subject matter: there needed to be “longer time for bidders to digest and understand everything ...”. Procurement Officer 8 (body governed by public law) described how in a competitive dialogue for complex electronic equipment five firms

were shortlisted (one dropped out); there were no bidding stages and all four remaining bidders submitted final tenders.

It is also not possible to give a general figure for bidder numbers participating in non-PPP dialogue, as in the experience of some interviewees this can be high in comparison with the numbers discussed in relation to PPP procurements. For example, Procurement Officer 8 (body governed by public law) ran a competitive dialogue where 13 bidders (31 qualifying firms) were invited to participate in dialogue. Following an early bidding stage, the 13 bidders remaining were reduced to eight; one then voluntarily dropped out; another bidding stage was held where the seven were reduced to four; a further bidder dropped out and the remaining three were invited to submit final tenders. According to this procurement officer, taking 13 bidders through was manageable because at those early stages they were only issuing generic documentation; they were not meeting to discuss specific ideas.

As outlined in the discussion above on the confidentiality rules, it is common for dialogue, particularly in the later stages of dialogue when discussions are more detailed, to be conducted with each bidder separately. In addition, it is usual for the dialogue meetings with each bidder to be broken down into several streams of meetings (e.g. a technical stream, a financial stream, and a legal stream). Procurement Officer 5 (local government) explained the reasons for this:

there are too many people on each side and too many issues to get through to have one big meeting with everybody there; the technical people would not understand or be interested in the legal side and vice versa. The technical people may as well have been speaking Swahili; I would not have added any value to the meetings.

This practice, not a requirement of the legal rules but a commercially logical consequence, can contribute to procedures being organisationally complicated and difficult to manage (see chapter 13).

11.6.2 Equal treatment

The legal analysis (chapter seven) discussed the uncertainty surrounding the practical implications of the explicit reference to equal treatment. There were no questions on the specific provision, as it was anticipated that the practical relevance of the provision would come through in answers to other related questions, such as general questions on the conduct of dialogue, and on the whole this turned out to be the case. In 19 interviews it was made clear that in terms of shaping UK practice the equal treatment provision has played a considerable role. For instance, according to Lawyer 4 (England & Wales), “[t]he issue on which I tend to advise most ... is to do with equal treatment”.

It is apparent from 15 interviews that the emphasis upon equal treatment in the legal rules on competitive dialogue has often been interpreted in such a way as to lead to some running dialogue in a highly structured manner. For example, each bidder receives an equal number of meetings, which are equal in length, and only involve discussion of pre-identified issues: “... meetings are extremely well structured; you go through a list of pre-prepared questions with a set amount of time” (Procurement Officer 7, central government). According to 3/15 (others not commenting), this did not happen pre-2006 under the competitive negotiated procedure (or restricted procedures). Although it is commonly accepted that the law would be the same regardless of the express equal treatment statement, as this provision merely reflects the Directive’s general principles of non-discrimination, transparency and equal treatment, it is unclear to what extent such

practices as those described in this paragraph would have developed had it not been for the express statement.

8/15 interviewees were critical of the above structured approach, arguing that such rigidity in the dialogue stage is ill suited to a procedure where bidders generally develop different solutions during dialogue and can hamper efforts to achieve value for money. For example, Lawyer 17 (England & Wales) stated:

... some of the ... processes I have been involved in have been over structured; there is a fear that you cannot favour one bidder over another and therefore you are asking all bidders the same questions. But, on the other hand, you are trying to encourage them to formulate innovative propositions which might differ from each other or differ from the standard contract. It is a bit of an odd way of going about that. Some dialogue processes are so well policed that you have a form for each meeting, you have to complete the form and they feed it back ...

Lawyer 39 (UK) spoke at some length about his/her concerns regarding the way in which the equal treatment provision has been interpreted:

... you get the impression that it really is not dialogue: they are being over pedantic or over procedural. ... A lot of the time it comes down to how you interpret equal treatment; some people interpret it to mean everybody should get the same face-to-face time and you have to put everything out to everyone via these E-portals. ... If you had a normal commercial negotiation it would not be like that at all. The point about [competitive dialogue] was that you were supposed to have these different dialogues with different bidders which inevitably would mean that some would need more working up than others; people do not seem to feel that comfortable with that. They have to have a standardised process.

Procurement Officer 1 (body governed by public law) also mentioned that adherence to the equal treatment provision can result in unfairness, for example due a perceived need for the authority to share the responses to a bidder's questions in relation to a requirement amongst all bidders:

... you have to have the same meetings with all the parties and make sure they all get the same information. You may have one developer spending a huge amount of time and money doing lots of due diligence and asking all the right questions, but the other three do [comparatively very little] and can take benefit of all the work because you have to notify the others of the information you have given out.

Also mentioned in five interviews was the interplay between the rules on bidder confidentiality and the rules on equal treatment. That is to say, contracting authorities are careful to respect equal treatment and ensure that information given to one bidder is given to all bidders, but at the same time need to respect the confidentiality of bidders' solutions (Lawyer 1, Scotland). It may be that the way in which some contracting authorities operate the rules is unhelpful to bidders in their attempts to develop an ideal solution to meet the authority's requirements. For example, according to Procurement Officer 4 (local government):

standard practice is that if a question is asked you give the answer and you give it to everybody involved. We had to say to a bidder, 'if you ask that question and you think that that is a confidential issue that could actually prejudice your bid or it is going to give an indication to another bidder of what your line of thought is, then perhaps you ought not to ask that question'.

There were a few of those conversations where we knew what they wanted to ask, but we could not formally respond.

Lawyer 26 (UK) explained his/her particular experience of this interplay between the equal treatment rules and the rules on confidentiality:

[w]hat we have found is that as you get into detailed dialogue about a particular solution quite often ... that throws up ... bidders saying we need amendments to your specification to facilitate our solution. Clients say, 'what is the problem in having three different specifications tailored to each of the three solutions?'; the problem is what are you scoring them against? You have got to hold the line and have one common specification and have quite careful conversations with each bidder about what you will permit them to suggest as a mark on ... and try and roll them out across all three bidders without revealing the confidentiality of their solution; it is a really tricky area. ... it is an area where you have to fall back on general principles and say well it is discriminatory if one bidder has been allowed to heavily mark up the specifications so effectively they are bidding on a different basis.

A small number of six interviewees considered the reasons why such inflexible practices as those described above may have resulted from the equal treatment rule. It seems the primary reason given for this restrictive interpretation is the need to avoid legal challenge. As Lawyer 17 (England & Wales) explained, "I think they are just trying to protect themselves, and I dare say it is their procurement advisors running riot (see chapter 14).

11.6.3 Bidder reduction

11.6.3.1 Introduction

It is common practice (57/58 interviewees) for bidder numbers to be reduced during the dialogue stage. Indeed, it was suggested by three interviewees (others not commenting) that even where a phased reduction is not envisaged at the outset of a procedure it is good practice for a contracting authority to leave this option open when drawing up the contract notice: "... we always tick the box to be able to shortlist; we won't always reduce the numbers but we like to give ourselves the option ..." (Procurement Officer 12, NHS Trust). A significant minority of 1/58 (Lawyer 14, England & Wales) disputed the legal acceptability of the standard UK practice of bidder reduction.

Regardless of legality, for 57/58 interviewees, the application of Lawyer 14's approach (above) would not be acceptable due to commercial necessities. Indeed, 23 interviewees spoke about the need to reduce the number of bidders participating in the dialogue stage of a procedure quickly in order to reduce the costs of the procurement and to incentivise remaining bidders:

... bidders want to know they stand at least a one in three chance of winning before they incur significant expenditure because when they start drawing up detailed solutions we are talking significant sums of money that are put at risk (£100,000s ...). If you do not slim it down early enough, you will find that although bidders may still show an interest they may not put the same amount of effort in to give the authority good solutions; that actually happens. ... I have had personal experience where that has been the discussion amongst the client team because they were under pressure from bidders to that effect. This is especially so in the current market ... because the risks and expenses are even greater (Lawyer 34, England & Wales).

As explained in the analysis of the legal rules in chapter seven, there is also a strong legal argument in favour of bidder reduction. This area was not explored with all interviewees, as it was clearly apparent that, in the UK at least, the views of Lawyer 14 were not prevalent; however, seven interviewees discussed this point, arguing against the opinion of Lawyer 14. According to Lawyer 39, “it uses the wording ‘solutions’ to cater for the possibility that one party could submit different solutions or a firm could be involved in two bidding consortia”.

11.6.3.2 Is a formal bidding process required?

It may be recalled from the analysis of the legal rules (chapter seven) that it is not clear whether or not bidder reduction must be made on the basis of formal bids. The interview findings do not present a clear picture of the law. 15/27 interpreted the legal rules as requiring formal bids for de-selection; 12/27 stated that a formal bidding process was not necessary under the rules. Nevertheless, the interviews reveal that formal bids are most common in practice.

15/27 interpreted the legal rules to mean that de-selection during dialogue must be done on the basis of a formal process:

there ought to be a formal bidding stage on the basis that it is more transparent and it is easier to mark a score than, for example, if you were just down selecting via negotiation (Lawyer 8, England & Wales).

Lawyer 6 (UK) highlighted the fact the rules refer to “solutions”: “... if a solution has not been submitted how can you fairly apply the award criteria (unless you have extremely well documented dialogue meetings)?”.

2/15 interviewees (formal bids necessary) commented that, particularly in the early phases of the dialogue stage, bidders may be down-selected on the basis of a formally assessed dialogue meeting or presentation without the submission of documents (others did not comment on this). Here, bidders would be made aware upfront that the meeting or presentation was to be formally assessed.

12/27 interviewees stated that under the legal rules a formal bidding process was not needed. According to Lawyer 5 (UK):

[f]ormality is a matter of degree but I think it can become clear in the course of a dialogue that one bidder was lagging well behind another and was providing solutions that did not appeal to the authority then they could be rejected on that basis.

8/12 (formal bidding process not necessary) stated that, although in their opinion a formal bidding process was not necessarily required, in order to minimise legal risk they would invariably only deselect on the basis of formal bids:

... in the course of a dialogue it can become apparent that someone may not match requirements even if it is not in the form of a formal bid; I think you can deselect but it is riskier. Judging on the submission of written documents which they know are going to be assessed puts you in a much safer place (Lawyer 19, UK).

Thus, it appears that, regardless of the precise meaning of the law, in the UK bidders are in the main down selected following a formal bidding process.

11.6.3.3 Bidding phases

It is apparent from virtually all interviews that the standard approach in practice in the UK is for dialogue to be broken down into a series of bidding phases, which authorities will often use to reduce bidder numbers. As dialogue progresses, the level of detail in which bidders' solutions are discussed increases. Hence, in a common early bidding phase, bidders are invited to submit outline solutions (referred to as the ISOS (Invitation to Submit Outline Solutions) stage). Here, following little (if any) dialogue meetings the embryonic versions of bidders' proposed solutions for meeting the authority's requirements will be assessed and bidder numbers will generally be reduced on the basis of these early assessments. At a later phase in the dialogue stage bidders left in the process may be asked to submit detailed solutions, which may be used to deselect further. There may also be some later phases involving even more detailed proposals and, as will be seen in section chapter 12, in some cases a dry run final tender stage will be held immediately prior to the formal close of dialogue.

The phased approach is certainly the approach favoured under the main PPP procurement programmes of recent years (schools, waste, hospitals etc.), and, as noted in the analysis of the legal rules in chapter seven, this approach was commonly adopted for PPP procurement under the negotiated procedure prior to the introduction of competitive dialogue. Although not explicitly stated in any interview, it would appear that the practice under the negotiated procedure has simply crossed over in most cases for reasons of assumed commercial expediency. Policymaker 3 explained the reasons for an early ISOS stage:

[i]t is ... a practical response by the market. The person who is most aggrieved in terms of cost and wasted time ... is the person that has come second; he has been in it a long time and has just

lost at the end. Frankly, you would always rather you had been knocked out early on before you have incurred so much cost. ISOS is a practical way of reducing the number of people in the competition and thereby reducing the overall cost. ... You just have to make sure you do not eradicate somebody who otherwise would have won.

It was seen in the analysis of the legal rules in chapter seven that, although commercially desirable, the practice of ramping up detail over the course of the dialogue stage, coupled with bidder reduction, has the potential to act in a discriminatory manner, and there is uncertainty over the most appropriate way of conducting this staged approach to bidder reduction. The interview findings in this respect are presented below. 34/48 interviewees revealed that it was considered legally acceptable and was most common in practice for an authority to look at different aspects of solutions at different stages of dialogue and vary award criteria accordingly. 14/48 interviewees disagreed with this position.

The legal acceptability of not touching upon sufficient issues in the outline solutions phase so as to enable assessment against the full set of headline award criteria to be used to judge the final tender was doubted by 7/14 interviewees:

- *I think you potentially do need to have touched upon all aspects of a bid at outline solutions. The reason I say that is that the most economically advantageous tender assessment is all about the balance between cost, risk and quality (Lawyer 27, England & Wales);*
- *I have seen dialogue documents talking about an outline solution and certain documents not being included in the outline solution. ... If you have not asked someone a question and you tell them I am going to ask this later, my argument is that you have not properly applied the award criteria; you cannot do that ... (Lawyer 37, Scotland).*

In answering questions on how much needs to be known about the make-up of each bidders bid when deselecting, a different 7/14 interviewees explained that although they will apply the full set of publicised headline criteria and weightings at all phases of the dialogue, the award criteria below that level would be tailored to the level of detail in which solutions are being considered at a particular dialogue stage:

[y]ou ask for different things. At ISOS you may ask them to allocate risk and at detailed solution you may ask them to cost that risk. Provided you have got your headline criteria and you can say you have got weightings, I think you are okay to vary criteria under that at different stages (Lawyer 38, England & Wales).

On the basis of 34/48 responses, it appears most common for the contracting authority to look at different elements of the solution at different phases of the dialogue stage and vary award criteria accordingly (apply a 0% weighting, automatically give full marks, or not use the particular award criteria); the only example given was the avoidance of financial issues during the early phases of the dialogue stage. It was explained by 10/34 that they would specify weightings as a range (see chapter four) (e.g. 0%-70%) in the descriptive documents and then vary the weighting at different stages within that range, some setting out upfront the precise weighting to be applied at each stage. The following are quotes representing this practice:

- *the best way of doing it is to have your bag of award criteria ... and then for outline solutions it is not possible to talk about financials; so you have that scoring zero at that point and you do not assess that bit. Say, if the weighting is 40% you just do not score that 40% and they are tested on the 60% and then at the next stage the 40% comes into play. Last time I spoke to the*

Commission their line was that it would all have to be set out in advance. So, if there is sufficient transparency, people know you are not doctoring it as you go along, then I think that kind of flexibility is available (Lawyer 39, England & Wales, London);

- *I have actually seen that quite a lot. In many respects I think it is potentially discriminatory to put a weighting on price at the outset because there is no integrity in the information. So, if I lost out because I was honest with my price, and then others' prices change later on, I would be suitably aggrieved ... (Lawyer 10, Northern Ireland).*

14/34 interviewees (others not commenting) commented that in order to limit the risk of legal challenge the contracting authority should ensure a transparent approach and one according to which the award criteria is varied equally for all bidders . So, it should explain in the descriptive documents at the outset that, for example, financial aspects of bids will not be looked at or assessed in the early stages of dialogue but will be during the later stages. Not only might it be said that this approach is in keeping with the requirements of the Directive, but, as three interviewees point out, this will start the challenge time limit:

the key thing is that everybody knows what the criteria are going to be right the way through. You are back to the, 'are we playing academic what the rules are or are we playing what is the reality and who is going to challenge?'. Those time limits become important then because if everyone has known from day one that these are the rules then they cannot challenge after three months (Lawyer 23, England & Wales).

Also, four interviewees expressed doubts over the appropriateness of an outline solutions stage, specifically where they saw such phases as being used as extensions of qualification

and selection. The main concern seems to be over situations where an ISOS reduction takes place following very little or no “dialogue” with very little information about solutions on the table:

I do not like ISOS because I do not actually think it is about anything; it is just false comfort; who can write a touchy, feely, cuddly document stuff ... I have got an ISOS stage because I have basically fluffed my pre-qualification ... In the waste sector they actually qualify as many as 12 bidders and go down to ... three or four just from a fluffy ISOS. The reason they do it is because they do not want to make a decision about technology ... [W]hat is it you are actually testing? That they can write an essay? ... I am a bit cynical here, but unless you bring money into it then what are you testing? I am in a small minority. That is the way we have gone in the UK. Anything can come out of it; anyone can win, but I am not sure how much you learn from it ... (Lawyer 17, UK);

In two interviews with procurement officers the ISOS stage was described as taking place prior to the formal commencement of dialogue.

11.6.3.4 Application of the award criteria

11.6.3.4.1 Introduction

Throughout the course of data collection it became quite apparent that uncertainty surrounding the law applicable to award criteria was a major concern. This was so particularly in light of recent case law on the subject of award criteria, made in the context of procedures other than competitive dialogue (see chapter four).

The application of the award criteria was perceived to be a high risk area, especially considering the stream of case law emanating from EU and domestic courts on the

subject in recent times: "... it is an easy hook. There are lots of areas of challenge. With the case law there is more certainty about what is wrong behaviour: a vicious cycle" (Lawyer 18, UK). It was explained in nine interviews that award criteria can be difficult to apply, for example because bids can become very difficult to differentiate; thus, the slightest of technical breaches can have the potential to make all the difference between de-selection and selection or winning and losing.

Six interviewees spoke about the difficult task of developing award criteria that can allow for different solutions to be compared in a fair manner:

... the difficulty is when you are ... talking about different technical, different financial, different commercial make-ups; the ... authorities find it very hard comparing what they consider to be apples and pears in a fair way and having award criteria that allow them to do that (Lawyer 28, England & Wales).

11.6.3.4.2 Disclosure of award criteria

As discussed in chapter four, there is a high degree of uncertainty surrounding the extent and timing of award criteria disclosure. It will be seen that the interview findings do not present a straightforward picture of UK practice on this issue; this is compounded by the fact that interviewees tended to be quite vague in their responses in relation to the rules on award criteria.

From a practical perspective, there appear to be two schools of thought. One is to disclose as much as possible as early as possible; this way the authority avoids any accusations of developing criteria to favour a particular bidder or an argument that, had it been assessed against all criteria, a deselected bidder might have been awarded different

marks. The other is to hold back some of the detail on evaluation and disclose on a per stage basis as the dialogue progresses and discussions become more detailed.

The findings below relate to how interviewees tend to apply the law in practice, not what they think the law is or should be. However, in terms of the law, 16 interviewees emphasised its uncertainty in this area, with 5/16 calling for the courts to clarify the issue.

18/41 interviewees appeared to signal a strict approach, explaining that in practice contracting authorities will set out extensively prior to the start of the dialogue stage the award criteria and weightings developed for each phase of the dialogue stage. The following are a selection of comments, which best represent this category:

- *... what transparency has been translated into is a requirement for specificity at a very early stage ... So, for example, on the need to be able to specify award criteria right at the commencement of the dialogue is quite tricky in terms of lack of knowledge at that stage. ... It would be useful to have clarity over the extent to which you need to specify award criteria at the beginning of the process ... It would make sense to start off with something that is reasonably general and then make it more specific as you move through, but I am not sure you can at the moment (Lawyer 22, UK);*
- *... they are putting the whole dialogue procedure out. I have seen it at [Outline Business Case]. So they have already got how they are going to evaluate and there is a whole package ... This may be a product of the climate of challenge and some of the judicial interpretations on evaluation. ... I think the big issue for us that we have grappled with is the extent to which we can identify evaluation criteria on a per stage basis, as opposed to saying from day one these will be the criteria, particularly when you do not know what the project is going to look like when you are*

starting out, but I think we are increasingly of the view, and seeing market practice, to try and set this out from the outset. ... As early as possible. ... Competitive dialogue is an iterative process where things develop throughout, so the rationale should be that your criteria can develop as well
(Lawyer 2, England & Wales).

23/41 interviewees expressed a more flexible approach, whereby there was viewed to be some scope to disclose sub-criteria and sub-sub-criteria on a per-stage basis. Although not falling within this category, Lawyer 12 (UK) commented that, if allowed, the sub-criteria etc. would need to be entirely consistent with the award criteria already publicised. According to Lawyer 28 (England & Wales), “[t]his is a nonsense with competitive dialogue because you are not in a position to be prescriptive because if you could be and the marketplace would be sympathetic to that you would be using the restricted procedure”.

11.6.3.4.3 Variations to publicised award criteria

As was discussed in chapter four, the extent to which changes can be made under the procurement rules to publicised award criteria is unclear. Interviewees were specifically asked about the scope for varying advertised headline award criteria, sub-criteria and weightings in competitive dialogue. The findings are presented below and are not conclusive on this point. As with most areas, it seems that out of necessity all manner of award criteria variations take place in practice, with risk of challenge being a key factor behind these decisions.

Seemingly in compliance with the Commission’s explanatory note, 10/45 interviewees argued that legally there was no scope for varying award criteria once publicised. These responses, however, are lacking in detail and it may be that the interviewees were only referring to headline award criteria only (clarification should have been sought on this).

23/45 interviews accepted that there was some scope for variations in award criteria, generally suggesting that whether or not the change was permitted would depend upon the materiality of the change. 4/23 stated that there was some scope to vary weightings. 11 spoke about there being some scope to vary criteria under headline criteria; two of these interviewees mentioned *Case C-331/04, ATI*⁵⁶⁴ in this regard:

- *[w]e would say at the outset that award criteria are indicative and we reserve the right to change them; but, if there were changes they would never be material ...* (Lawyer 16, Northern Ireland);
- *... it depends, sub-criteria and sub-sub-criteria, maybe. You have to look at the ATI case; that is the classic case on that. How far should you be able to do it? Again, it all depends on the circumstances* (Lawyer 15, UK).

7/45 interviewees were not clear about the precise scope for variations, with one Procurement Officer 2 (body governed by public law) stating that she/he would need to seek external legal advice on the issue. 5/45 interviewees also spoke about how the decision would depend very much on practical considerations, such as the timing of the change. According to Lawyer 1 (Scotland), the decision would ultimately come down to a risk assessment:

... you would have to analyse any change in terms of – is this a material change? Would it have changed the outcome? Would it have changed the economic balance when we got to procurement? I would say you could do it but it would be very much on a risk assessment basis.

⁵⁶⁴ *ATI*, fn.124

With this in mind, four interviewees argued that, provided the authority is transparent and considering the rules on time limits for challenge, only major changes are likely to be at any real risk of being challenged:

... you have three months to challenge and very few will challenge whilst they are still in the competition. Provided everybody knows about the change, it is only when a change means a significant change in direction that a challenge is more likely, as that is when the costs mount up
(Lawyer 18, UK).

Furthermore, it was suggested by Procurement Officer 11 (local government) that to limit legal risk the authority would be well advised to discuss the change with bidders. If the alternative is restarting the procurement, they may be willing to accept the change and give assurances that they will not challenge.

11.6.3.4.4 Selection and award criteria

The distinction between selection and award criteria was analysed in chapter four. 12 of the legal advisors interviewed (others not commenting) commented upon a lack of awareness amongst certain contracting authorities of the law in this area. These comments were generally based upon experience from training staff within authorities or through encountering situations in practice where authorities had used or had sought to use what they perceived to be clear examples of award criteria to select firms or vice versa. For example, according to Lawyer 23 (England & Wales), “... they look shocked when you tell them about the difference between selection and award criteria. This is a major part of the training I do. It has been embedded in practice for so long”.

Lawyer 2 (England & Wales) explained how her/his interpretation of this aspect of *Lianakis*⁵⁶⁵ can be difficult for those not involved in the procurement on a day to day basis to accept:

[i]t has caused a very difficult issue on this particular project where one of the bidders is continually in the press for non-performance on a different contract ... Our advice is that you cannot ... take this into account because it is not the bid they are putting forward. It is hard for the council to accept, particularly for people not directly involved on the procurement. They just see that you are taking this bidder through and they see on 'News at Ten' that they are performing really badly on another scheme.

Although an issue not specific to competitive dialogue, 26 interviewees set forth their interpretation of Case C-199/07, *Lianakis*. 22/26 favoured what might be perceived to be a more flexible reading of *Lianakis*; that is to say, criteria such as experience are capable of being used at award stage provided they are forward looking, related to ability to perform the specific contract being procured (not capability in general). 4/26 expressly disagreed with this view, stating that they interpret *Lianakis* as ruling out any cross-over between selection and award criteria, however commercially inappropriate.

This area of the law was, however, noted to be difficult and fast moving and that there can be a fine line between what is and is not acceptable criteria at the separate stages. The following comment exemplifies the perceived high threat of legal challenge for potential non-compliance in this area:

⁵⁶⁵ Case C-199/07, *Lianakis*, fn.117

... we are advising caution. A current competitive dialogue involves award criteria based on 4Ps templates; they had financial standing as award criteria. We went out with it, but after outline solutions we moved the weighting to 0% in light of Lianakis so that we could not be criticised for having selection criteria in the award part. The risks were too great (Lawyer 26, UK).

11.7 One bidder situations

In four interviews a situation was described where, usually due to bidder financial troubles, only one bidder remains in the process prior to the close of dialogue. Here it was clear that the decision whether or not to persevere with the one bidder often comes down to an assessment of the risks involved. The approach adopted by Lawyer 38 (England & Wales), with the support of a policymaker, was to continue the process with the remaining bidder competing against a shadow bidder. That is to say, "... the authority has brought technical and financial consultants in to devise a solution and reference project which will be priced on the best available information ... to provide a benchmark to compare against to see whether what is submitted is value for money".

11.8 Concluding remarks

The chapter has presented findings on legal and practical issues arising before the close of dialogue. It can be seen that up to this stage the staged approach to bidder reduction is very similar to past UK practice. In relation to the application of award criteria when reducing bidder numbers during dialogue there is clearly great legal uncertainty resulting in variations in practice in the UK.

12 Findings: close of dialogue to contract signature

12.1 Introduction

Chapter 12 will present interview findings for the post-dialogue stages of competitive dialogue. Following a similar structure as the legal analysis in chapter seven, chapter 12 will consider practical and legal issues in the same order they are encountered in practice. The chapter will begin in section two by looking at issues arising in the run up to the final tender stage. In section three the issues arising at the final tender stage will be presented; these include issues such as the minimum number of tenderers permitted and the scope for clarification, specification and fine-tuning of tenders. Section four concentrates on the preferred bidder stage and the scope for changes to tenders or the call for tenders. This section of chapter 12 also looks at the timing of the *Akatel* standstill and information requirements.

12.2 Formal close of dialogue

12.2.1 The requirement for complete final tenders

12.2.1.1 Introduction

The Directive/Regulations require final tenders to contain “all the elements required and necessary for the performance of the project” (Art.29(6)/Reg.18(25)(b)). Furthermore, there are express limitations placed upon the work that can be done post-appointment of a preferred bidder (Art.29(7)/Reg.18(28)). As was discussed in the analysis of the legal rules in chapter seven, in view of the genesis of the legal rules on competitive dialogue these two provisions have the potential to heavily impact upon UK PPP procurement practice, in particular if they are applied so that the early appointment of a preferred bidder no longer takes place; however, as pointed out in chapter seven, the wording of

Art.29(7)/Reg.18(28) is not consistent and there is some scope for finalising matters post-close of dialogue. In order to gain an understanding of interviewees' interpretations of the law and their practical experiences in this important area, all interviewees were asked about the extent to which final tenders were final and what, if any, matters might be left to be resolved with the preferred bidder.

Although not always going into great detail, the majority of interviewees (22/35) set forth a strict literal interpretation of the requirement for complete final tenders. These interviewees suggested that final tenders are required to be at a very high stage of development, for example, so that it is possible to conclude the contract immediately after the selection of the most economically advantageous tender. In comparison, only 6/35 interviewees adopted what might be considered to be a more flexible interpretation of the law at this stage. Under this more flexible approach, interviewees interpreted the law as requiring final agreement on material points only. 7/35 interviewees expressed the view that the law was not certain and hence could not say how much flexibility there was.

Regardless of their interpretation of the law, in relation to practice, most interviewees (25/47) recognised that for whatever reason (explored below) when running competitive dialogue procedures a strict literal approach was not followed. In contrast to this experience, 17/47 interviewees adopted a strict approach in practice, and 8/25 interviewees (strict approach not possible), although not engaging in or advising upon such practices themselves, stated an awareness of the existence of such strict approaches in practice. In 5/47 interviews legal practice was said to vary, depending upon the nature of the procurement. It can be seen from this brief snapshot that, although the majority of interviewees appear to take a literal interpretation of the law, this is not necessarily carried through to the practical application of the legal rules. In terms of UK legal practice, it is

very difficult to say, on the basis of the interview findings, to what extent final tenders are complete.

12.2.1.2 The law

22/35 interviewees interpreted the requirement for final tenders containing “all elements required and necessary for performance of the project” literally:

- *[a]ll the Is needed to be dotted and the Ts needed to be crossed. We had to have absolutely final contracts in place. All bidders' amendments to documents had to be in place. This is where it becomes very difficult, but ... you have got to resolve everything regardless of expense. This is crucial because otherwise how are you comparing apples with apples or pears with pears?*
(Procurement Officer 1, body governed by public law);
- *[final tenders] need to be capable of being signed. ... The final BAFO [Best and Final Offer] should be executable* (Lawyer 20, UK).

Those clearly adopting a flexible interpretation of the requirement for final tenders containing “all elements” were in the minority (6/35). Here, interviewees tended to argue that there was scope for leaving some matters the post-tender agreement of which were unlikely to impact heavily on the preferred bidder's score:

- *[a] narrow interpretation ... is counterproductive. You have complex contracts that need discussion and limiting people, front loading the whole system and asking bidders that do not stand a chance to spend £millions participating in a long dialogue ... Our perspective is different to the Commission's perspective. They say just follow the letter. Our view is concerned with discrimination and transparency; provided you respect transparency and fairness you are okay*
(Lawyer 19, UK);

- *[f]or compliance you would not want to leave anything to the final stage that could affect the order of award* (Lawyer 11, Scotland).

7/35 interviewees expressly stated that the law was uncertain and hence the matters to be left to be finalised with a preferred bidder often came down to practical considerations (such as risk of challenge, cost, time etc.). According to Lawyer 24 (UK), it is very common that, where a contracting authority is told by legal advisors that it is appropriate for them to close the dialogue and call for final tenders this is questioned internally: "... you get someone else from somewhere saying, 'no it is not; how do they know?'. Well, no one knows ...".

12.2.1.3 Practice

A cautious interpretation of the law, such as those above, did not necessarily mean that a cautious approach was adopted in practice. In contrast to interviewees' interpretations of the law in which 22/35 adopted a strict literal interpretation of the rules, only 17/47 interviewees stated that in practice such an approach was adopted. The majority of interviewees (25/47) explained that in practice a more flexible approach was taken, i.e. whilst material points will be finalised, this is not the case in relation to all points of detail. Interestingly, 9/22 interviewees stating a strict literal interpretation of the law explained how this strict literal approach was not possible in practice. Lawyer 4 (UK) is one example of an interviewee whose legal interpretation differed from his/her practical experience:

... tenders should be ... completely final ... but no one is going to fully negotiate a full legal agreement and spend a huge amount of time and money on lawyers' fees getting the agreement in a form where they are ready to sign if they are not the preferred bidder. So, it is all very well saying

that only 'clarification' is allowed and that is fine for commercial principle, but actually in terms of negotiating the legal documentation, getting all that done, there is still going to be some toing and froing at preferred bidder stage. ... [I]t just does not make sense for you to spend thousands of pounds on lawyers' fees negotiating an agreement you are never going to use.

17/47 interviewees stated that in practice they adopted a strict approach to final tenders in which very few, if any, matters are left unresolved. Also, 8/25 (strict approach not possible) interviewees indicated that, although not followed or advised upon by themselves, they were aware of the existence of such strict methods in practice:

... people are asking for a higher degree of certainty in terms of comments and documentation and so on. Some lawyers will want you to have finalised everything at bid submission. In the past you might have had a sheet of main outstanding points and there would be a pragmatism around what you could and could not do and to what extent you would involve funders or subcontractors or others in the detail ... (Lawyer 17, UK).

This indicates that a strict literal approach to the matters that must be resolved prior to close of dialogue is reasonably prevalent in UK practice. Several reasons were put forward to explain the cautious approach. Firstly, 11 interviewees cited the uncertainty coupled with risk of legal challenge due to incomplete bids leading to unlawful post tender negotiations. According to Lawyer 10 (Northern Ireland), "... there is a drive to get to commercial certainty when ... still in dialogue due to the uncertainty about what is and is not permissible post-closure of dialogue". Also, Lawyer 13 (England & Wales) explained, "[b]ecause there is uncertainty and because people are nervous they are tending to interpret [the rules] very cautiously. That means you get this duplication and triplication of bid costs". According to Procurement Officer 1 (body governed by public law), "...

you are in this climate of fear”. The risk of legal challenge and its impact on contracting authority behaviour is looked at in greater detail in Chapter 14.

Five interviewees noted that authorities may view it as being in their interests to require a high degree of bid development whilst bidders are still in competition: “... [authorities] are ... very rigid I think on the issue of clarification because it suits them commercially. It is a good commercial stance ...” (Lawyer 15, UK).

It was also mentioned by two interviewees that, because of the nature of the contracts they had experience of procuring under competitive dialogue, requiring a high degree of bid development was not seen as problematic. For example, according to Lawyer 22 (UK):

.. this is an area where there is a difference between IT and non-IT, in that it is now very rare for IT projects to be externally funded. It is easier for us to get to completed contracts in IT procurement as compared to projects where you are trying to get external funders onboard who are not interested, and things like planning permission, we do not have that ... We do not have the same sort of pressure at preferred bidder. Nowadays, they are pretty complete contracts.

This is not necessarily the case, however; two interviewees referred to ICT procurement, particularly unique ICT procurement, as examples of projects where bid costs were often high and it was often difficult to get complete final tenders.

Finally, nine interviewees explained how the requirement for highly developed bids prior to close of dialogue was often a requirement or a result of requirements made by certain government departments or bodies responsible for public investment schemes (such as

Partnerships for Schools). For example, as explained by Policymaker 2, the Interim Final Business Case/Appointment Business Case will dovetail with the close of dialogue. It seems that a contracting authority will need the business case approved prior to the formal close of dialogue in order to gain clearance for the scheme to go ahead. According to Policymaker 2, the business case signoff for hospital PPP procurements is predicated on there being a done deal by the close of dialogue. Lawyer 26 (UK) explained his/her experience of this requirement:

[w]e had to go through an interim final business case process with our sponsoring department; so, as part of that, we had to get sign off for all our derogations from Local Partnerships. They run through a similar process on BSF projects. I found that ... helpful because (a) it forced ... issues out from bidders and funders, and (b) it gave us confidence that we were not going to be met with a rejection of derogations after we had closed dialogue. ... It effectively acted as a dummy run of the final tenders. They ran financial models as part of that process, which was helpful as it threw up that at least one of the bidders was not affordable.

The procurement of hospitals appears to be one area where a particularly high degree of bid development is required prior to close of dialogue. For example, Lawyer 3 (England & Wales) described his/her experience of such procurements in some detail. The level of design detail was, for the author, unexpectedly high:

[w]e required a high degree of design detail at final tender stage. ... [The plans that bidders were required to draw up for the hospital] is scale 1:50; it shows the fixtures and fittings in each room; you can see that there is a hand basin here, a soap dispenser here, and even plug sockets. So, it even tells you the number of plug sockets that are in each room. You have to demand that level of detail in order to get properly priced bids ...

Lawyer 3 went on to explain how it was necessary, to the greatest extent possible, to reduce the opportunity for bidders to introduce something new, which is material, once selected as preferred bidder that has not been the subject of dialogue. For example, he/she advised how in the hospital procurement it was necessary to “test bidders’ assumptions”, as some bidders will attempt to gloss over certain issues in order to offer a lower priced tender. He/she described how a bidder got through to the latter stages of dialogue, but hidden in various schedules of the bid were various assumptions, e.g. that there will be no section 278 Highways Act 1980 works, that there was no Japanese Knotweed (an invasive plant, which can damage buildings), and also that there were no ecological risks (e.g. bats). If these assumptions were inaccurate there would likely be a dramatic upward impact on the price of the bid. Hence, prior to close of dialogue in this procurement bidders were asked to produce full financial models (i.e. where bidders price everything): “it is costly for bidders, but really the only way that the procuring authority’s advisors could test the assumptions in the bids. We want to know, for example, that they have priced for ground investigation and removal of any contamination”.

Linked to the cautious approach to the legal rules described in the paragraphs immediately above and the need to avoid closing the dialogue stage too early and limiting exposure to risk of legal challenge, 11 interviewees (others not commenting) described usual practice as being to have a dry run final tender stage prior to close of dialogue:

[t]he one issue that people used to be worried about was very much the issue of saying well once you have closed dialogue you are not allowed to talk anymore; what do you do? I think the widespread use of a sort of dummy BAFO [Best and Final Offer] is pretty fairly settled and seems to work quite often ... (Lawyer 12, UK);

The author has been informed anecdotally that ideally, where a draft final tenders stage is held prior to close of dialogue, final tenders will consist of little more than a short reference to the draft tender. This fits with comments by Lawyer 6 (England & Wales, London) that after formal close of dialogue “in some cases local authorities will only allow you 48 hours to put in your final bids”.

Although the above practice of holding a dry run final tenders stage was raised spontaneously in 11 interviews and some interviewees referred to such a practice as being “well established” and “widespread”, on the basis of these figures it is difficult to say with any certainty how prevalent the practice is. Indeed, it may be that the situation is more nuanced than indicated by the quotes in the above paragraphs. For example, according to Lawyer 13 (England & Wales), whether a dry run final tenders stage is held prior to formal close of dialogue will depend upon the nature of the contracting authority, with this practice more common amongst risk-averse authorities because of the legal comfort gained; more bullish contracting authorities may regard a dry run as unnecessary:

... it will very much depend upon the client's risk appetite. If you get a nervous client who wants to follow the letter of the law, they will want to have everything done during dialogue, and some of them, I am sure you will or have come across this, have ... a dummy run ..., so that they are confident that the bids they get back will contain all the elements necessary. Other clients are a bit more feisty and prepared to accept a bit more flexibility at preferred bidder stage and will not be terribly bothered about that. They will not have hammered down all points; there will be quite a lot of square brackets and things like that; so, it will very much depend on a client's risk appetite.

Also, there is the potential for the effectiveness of a draft final tenders stage to be negated by external factors, for example if sign-off of the interim final business case/appointment business case takes a significant period of time. This was brought to the author's attention through anecdotal sources (i.e. informal conversations with procurement lawyers).

Most interviewees (25/47) accepted that, although they might strive for strict literal compliance with the requirement for complete final tenders, in practice it was not possible, for example because bidders would not be prepared to incur certain costs at risk, because bidders may be being uncooperative, or because of time or (internal) cost pressures necessitating a premature close of dialogue:

- *... the reality is that funders will not get involved until [preferred bidder stage] ... I can see the positives of competitive dialogue, but I think it is idealistic to think that competitive dialogue overcomes the preferred bidder problem because in complex projects so much does still have to be back ended and things will happen ... (Lawyer 7, UK);*
- *... [a]s I read it, it is quite narrow, but in practice there is a lot of negotiation particularly around the legal; that is driven by, in part, political pressure to conclude the dialogue. When to close the dialogue is a question in itself. There comes a point where people realise they are spending a lot of money; the pressure comes politically (internally) but also from developers, 'we need to get this done, we need to draw it to a head'. There is a pressure to close as early as possible (Lawyer 34, England & Wales).*

It was further noted by four interviewees that bidders can be under an incentive to hold back information throughout the dialogue stage; for example, a bidder that fully marks up

a contract may be at a disadvantage to other bidders that have held back their position in relation to acceptable contract terms and conditions.

Although 2/25 who adopted a flexible approach to the requirement for complete final tenders indicated that PPP practice had changed very little since the introduction of competitive dialogue, i.e. there was still an early appointment of a preferred bidder and significant negotiations with that preferred bidder (“[w]e have not seen much difference maybe because people do what they are used to doing” (Lawyer 18, UK)), most (10/25) indicated that, despite the practical obstacles to achieving fully complete final tenders, final tenders are more final than they might have been for a PPP project procured under the negotiated procedure pre-competitive dialogue (though not all interviewees agreed with the Commission’s characterisation of UK PPP procurement practice pre-competitive dialogue): “[d]o not expect to close the dialogue and have six months of negotiations. The substance of the tender must be there. You need to bring [the dialogue] to a fuller conclusion than under the negotiated procedure, but there is a good room for manoeuvre” (Lawyer 19, UK).

The category of 25 interviewees who adopted a reasonably flexible approach in practice gave examples of matters that may be left to be finalised after the close of the dialogue stage, and these generally corresponded with those matters listed in the Partnerships for Schools guidance and the 2008 OGC/HMT guidance (detailed site surveys, investigation of legal title, lender due diligence, detailed planning applications, etc.). It was, however, highlighted, by 5/25 interviewees that it was not possible to generalise about the matters that would be left to be resolved just with the preferred bidder, as this would vary depending upon the nature of the procurement, e.g. the cost for bidders, the practicalities,

and the extent to which any matters had the potential to have a material (could it effect the award decision?) impact on price or the risk/reward balance.

In addition, the 2008 guidance on the requirement for complete tenders was noted as helpful, and a number of interviewees stated that they gained comfort from the acceptance in the guidance that in practice certain issues had to be left until close of dialogue.

11/25 who adopted a reasonably flexible approach spoke about how, provided agreement had been reached on points in broad terms, they preferred to delay some of the detailed drafting of contractual documents until there is only one bidder left in the process:

... [I]here is a perception that you have to have nailed down every individual clause and agreed that before you can close dialogue. We think that is wrong. We think you can close dialogue when you have got agreed positions ... and you can actually do the finessing ... afterwards. But, unfortunately that is not the way projects are being delivered, which is causing huge costs ...

[Y]ou should not be looking to close out every individual word during dialogue. For example, on a project at the moment we are agreeing principles so that 95% of the contract is agreed, but we are not spending £1,000s trying to nail the final points. If we had taken the view that we needed to close down and draft every point with both bidders it would have taken months. ...

When you get lawyers involved and you are looking at detail, it is no exaggeration but you are doubling your costs because you have got bidder A and bidder B . We need to postpone some of the drafting ... (Lawyer 2, England & Wales).

These interviewees were not clear on the precise amount of detail being finalised post-tender; thus, it is hard to assess the magnitude of the work that may be taking place with the preferred bidder.

3/25 interviewees spoke about the need in certain procurements to delay full design development due to cost. For 2/3 (Lawyer 6, UK; and Lawyer 24, UK) this was in relation to PPP housing developments:

- *[a]t close of dialogue you only have designs for one or two sites out of ten. It would not be possible to do it any other way; you would be in dialogue for years and you would never get any houses built. Our view is that as long as the authority is transparent about that approach from the beginning of the process and clear on the parameters on which a bidder becomes the preferred bidder then it is going to be okay;*
- *... we had an accommodation project with multiple sites, 13 different buildings. Are bidders really supposed to design all 13 before we call for final tenders or can we not let them bid on the basis of four samples and work the rest up at preferred bidder stage? Of course, that would be going beyond 'clarifying'; they have nothing to clarify, they are actually designing the other nine. ... The competitive dialogue does not work for these large projects ...*

12.2.2 Involvement of lenders prior to close of dialogue

30 interviewees noted the problems with private lenders (e.g. banks) being reluctant to fully engage in the procurement process until their client had some guarantee of success due to the costs involved. According to these interviewees, lenders due diligence post dialogue invariably gave rise to changes to tenders/requirements, increasing the risk of challenge.

In view of the difficulty with lenders, 11/30 explained how they had attempted to address the problem. These include, for example, getting lenders (or shadow lenders) to attend dialogue meetings (Lawyer 3, England & Wales); getting bidders, as a condition for submitting a final bid, to get a letter from their lender stating they wish to raise no additional points on the contract (Lawyer 31, England & Wales); investigating the expectations of lenders pre-procurement (Lawyer 34, England & Wales); and funding competitions (Policymaker 2). Despite the above, only 2/30 expressed the opinion that the situation with respect to lender engagement in competitive dialogue procurement was satisfactory. The reluctance to incur unnecessary cost and a lack of interest in the procurement rules were cited as reasons for this.

Furthermore, 22 interviewees recognised that due to the volatile funding market caused by the 2007 financial crisis even when banks do fully engage and give sufficient financial terms to a bidder it is unlikely that a bank will be able to hold to those terms through to financial close (potentially a year or more down the road).

2/22 interviewees described how, after a period of good behaviour, in recent years the situation with funders was deteriorating:

- *[i]n the good/ bad old days, you used to lie until you got your bank along. You relied on your bank to say how it is. The bank would come in at preferred bidder and say, 'I like the project but I cannot do this, this and this'. After several meetings, a lot of shouting, and a few tears, the bank would get its way. We have gone back to that situation. If the bank does not like it ... [a] contracting authority can point to the rules, but the bank will just say, 'if you do not want this money do not have the money'. What will the authority say then? It will say, 'I would rather have the money than stick to the rules'. Anyone who has actually closed a project in the*

last two years has done a fantastic job, but from a procurement law perspective, they will have had to cut a few corners (Lawyer 17, UK);

- *it is increasingly the case that banks are getting back to the bad old days, coming in late and getting up to old tricks (Policy maker 1).*

These were the only two interviewees to make such comments. Although no other interviewees made statements conflicting with these views, due to the limited numbers involved, it is difficult to say with any certainty how representative the views expressed in this paragraph are.

12.2.3 Other issues

A further matter identified spontaneously by a limited number of interviewees (not considered by chapter seven) as potentially problematic at this stage is where bidders' solutions are at different levels of development. Although most interviews did not appear to suggest this to be a significant practical issue, four interviewees (Lawyer 6, UK; Lawyer 12, UK; Lawyer 13, England & Wales; Lawyer 26, UK) discussed a situation where solutions are being developed by bidders with the contracting authority in parallel sets of discussions, but the solutions are at different levels of maturity. Lawyers 6, 12 and 26 spoke spontaneously on this issue from what appeared to be practical experience. Lawyer 13, however, responded to a direct question and spoke in hypothetical terms. Under the legal rules, a contracting authority "shall continue ... dialogue until it can identify the solution or solutions ... which are capable of meeting its needs" (Art.29(5)/Reg.18(24)). According to these legal advisors, it is not clear whether the authority has some flexibility to close dialogue as soon as one bidder's solution is up to the required level or whether the authority must wait until all solutions being taken to the final tender stage are at a similar level before closing dialogue. It was suggested that to be able to provide a fair

evaluation the authority must delay the close of dialogue. Lawyer 26 described how a central government body or department interfered in the conduct of the process at this stage:

... we had one bidder who had put together a solution which clearly met each of our council's needs but ... a second bidder ... was probably going to be unaffordable. We made the point that under the Regulations we are allowed to close dialogue with one solution that meets our needs. We were met with a response, 'we are not happy with that'; from the sponsoring partner's point of view that did not show sufficient competition. ... If they had have stuck to their guns, not allowed us to close until there were two acceptable solutions, how long do you stay in dialogue for? Every week in dialogue is costing £1,000s. If you think they are miles off, there is an argument for saying that you are misleading that bidder by keeping them in a process ... Having said that, the second bidder, in the four week period we extended dialogue by, got up there and they ended up being the preferred bidder. Maybe they were right.

12.3 Final tenders

12.3.1 Numbers

The uncertainty surrounding the minimum number of bidders that may be invited to submit final tenders was noted in chapter seven. It can be reasonably concluded from the interviews that having only two bidders left in the process at final tender stage is not a controversial issue. Indeed, virtually all interviewees accepted that the minimum number of bidders permitted is two. Only one interviewee disagreed with this (Procurement Officer 5, local government), arguing that it was lawful for a contracting authority to invite final tenders from only one bidder. Also, Lawyer 12 (UK) discussed the possibility of taking just one bidder through to the final tenders stage to bid on multiple solutions:

[w]hat in practice I have not seen is while you could end up in theory with potentially saying, 'look you are bidder A and you have idea one and two and I want you to take those two forward, you are bidder B you only had one idea that I did not like so you are not going forward'. People are tending to come out of it and say, 'bidder A go forward with one, Bidder B go forward with one, Bidder C go forward with one. The way I read the law on it actually is you might be able to say bidder A go forward with one and two. People are not applying the law like that, but it would be logical for them to do so, but no, no. ...

It is difficult to give a precise average figure for the number of bidders invited to submit final tenders, as this seemed to vary from procurement to procurement, depending, for example, upon the authority, the nature of the procurement, and the bidders involved; however, 47 interviewees described the final tender stage involving two-three bidders: 22/47 described how final tenders were invited from two bidders; 14/47 described how three bidders were involved at this stage; and 11/47 explained how their experience had varied between two and three bidders at final tenders stage. No interviewees described this stage as involving a greater number than four bidders.

The number of bidders invited to submit final tenders tends to be based on practical considerations; for example, the costs of requiring bidders to prepare final tenders at risk will be a key consideration: “there is a mandate to get from three–two very early in the dialogue ... nobody wants to be at risk with too many people in the game when things start to get really expensive, which is round about the second stage of the dialogue. ... [T]here is an understanding that there should be a very small group at that stage” (Lawyer 7, UK). Further, the more bidders at the final tender stage, the more expensive it is likely to be for the authority: “... authorities usually want to have a fairly short list because it is

just time and money consuming to process four or five bids at once. ... [T]here is somewhat of a practical pressure to keep numbers down” (Lawyer 5, UK).

A further consideration may be the number of bidders taking part in the process, voluntarily dropping out of the process or the likelihood that bidders may drop out. For example, due to a lack of interest, Lawyer 37 (Scotland) was not able to take three bidders through to the final tender stage as planned: “The big procurement we are doing just has two bidders in it and there is no step down; we did not get enough interest despite offering to pay tender costs. The original intention was to take three all the way through to the end”.

12.3.2 The requirement

The legal analysis explained how, unlike the restricted or open procedures, at no stage during a competitive dialogue is the authority required to draw up a detailed specification for bidders to tender against (chapter seven). The responses of 19/26 interviewees reveal that contracting authorities in the UK will tend to require bidders to tender against an output-based specification that is drawn up broadly enough to allow for each bidder’s individual solution which they have worked up with the authority over the course of the dialogue stage. It appears that other approaches are less common: 4/26 interviewees explained how bidders tendered against a single detailed technical specification; and 3/26 interviewees described how bidders tendered against separate specifications. Although the above is interesting in terms of the different approaches existing in practice, the author is cautious to generalise on the basis of these findings. Responses were generally brief and it may be that a combination of approaches are employed within each procurement, e.g., for technical, legal, and financial and different aspects thereof. This was not clearly stated in any interviews; however, on reflection the author feels it may have inferred in certain interviews.

As noted in the discussion of findings on confidentiality issues (see chapter 11), it is most common for bidders to work up their individual solutions individually in parallel sets of dialogue, with them submitting final tenders against a broad output specification (possibly defining generic aspects of the solutions) (19/26 interviewees). Indeed, it was mentioned by 2/19 interviewees that the requirement may not even be reissued prior to the final tender stage: “[a]n outline specification has allowed the authority to put out the same specification; it does not need to keep altering it because it is only an outline solution” (Lawyer 24, UK). Because of this approach, the author was given the impression that the occurrence of non-compliant tenders is quite rare and not such a practical issue as it might be in a restricted or open procedure where tenders must be submitted in line with a detailed technical specification; however this was not stated explicitly in any interviews other than the following:

... the trouble is because a competitive dialogue kind of moves around quite a bit, if authorities are not very clear in terms of what they want it can be harder to work out what a non-compliant tender is because there is not an original tender document that says we want it is this form and sometimes authorities are not as precise as they should be in terms of determining what they are looking for in terms of final bids ... (Lawyer 9, England & Wales).

The approach outlined above (bidders tendering against output specifications) is not the only approach, and it may be that the approach taken varies from procurement to procurement. For example, it was explained by 4/26 interviewees how, perhaps for less complex projects, the information gathered during the dialogue stage may allow the contracting authority to draw up a single generic specification:

... either we will get down to a generic specification that they can all meet or we will spec' it in output terms. A generic specification is the result of a natural process: 'there is only one way to do this' and 'you can all do it' and 'we are satisfied the generic specification is the best way'. ... [Y]ou are very clear exactly on what the [solution] is; you can specify the type of equipment, the type of software, and it is generic enough that you are just using a unique combination of components to come up with a solution that can be met by any number. ... Having said that, ...the process may help get the comfort that there is a solution out there, but it is such that we would not want to specify it down to that degree. We would specify what we wanted in output terms: 'as long as it can do this and that and that and you can meet all that in this timescale, tell us what you can do ...' (Procurement Officer 2, body governed by public law).

An alternative, but seemingly less common, approach (3/26 interviewees) is for the authority to draw up individual specifications for each bidder. Lawyer 6 (UK) struggled to reconcile this approach with the legal rules:

I have been asked by authorities whether I can set one specification for one bidder and another specification for the other bidder and I always struggle with this one ... You cannot point to anything in the law that says you cannot, but I do think it really undermines your evaluation process. I think it is very difficult to do a robust evaluation on that basis.

Lawyer 26 (UK) made similar comments. It may be that this approach is most appropriate for contracts where there are several possible distinct solutions. For example, this approach was employed by Lawyer 23 (England & Wales) in the waste sector, where there are a number of possible waste disposal solutions: "you can bury it, burn it, you can make petrol out of the residue, you can recycle the residue, and there are people that can

run Tesco type facilities”. Here, Lawyer 23 explained that because the solutions are potentially so different you may need to consider issuing separate contracts.

There were no specific questions on the law and practice in relation to variant bids. Also, the general opening and closing questions failed to elicit information of any worth on this subject. It was clear from six interviewees, however, that variant bids are sometimes expressly permitted by authorities.

12.3.3 Scope for amendments to tenders

12.3.3.1 Introduction

Interviewees were asked about the scope for and their experience of amendments to tenders prior to identification of a preferred bidder, the uncertainty surrounding which was highlighted in chapter seven. Interestingly, 16/38 interviewees explained Art.29(6)/Reg.18(26) to have only a minor role in practice due to the dialogue which had taken place in the run up to the close of dialogue, particularly where there are draft final tenders and where sign-off of an interim final business case is required for authorisation for close of dialogue. This limited role may, however, only occur where circumstances are ideal; 14/38 argued that from their practical experience this was not necessarily the case; for example, practical considerations (such as financial and/or time constraints leading to premature closure of dialogue) may mean it is not possible to ensure tenders are in the condition desired. 26/47 adopted a narrow legal interpretation of Art.29(6)/Reg.18(26), arguing that there is the same or less flexibility at this stage as there would be to amend tenders in a restricted procedure, and attaching no particular significance to the term “fine-tuning”. 13/47 interviewees disagreed with the above narrow interpretation. Eight interviewees highlighted the uncertainty of the scope of clarification specification and

fine-tuning, and the above findings very much confirm that uncertainty. A common approach does not emerge from the interviews.

12.3.3.2 Significance of 'clarify, specify or fine-tune' in practice

It was evident from 16/38 interviewees that Art.29(6)/Reg.18(26) often plays only a minor role in practice due to many issues being resolved during dialogue; this was particularly so where a draft final tenders stage had preceded the formal close of dialogue. Hence, many interviewees did not appear to have thought about the scope of this provision in great detail. For example, Lawyer 16 (Northern Ireland) stated:

there has not been a huge amount of work on tenders at that stage; everyone will know at that stage pretty much what is coming through the door from the preliminary tenders ... So, it has not been engaged in hugely because of the amount of dialogue prior to that stage.

Lawyer 10 (Northern Ireland) described how the uncertainty of the law had led him/her to err on the side of caution:

... 'fine-tuning' it does not appear in the Commission's 1989 statement, but I do not think the analysis takes place on that basis. You do not say, 'what is clarification, what is specification, what is fine-tuning'; you just have to say let's try and resolve as much as we can during dialogue.

According to Lawyer 20 (UK), the narrow approach is down to the perceived risk of legal challenge:

[i]n advising ... authorities upon the scope for post-tender amendments we will take a strict line; for example, we will not draw attention to the phrase 'fine-tuning'; we tend to find this discourages authorities engaging in it too extensively. 'Fine-tuning' would lead some towards full

scale renegotiation; no matter how attractive, there is just too great a legal risk. It is a false economy: if you are needing negotiations at this stage then you have closed dialogue too early.

14/38 suggested, contrary to the above, that in practice Art.29(6)/Reg.18(26) was made use of, for example where the dialogue stage is closed prematurely. According to Lawyer 9 (UK), Art.29(6)/Reg.18(26) is abused in practice:

... it is something that is quite heavily abused ... Sometimes authorities do seem to put a sort of BAFO [Best and Final Offer] in at that ... stage. I am not sure BAFOs really fit ... because BAFOs kind of imply retendering and sharpening your pencil ... So, I think clarification, specification and fine-tuning should not include re-pricing but it sometimes does and it is sometimes because authorities find they need to save money ... or because the bidding organisation finds that their bid has become unsustainable ... or perhaps the authority was not clear enough in terms of its requirements ... These should all ideally be resolved in dialogue but the trouble is, when you get an organisation with several different departments, some departments are not always involved and it suddenly comes through for their approval and they come up with things that require changes.

Five interviewees (others not commenting) spoke about how they felt more comfortable making changes to tenders at this stage where there is still competitive tension than making changes after a preferred bidder has been selected. For instance, “[b]ecause you are still in a competitive situation, you have got a bit more flexibility” (Lawyer 32, England & Wales).

The lack of clarity surrounding the provision was flagged in 8/38 interviews. It was mentioned that the terminology and phrasing of Art.29(6)/Reg.18(26) is unhelpful. For

example, Lawyer 2 (England & Wales) complained, “I mean ‘fine-tuning’ is not a helpful term; it differentiates it from the restricted procedure, but it is not particularly helpful; it is not even a proper word”.

Because of the uncertainty, the above 8/38 interviewees explained how it was necessary to look to fundamental procurement law principles and government guidance for help when interpreting the law, and/or how legal practice often depends upon practical considerations. For instance, Lawyer 5 (UK) stated:

I doubt there is any great significance in these words; I mean, one can stare at them and their precise boundaries are not going to become apparent through semantic scrutiny. It is going to be a matter of what a court thinks is reasonable

Similarly, Lawyer 20 (UK) explained that behaviour will vary from procurement to procurement:

I would say that legally it is restricted to the same sort of scope as there is in the restricted procedure. In practice, though, people do not even do that with the restricted procedure. It is like driving along the motorway; you may be breaking the speed limit at 75mph, but you are less likely to get into trouble at that speed than, say, if you are going at 120mph. It is all about a question of degree and that will be dictated by the nature of the procurement, the value of it, and also the identity of those participating in it.

2/8 interviewees explained how in practice authorities used this uncertainty to their advantage adopting a narrow or broad reading of the provision depending on its particular circumstances, as is clear in the following statement: “[i]t is made use of; sometimes

interpreted broadly and sometimes narrowly; whatever works best for the authority in that scenario bearing in mind what the potential risks are” (Lawyer 20, UK). This is a noteworthy comment in view of the fact that similar statements have been made about other areas of uncertainty (i.e. in relation to scope for preferred bidder negotiations).

12.3.3.3 The legal scope for clarification, specification and fine-tuning

26/47 interviewees adopted a narrow interpretation of the scope of Art.29(6)/Reg.18(26), in the sense that it offers the same or less flexibility than is available under the restricted procedure. What this tells us may be quite limited, as certain interviewees seemed to adopt quite flexible interpretations of the scope for negotiations under a restricted procedure. However, these interviewees did not attach any added significance to the term ‘fine-tuning’. The following are example comments from this category of responses:

- *It is tight. I would say that generally it is the same across all procedures: there is no more scope in competitive dialogue than in a restricted procedure, not at that stage. Arguably it should all be done and dusted by that stage, but it is generally used where a supplier has been a bit vague about something ... and there is ... a need to get that bolted down. ... you cannot fundamentally change the subject matter of what has been offered. The supplier may allude to a piece of kit having between six and 12 outlets, we will need to find out whether we are paying for six or 12* (Procurement Officer 2, body governed by public law);
- *[w]e do not use this really at all. The more controversial one is after preferred bidder. This is for obvious things; if you have left something blank or there is a typo or something clearly wrong. It is a clarification questionnaire initiated by the authority; it would just call for yes or no answers. It would not be shall we chat about this issue; although, ... people do this under the restricted procedure, and that is where the risk comes in ...* (Lawyer 39, UK).

In view of the conservative approach advised upon at this stage by the 2008 OGC/HMT guidance and a perceived high risk of legal challenge at this stage, it is unsurprising that most interviewees suggest only a minor clarificatory role (if any) for Art.29(6)/Reg.18(26). Nevertheless, in a significant 13/47 interviews, interviewees spoke of the provision in more flexible terms:

- *[p]resumably a court will be inclined to allow something as fine-tuning or clarification if actually it does not make any difference to the outcome of the competition; whereas, if actually the change is so substantial that someone else might have won then it is going to be the wrong side of the line (Lawyer 5, UK);*
- *[i]f you had a problem with the offers, the most that provision could be used for would be some sort of BAFO ... At an extreme, I can see a BAFO coming in ... [T]he use of the word 'fine-tuning' does suggest more latitude; it sounds like a bit more than clarification, but it is not wholesale negotiation. Clearly, it is a problem if you are only engaging with a limited amount of the bidders (Lawyer 37, Scotland);*
- *... we allow the greatest flexibility possible. We allow changes provided they are not discriminatory, give everyone the same opportunity. Our perspective is different to the Commission's perspective. They say just follow the letter. Our view is concerned with discrimination and transparency; provided you respect transparency and fairness you are okay. That is our starting point and our guiding light (Lawyer 19, UK).*

Common to seven interviews (others not commenting) were statements that Art.29(6)/Reg.18(26) is a right for contracting authorities to approach bidders and not the

other way round. Interviewees spoke about the need to keep bidders at arm's length at this stage, e.g. via an electronic system.

12.4 The preferred bidder stage

12.4.1 The legal scope for changes to the tender or call for tender

All interviewees were asked about the legal scope for change at the preferred bidder stage (chapter seven); however, interviewees tended to emphasise the uncertainty of the law and concentrate on practical considerations. Lawyer 6 (UK) explained that when a need for change arises at this late stage the legal rules are only of minor significance: "... whether or not to allow a change does not normally come down to procurement risk; it is about the commercial position. Procurement risk usually only comes into it if you want an added reason to refuse a change". Also, two of the procurement officer interviewees commented that this would be an area where they would need to obtain legal advice. One legal advisor interviewee stated that his/her firm were seeking the opinion of legal counsel on the legitimacy of change at the preferred bidder stage (Lawyer 2, England & Wales).

Due to the uncertainty, no one could give a definite answer as to the precise scope for change. As observed in other areas of competitive dialogue where the legal rules are not certain, in practice authorities may use this legal uncertainty to adopt whichever interpretation is most favourable to them; for example 11/20 interviewees cited situations where a narrow interpretation was adopted in order to resist a change that would mean a worse deal for the authority:

[v]ery often the procurement rules are used as a sort of fig leaf to cover the authority's commercial position: it is easier for someone to say we cannot do this for procurement law reasons rather than just we do not want to do that (Lawyer 13, England & Wales).

Nevertheless, 9/20 interviewees noted that a contracting authority will not always be in a strong enough negotiating position to resist change, e.g. where some months have passed since contract award and there may be deadlines to meet. As Lawyer 41 (Scotland) explained:

it is a very different situation where two months post-appointment of preferred bidder when a credit committee comes along with things they want to change. The dynamics are totally different; the bidder is in the dominant position. Do you want your project or not? There are timescales, promises that a contract will be signed by X date.

According to Procurement Officer 6 (government department):

[t]he balance of power changes as soon as you announce the preferred bidder; they know they are in a good position: (1) you like their offering; (2) everyone else will have gone looking for other opportunities so provided they do not make a fuss they are probably in a field of one.

As will be seen in the quotes below, due to the uncertainty, interviewees tended to respond to questions on the scope for change by outlining differing degrees of change and the level of legal risk, or they would present their answer as an interpretation of the law they would be or could become comfortable with in order to support an argument for change. This is because, according to 21 interviewees, any change post appointment of preferred bidder, however minor, will bring with it some degree of legal risk. In the words of Lawyer 39 (UK), "... clients will be told that there is a legal risk attaching to any change that you do; then it is just a question of how much risk the authority wants to run".

There are different degrees of change, some perceived as less of a risk than others. For example, a small change that does not affect the award scoring is likely to be perceived as low risk. Where there is a change (or an accumulation of minor changes) that affects the award scoring, but does not change the award decision, the risk of challenge is raised. The level of legal risk would be raised further if the changes impacted on scoring to the disadvantage of the contracting authority, i.e. the changes did not improve the preferred bidders score at contract award (4/42 interviewees). It was seen as very high risk to allow changes that, had they been known about earlier on in the process, would have resulted in different decisions or would have attracted different bidders at the outset. 25/42 indicated that legally the most they would be comfortable stretching the interpretation of Art.29(7)/Reg.18(28) to cover would be where the change affects the preferred bidder's score to the detriment of the contracting authority but would not impact on the award decision. 13/42 interviewees viewed the law as narrower than this. In addition, most of those interviewed echoed the words of OGC/HMT 2008 guidance that a strong justification for change, such as the change being outside the authority's control, was important.

There are two cases of particular relevance to the legal scope for change post-appointment of a preferred bidder: Case C-454/06, *Presstext*⁵⁶⁶ and the London Underground Decision⁵⁶⁷ (chapter seven). 13 interviewees spoke of this case law as helpful guidance.

The following are a selection of comments that illustrate some of the general points made in the above paragraphs:

⁵⁶⁶ *presstext*, fn.261

⁵⁶⁷ London Underground, fn.326

- *if what you are tweaking is stuff that is manifestly not changing anything which would count in your evaluation ... that is something which at least in theory you are probably safe doing under any procedure. ... If it would affect the decision, that is really dodgy. ... [W]here ... the winner's offer looks even better then arguably that is better than one that makes the winner's offer look worse. But, ... there is always a risk that the losing bidder will say, 'while they have improved by five percent, had you given me the chance I would have improved mine by 10% and caught up'. ... [A]nything that changes evaluation marks at all is to be inherently avoided; it is not that it is illegal, it is just risky. Then there is the problem of changing a lot of stuff that does not change evaluation individually, but when considered altogether there is a risk someone is going to argue successfully in court that it would have ... (Lawyer 12, UK);*
- *[t]he first touchstone is whether it would change the ranking. If it would ... clearly that is absolutely out of the question. Changes that would not have affected the score ... at all are probably fine. In my view, that would be low risk. Changes that do not affect the price, provided they do not materially reduce what you are getting are also probably okay. It is difficult to answer in the abstract (Lawyer 21, UK).*

Despite the above approach, three interviewees feared that if the matter ever came before a court a narrower view would be taken of the scope for change than that presented in the paragraphs above: “... my assumption is that the [CJEU] will go narrower than *London Underground* and *Pressetext*. I would like the flexibility to work within those parameters” (Lawyer 41, Scotland).

Policymaker 3 spoke at some length about how the 2007 financial crisis highlighted the problems of a narrow interpretation:

... the recession and the breakdown of the banking market posed real issues. In a way, it suggested ... a strict application of these EU rules simply was not going to work. A complex procurement often takes two years or more and if part of the way through that period the market crashes sometimes the only way you can get the project away is by doing something that had not necessarily been foreseen in the original OJEU. ... [O]ne of the things that happened is the public sector making financial contributions to projects ... A technical interpretation of the rules might have caused difficulty but actually abandoning the whole thing and starting again was not of any practical benefit to anyone ... You are still in the same market; you are still doing the same thing; it is just you have started again, but people have wasted ... bid costs. ... You try to take a practical approach bearing in mind the principles of fairness, equality and transparency. There were a number of projects where changes were made part way through the process, but there was pretty much no alternative other than abandon the procurement.

Five bidders spoke about how change, particularly change flowing from planning approval, will be dealt with through contractual drafting:

- *... with planning permission we will usually draft the contract to cover that. People do not like waste facilities so planning is often an issue ... This is often dealt with under contractual drafting: you sign the contract, then you apply for planning permission and there is a judicial review procedure and it is a condition precedent (Lawyer 23, England & Wales);*
- *... people deal with it practically, ... let us get the contract signed up, let us get a firm contract baseline sorted out, and we ... deal with changes through change control subsequently rather than try to shoehorn it in in a very unstable situation. All IT contracts have a change control process ... We do not see too many scope for change issues at preferred bidder stage. We do see it once*

contracts have been entered into, which actually I do not think alters the issues at all (Lawyer 22, UK).

12.4.2 The scope for change from a practical perspective

Interviewees were asked about the types of changes at the preferred bidder stage that they had encountered in practice and how decisions had been made on how to proceed. The data immediately below does not provide information on the frequency of different situations giving rise to a need for change. There were no presumptions; interviewees were asked generally what their experience had been at this stage, not whether or not they had experience of specific situations.

Eight interviewees noted it as not uncommon for an authority's requirement/s to change over the length of time it takes to complete a competitive dialogue procurement; this could be down to, for example, a political change within the authority itself, or, due to government spending cuts, the project may have become unaffordable without a reduction in scale.

The financial crisis and recession was said by 11 interviewees to have given rise to numerous difficulties, for example consortium members going insolvent, and lenders withdrawing funding. Lawyer 10 (Northern Ireland) spoke about a situation where as a result of the financial crisis the preferred bidder's lender withdrew:

[g]etting a replacement funder was the only credible, applicable, appropriate option. It would have been the same for any bidder. ... The other two bidders did not challenge. ... We had a discussion with them to say, 'look, you are going to tell us that you can stand over your bid as it is, but we know for a fact that your funder is not prepared to stand over your terms'. I do not want you to think it was a decision taken over night; it was a complicated process involving some

of the highest levels of government. We looked at it and did an awful lot of due diligence from a financial perspective to see if it would be possible to just instead move to bidder number two for example. It was not.

Further, changes may be needed simply because bidders have made mistakes in their tender, for example in relation to costings or because issues fully within the control of the contracting authority were not sufficiently finalised during dialogue (15 interviewees). Examples were also provided of situations where lender due diligence (22), detailed planning applications (seven), site surveys (three), and sub-contracts (three) gave rise to change. According to Lawyer 34 (England & Wales):

[i]t is too extreme to say preferred bidders will try and renegotiate the deal. It is more a question of them hanging on in there for last minute concessions, particularly in a changing market (like timing of commencements or terms of funding). They will always try to secure the best deal they can. In a constantly shifting financial landscape a developer will try to get last minute concessions once he knows he has got the job; they will look for protection. It is a problem that is likely to crop up again and again. It is all a question of degree. It is a fact of commercial life the procurement purists have to just accept.

There are several options open to contracting authorities where a necessary change occurs at the preferred bidder stage: the authority can adopt a flexible interpretation of the law, conclude the contract with the preferred bidder, and hope losing bidders do not challenge; the authority can partially rewind the process (e.g. re-run the final tender stage); the authority can award the contract to the second placed bidder; the authority can abandon and restart the process; or the authority can put the process on hold. Each option has its respective advantages and disadvantage.

The route taken will very much depend upon the specific circumstances of the procurement; however, in view of its convenience, and practical and legal difficulties associated with other options, according to 16 interviewees (others not commenting), in most circumstances a contracting authority is most likely to go ahead with the change and conclude the contract with the preferred bidder:

... in practice, what you have to say to clients is, 'you have got to accept [the change] or go back and spend another six months'. So, most of them will say ... 'we are just going to have to accept it'. [They] are incredibly cautious all the way through ... then right at the end are forced to accept some sort of risk. In every competitive dialogue we have been involved in, for a bidder or an authority, there is a bit of a wrinkle at the final stage ... (Lawyer 13, England & Wales).

For a competitive dialogue to get restarted having reached the late stage of preferred bidder appointment would be very rare, as stated by 13 interviewees (others not commenting). Indeed, no interviewees expressed experience of such an occurrence after having appointed a preferred bidder.

27 Interviewees explained the different pressures contracting authorities operate under, the minimisation of legal risk being just one of those pressures. The main pressures cited can be grouped under the headings cost pressures and time pressures and these must be carefully considered in deciding whether or not to proceed in spite of a potential unlawful change. A number of factors will be taken into account, which include, inter alia, the severity of the breach, the likelihood of challenge, the possibility of rewinding the process, the legal risks associated with rewinding the process, the costs and delay of rewinding the process, and the costs and delay of abandoning and restarting the process:

- ... it is a case of balancing the risks of what you do and what you do not do. Sometimes the risk of not doing anything can sometimes outweigh the risk of doing something. You can get yourself in a situation where there is no risk free solution ... You just have to balance them (Policymaker 3);
- ... whether to allow changes ..., will ... come down to a common sense decision: a balance. You have to be commercial ... but also play by the rules. ... [I]t will be a case of pragmatism versus technical correctness; we will not just outline a problem for the umpteenth time. ... You must take a pragmatic approach depending upon what you think you can get away with. We will not advise upon a breach of the rules, but it is never as straightforward as that. Where the scope for change is unclear, we want to be helpful, not obstructive (Lawyer 30, England & Wales).

There are also other factors, such as subjective factors, that can potentially come into play, e.g. personal relationships with bidder bid teams. These factors will be elaborated upon below.

A high degree of legal risk is likely to restrain authority behaviour (see chapter 14).

According to interviewees, theoretically at least, the perceived risk of challenge is at its highest at this late stage in the process because the losing bidder will have incurred substantial costs. It was explained that the bigger the project and the greater the bid costs incurred by losing bidders, the greater the risk of challenge:

[i]f you are talking about a really major PFI, e.g. in the £billions, bidders will have invested in bid costs of anywhere between five million and 15million pounds. That is an awful lot at stake.

The potential for challenge in these bid procurements, particularly as there will not be another big hospital PFI just around the corner, it is more likely (Lawyer 27, England & Wales).

Risk of challenge, however, is not just measured in the abstract. 12 interviewees (others not commenting) explained how, for an authority to rewind or restart, there would need to be a real practical risk of challenge which would need to be assessed on a case by case basis. For example, it would depend upon “how disgruntled the unsuccessful bidder was; are they chomping at the bit and jumping up and down, or are they actually quite okay with it?” (Lawyer 6, UK). According to Lawyer 27 (England & Wales), “you get to know bidders as you are going through and can often gauge the real likelihood of challenge”.

Furthermore, eight interviewees cited a number of factors likely to deter challenge at preferred bidder stage: depending upon the size of the market, there may be a bidder worry about a challenge spoiling its chances of future contracts or bidders may want to concentrate resources on future contracts (4/8); it may be difficult to find out about changes that occur with the preferred bidder (1/8); and the uncertainty of the rules may deter legal challenge (3/8). From the limited amount of comments on factors deterring challenge at preferred bidder stage; the practical significance of these factors is difficult to gauge (see chapter 14).

If there is a necessary change at preferred bidder stage, and the authority is not legally comfortable concluding the procurement, rewinding, i.e. rerunning the final tenders stage or going back a stage further and reopening dialogue, is, from a cost perspective, the next best option for the authority. Nine interviewees spoke about themselves having practical experience of this, for example where the preferred bidder was not capable of delivering its tender or where a challenge on strong grounds is expected:

[w]ould I wing back? Yes, I would. We have done it recently on one. We reached a stage where we thought, 'this is going nowhere'. We said to the bidder, 'you either do what you have promised within the next six weeks or we just go back a stage and we bring the others back in' (Lawyer 23, England & Wales).

However, as discussed by 15 interviewees, rewinding the process once a preferred bidder has been appointed is not unproblematic from a legal and practical perspective. Firstly, there are legal questions over how far back the process must be rewound and how many bidders must be invited back. However undesirable, if the change is so great that the contract would have attracted different bidders at the outset, legally the contracting authority may have no choice but to restart the procurement. If rewinding to an earlier stage, there are serious equal treatment issues to contend with, particularly if the losing bidder has been debriefed. Also, it is not clear whether or not legally, once closed, the dialogue stage can be reopened:

[t]here are big issues with equal treatment if you were to rewind ... [T]here is a real risk to rewinding and I do not think you can ever do it perfectly. We got a procedure rewound ... and it was just shoddy really, the rewind. The person that complains gets more information than the others. It depends how you do it, do you rewind and keep all offers at that point in time or do you get everyone to resubmit offers? ... [Y]ou cannot ever do it neatly, but authorities seem much more amenable to rewinding than starting again. If I was a bidder, I would not want to be part of a rewind; inevitably the complainer never feels like they get an equal shot because they have caused all the trouble (Lawyer 39, UK).

There were also practical issues highlighted; for example, if the contracting authority has been at preferred bidder stage for a long period of time (e.g. six months), the second placed bidder may have lost interest in the contract and moved on to compete for other contracts. It may simply be that the authority does not want to give the second placed bidder a further opportunity because it prefers the preferred bidder's solution.

Interestingly, Lawyer 35 (Scotland) was in the process of advising an aggrieved bidder in a damages action in which a competitive dialogue had been rewound to a point prior to submission of final tenders and the original second placed bidder, which had received feedback, went on to win. The original preferred bidder is claiming discriminatory treatment.

Where a change occurs a further option is to abandon and restart. It is evident from 13 interviews that, although competitive dialogue procurements do get abandoned and restarted (though not those that have reached preferred bidder stage) it is highly unlikely at this late stage. Nevertheless, as stated by five interviewees, this option will be on the table where the change is so significant that a different set of bidders would have sought to participate in the procurement process had they known at the outset or where rewinding short of restarting the process is considered not possible.

As discussed by 15 interviewees, there are a number of practical factors that dissuade authorities from restarting. The most significant factor appears to be the often huge costs involved for the authority and bidders, but timescales and political embarrassment for the authority and professional embarrassment for individuals (plus the potential risk that the preferred bidder may litigate to recover its costs for a restart) are also noted as potentially coming into play:

- *[t]o restart a procedure would be a nightmare scenario given the length of competitive dialogues generally and the costs associated with it. Restarting would be a last resort entirely. I think it is more likely that we would just step back to whatever stage felt comfortable, but I doubt we would restart the dialogue entirely* (Procurement Officer 4, Local Government, Scotland);
- *[w]e will rarely advise upon going back or restarting a procedure at this stage, just because of the costs involved and also because these projects have to be delivered: people are expecting a new hospital or a new fire station* (Lawyer 24, England & Wales).

Due to the complicated nature of the decision at this stage, according to Lawyer 4 (UK) only, it is not surprising that certain high value procurements have, rather than being abandoned, been frozen, for example in the hope that the change becomes unnecessary (e.g. the funding markets recover to enable the lender to keep to the terms originally agreed) or to see if a challenge materialises. This option is only likely to appeal to an authority where the timetable is not critical. An authority is most likely to freeze a procurement where a change has occurred, the risk and likelihood of challenge is high (e.g. there are signs that the losing bidder is considering legal action), but the authority does not want to rewind or restart the procurement (Procurement Officer 14, local government).

Procurement Officer 14 (local government) described his/her predicament. Here, the project, a development scheme, had been greatly affected by the economic crisis. The developer selected as the most economically advantageous tender had become unable to deliver the scheme on the scale that had been advertised. At the time of the interview, the authority had been at the preferred bidder stage for over 18 months. The authority was

waiting whilst it decided how best to proceed: whether to conclude at a smaller scale or wait for the preferred bidder to recover so that it could deliver the full scheme. Restarting the procedure was stated as not being a serious consideration due to “costs, time and resources that would have been wasted”, and also because the authority was quite sure that they could not get anything better than the preferred bidder’s solution. At the same time, however, the authority did not want to run the risk of challenge.

As was common PPP practice under the negotiated procedure, keeping a reserve bidder may be one way to limit the risk of change at preferred bidder stage by maintaining an element of competition. However, only five interviewees spoke of adopting this practice (others not commenting). If preferred bidder negotiations broke down it was recognised as unclear whether you could simply go to the second placed bidder without running the final tenders stage again, and sending a reserve bidder letter out did not make this less of an issue. Also mentioned were the same practical difficulties associated with rewinding a process, for example the reserve bidder may not be prepared to be kept on hold and is likely to concentrate its efforts on new competitions.

12.4.3 *Alcatel* information and standstill requirements

The legal analysis in chapter seven highlighted the uncertainty surrounding the correct timing of the *Alcatel* information and standstill requirements. Interviewees were asked when these requirements must be observed in competitive dialogues and if this was the case in practice. Some interviewees did not perceive there to be an issue here; this was often because their experience of competitive dialogue predominantly involved lower level complexity projects where the period between preferred bidder appointment and contract signature may be relatively short.

In relation to what interviewees interpreted the law to be and whether this translated to procurement practice, there was a mix of responses. 19/38 interviewees argued that the law required the standstill period to be held at the time of the decision to award the contract, which was not on identification of the preferred bidder, but at a later point closer to contract signature. That is to say, 6/19 interviewees said it was following completion of an authority's internal governance processes; 5/19 said it was when all substantive issues had been resolved; and 8/19 said it was when contract signature would take place immediately following standstill. An alternative interpretation was put forward by 13/38 interviewees who considered that under the law the standstill requirement was to be applied immediately following identification of a preferred bidder. In addition, 2/38 interviewees, both legal advisors operating predominantly in Northern Ireland, stated that two *Alcatel* information and standstill periods were required by the law. 4/38 interviewees recognised the law as uncertain.

As regards practice, 20/50 interviewees described practice as generally being to notify losing bidders at the time the preferred bidder is identified and to apply the standstill period at this time only. 19/50 stated that *Alcatel* information and standstill occurred at a later point in practice. 7/19 stated that it occurred following internal governance processes; 7/19 stated that it occurred after all substantive issues had been resolved; and 5/19 stated that it occurred when parties were on the verge of contract signature. 9/50 interviewees described how in practice, although not necessarily holding two standstill periods, two *Alcatel* letters would be sent out, one on identification of the preferred bidder and one much closer to contract conclusion. In 2/50 interviews practice was said to vary depending upon the circumstances.

It can be seen in the paragraph above that the interpretations of the law did not necessarily translate to procurement practice; for instance, as seen above, certain interviewees, although not viewing it as a legal requirement, sent out two *Alcatel* letters at different points. The apparent reason for this is to limit risk of challenge.

Although the above figures are far from conclusive, it may be that UK competitive dialogue practice is slowly moving towards an approach involving two *Alcatel* type letters. This may be the result of recent case law, such as *Commission v. Ireland*,⁵⁶⁸ which two interviewees vaguely referenced, and the new remedies directive, which the UK was in the process of transposing at the time interviews took place (raised by the same two interviewees). The new remedies directive introduces a new remedy of ineffectiveness (see chapter four), which is potentially available where a contracting authority fails to comply with the *Alcatel* standstill requirement.

9/50 interviewees described how in practice two letters would be sent to losing bidders: one upon identification of the preferred bidder and another at a point close to contract close. The practice of having two *Alcatel* letters was, from a legal risk perspective, viewed as the safest practice, described by one interviewee as “a belt and braces” approach (Lawyer 24, England & Wales).

Certain interviewees preferred to seek to comply with *Alcatel* early on identification of the preferred bidder because of a desire to start the time limit for bringing a legal challenge by ensuring bidders have sufficient knowledge of the contracting authorities actions up to that point:

⁵⁶⁸ [2008] 1 CMLR 34

it is normally at the point that the preferred bidder is chosen. I know in practice that contracts do not get signed within the 10 days, but normally I think there is a discipline that that is when it tends to be done and of course that flushes out any challenges quite quickly (Lawyer 9, England & Wales).

According to Lawyer 24 (England & Wales), the practice of holding the *Alcatel* period as soon as possible upon identification of a preferred bidder may also be the result of lenders' requirements:

... it is normally done when you appoint the preferred bidder. It is in the authority's interest; they want to get it done so they can show they have done it; the standstill is out the way. Banks will want them to confirm they have done their standstill and there have been no challenges before they sign anything.

Interestingly, three interviewees holding the *Alcatel* period on identification of the preferred bidder recognised that a more compliant approach may be to issue a second *Alcatel* letter and standstill period:

the law is not settled, but we do it at the point of no return. ... We would normally say the point of no return is when you have selected your preferred bidder. When you have progressed discussions so much in the preferred bidder stage that there may have been changes, perhaps you should have another Alcatel, but no one does to be honest (Lawyer 19, UK).

According to Legal Advisor 13 (England & Wales) the question about the timing of *Alcatel* compliance may be a non-issue:

.. the OGC, at least at one stage, bizarrely said you should do it when you appoint the preferred bidder rather than just before conclusion. I think that is a bit strange because you are clearly going to have to do it before you can conclude the contract. ... I almost wonder whether it is a non-issue because when you ... appoint a preferred bidder, you are going to have to say to the losing one, 'look you have not got preferred bidder status and here is why'. Under the new Reg.29A, the obligation to debrief, you are going to have to tell them something at that stage anyway. So you are going to give them pretty much an Alcatel ... The standstill obligation is irrelevant at that stage because you are not going to get signed up within 10 days. What I have tended to say is, 'you need to do an Alcatel letter at the end; if you want to do one at preferred bidder stage that is up to you, but I do not really see the need because you are doing a full formal debrief anyway. I thought the OGC guidance on that point was weird.

In apparent agreement with this view, two other interviewees described how losing bidders were debriefed at preferred bidder stage but treated this separately to the *Alcatel* debrief held just before contract signature.

In addition, according to Lawyer 24 (UK), a second letter is worthless, as an authority is unlikely to admit to legally risky changes that have occurred between *Alcatel* letters: "... commercially you are not about to say, 'oh by the way, these things have changed since the last letter'. ... [I]t is done almost as a matter of courtesy ...".

Also, two interviewees explained how a second *Alcatel* letter is often treated with suspicion by losing bidders. According to Legal Advisor 7 (UK), "... you get the unsuccessful bidder saying, 'why have you sent me this again? What has gone on?', and then you have to just say, 'well there is a slight difference of opinion within the legal

profession as to what is the right time to send *Alcatel* notices, so we are doing it both times”.

12.5 Concluding remarks

Chapter 12 has presented the findings for the closing stages of competitive dialogue. The findings highlight that in these crucial stages there is great uncertainty over the correct application of the rules and many signs that strict application of the rules, in particular over the scope for preferred bidder negotiations, is not in line with the reality of complex procurement.

13 Findings: general issues

13.1 Introduction

A number of interviewees identified certain general issues relating to UK competitive dialogue practice. These include financial costs, procurement duration, uncertainty, complexity, and participation difficulties. Chapter 13 will explain the above issues and explore the reasons behind them. In response to the practical challenges identified above, interviewees discussed ways in which they have sought to improve the efficiency of competitive dialogue procurement; this will also be looked at. It will be seen that many of the findings in this chapter support those of the Treasury review⁵⁶⁹ and Cabinet Office (Efficiency & Reform Group) review.⁵⁷⁰

13.2 General issues

13.2.1 Introduction

As opening questions, interviewees were asked to identify issues (if any) that came to mind when talking about their experience of the practical application of competitive dialogue in the UK. Also interviewees were asked about the compatibility of the legal rules with the commercial reality of complex procurement. It was possible to group most responses to these early questions under several general headings: cost (42 interviewees), time (36), uncertainty (eight), complexity (14), and participation (19). The findings are broadly in line with issues identified by the Treasury and Cabinet Office.⁵⁷¹

13.2.2 Cost

Recent HM Treasury research concludes that compared to alternative procurement routes, competitive dialogue procurements are more costly to both the public and private

⁵⁶⁹ HM Treasury (2010), fn.198

⁵⁷⁰ Cabinet Office (2010), fn.199; Cabinet Office (2011), fn.199

⁵⁷¹ HM Treasury (2010), fn.198; Cabinet Office (2010), *ibid*; Cabinet Office (2011), *ibid*

sectors.⁵⁷² 86% of respondents to a general web based survey believed that compared to the negotiated procedure, competitive dialogue has increased bid costs. 55% of contracting authorities surveyed were of the same opinion. According to HM Treasury, for unsuccessful bidders costs have risen from 2-3% of contract size under the negotiated procedure to 5-6% under competitive dialogue.⁵⁷³ Likewise, significant 42 interviewees highlighted the financial expense of competitive dialogue as being an important practical concern. This included all three policymakers interviewed. In view of the difficult economic situation at the time the interviews were conducted, the costs associated with competitive dialogue gave rise to some strong reactions. 38/42 spoke about high participation costs for bidders in comparison with the negotiated procedure. 36/42 mentioned high bid costs for contracting authorities. 13/42 interviewees were not of the opinion that the high bid costs of competitive dialogue were offset by enhanced competition in comparison to the negotiated procedure. 24/42 considered competitive dialogue to facilitate better value for money than the negotiated procedure. Other interviewees were either not sure or stated that whether or not competitive dialogue brings better value for money depends on the circumstances of the procurement.

38/42 spoke about high participation costs for bidders. Research by the UK government notes similar findings. According to the Cabinet Office, monthly bidding costs on a competitive dialogue procurement are on average £130,000 and total bids costs are on average £2,500,000, compared with £70,000 and £900,000 for equivalent private sector procurements.⁵⁷⁴ In the words of Lawyer 36 (UK):

... the private sector ... hate [competitive dialogue]; they can't stand it. [A reason for this is] they do not get their bid costs covered and these can be £millions. For a £300 million project,

⁵⁷² HM Treasury (2010), *ibid*, 4.7

⁵⁷³ *Ibid*, 4.11

⁵⁷⁴ Cabinet Office (2010), fn.199, 14

average bid costs would be ... four-eight million pounds. In a £multi-billion project ... bid costs were in the region of £20 million.

In accordance with the analysis in chapter seven, it is apparent that a key reason for increased bidding costs is the perception that, in comparison to pre-2006 PFI practice, bids must be developed in competition to a more mature point before a preferred bidder may be selected. As Lawyer 13 (England & Wales) explained:

[authorities] are trying to cover everything during dialogue ... In the old days you would get down to preferred bidder and thrash it all out then... Bidders loved this because they did not incur heavy costs until they were pretty comfortable that they were going to win. Also, ... authorities ... did not incur heavy costs because they were only negotiating very heavily with one bidder ... Now authorities are ... forced to heavily negotiate with at least four bidders and this can mean double bid costs for unsuccessful bidders ...

All the policymakers interviewed expressed acute awareness of this issue. According to Policymaker 1, “... the biggest issue is there is no coming second; it is winner takes all and the loser gets stuffed – usually for a lot of money”.

For 23 interviewees, expensive and time consuming dialogue meetings were seen as the source of cost and time problems associated with competitive dialogue. In the words of Policymaker 1, “the problem is you end up with big meetings with lots of expensive people dealing with lots of detailed issues – not generally an efficient way of procuring”. These interviewees were critical of competitive dialogue procedures where there is “meeting-itis” or which descend into “meeting mania” (Lawyer 2, England & Wales).

In addition to the costs for unsuccessful bidders, it was also clear from interviewees that many felt under competitive dialogue even a winning bidder's costs were likely to be higher than they would have been had the contract been procured under a negotiated procedure. The reasons for these increased costs tended to relate to difficulties operating dialogue efficiently (i.e. not to the rules on themselves), and are looked at below.

36/42 interviewees pointed to an increase in costs or greater drain on resources for contracting authorities running competitive dialogue procedures. Most interviewees put the costs down to the resources needed to conduct detailed negotiations with more than one bidder:

[a] major issue is the cost for an authority from running two or more full sets of negotiations for what could be ... completely different projects. ... This was a PFI contract; there is a lot of meat in it to keep on top of; every time you are negotiating a point you are going through a hundred page+ document and you go through umpteen iterations of that; it's quite wearing - multiply that by two (Lawyer 30, England & Wales).

According to Lawyer 20 (UK), during a competitive dialogue "bidders know authorities are stretched and ... take advantage of this".

Ideally, the increased procurement administration costs for authorities would be offset by enhanced value for money derived from enhanced competition. 78% of those taking part in the general survey in the HM Treasury review considered the introduction of competitive dialogue to have improved procurement outcomes.⁵⁷⁵ In the present research 24/42 interviewees expressed a clear view that in general competitive dialogue facilitated

⁵⁷⁵ HM Treasury (2010), fn.198, 4.3

value for money procurement in comparison to past procurement under the negotiated procedure. For example, Lawyer 24 (England & Wales) stated, "... it is definitely preferable to the old scenario when you used to get to preferred bidder and then everything used to land back on the negotiating table. ... [Y]ou are driving out a better, more competitive deal by keeping ... competition for longer". 13/42 interviewees, however, expressly disagreed with such a contention: "I don't think we are getting significantly better deals than we were. Best practice under the negotiated procedure led to pretty good deals and ... probably cost less to procure" (Lawyer 17, UK).

Not all interviewees were of the opinion that increased costs were inevitable. It was noted by some that the new legal rules were not themselves to blame for the excessive costs:

[m]y main gripe ... not with the legal rules themselves. ... When you read the Regulations there is actually not a lot there. You have got quite a lot of leeway in terms of how you conduct the process. ... [I]t is the way it has been interpreted, the way guidance is forcing authorities to follow quite a strict approach. ... [T]he process was brought in ... to provide flexibility. It was meant to be a front-ended negotiated procedure. ... [T]hat actually has not happened in a lot of cases (Lawyer 6, UK).

A number of interviewees discussed methods they employed to keep costs for bidders and authorities under control. These will be looked at below.

13.2.3 Time

Research by UK government has found that in comparison to the private sector (10 months) on average public procurements under competitive dialogue takes 50% longer

(14 months).⁵⁷⁶ The Government's current target is to reduce competitive dialogue procurement timescales from 429-135 working days.⁵⁷⁷ 36/58 interviewees noted the length of competitive dialogue in comparison to procurement under the negotiated procedure as a practical concern. According to Lawyer 20 (UK):

[w]ithin the firm it is ... said that competitive dialogue takes roughly 30% longer than the negotiated procedure would have done. Under competitive dialogue the requirements are much more under discussion. In a negotiated procedure it was much easier to get started without the work being frontloaded. Also, lawyers are finding they have to spend significant time with bidders and authorities explaining the new process ...

There are only limited time requirements in the legal rules. As with the discussion above, on this basis some felt that the legal rules could not be blamed entirely for protracted procurements. In the words of Lawyer 5 (UK), “[s]o far as the law goes, there is room for efficient and inefficient uses of the process”. It was argued that the legal rules were not the reason for long procurements:

the economic situation has made bidders complain about any long procurement process. ...
[C]ompetitive dialogue gets a spectacularly bad name when it is not inherently the fault of the procedure. We are back to the fact that if you have a long procurement process that loses its way people hate it. It so happens that quite a lot of those have occurred under competitive dialogue. In the old days ... they would have happened under another process (Lawyer 12, UK).

⁵⁷⁶ Cabinet Office (2010), fn.199, 14

⁵⁷⁷ Ibid, 14

Indeed, according to Lawyer 21 (UK), “we are still doing negotiated procedures [that] have been at preferred bidder stage for two years. It is not like these procurements are quick under one procedure and slow under another; it is slow under both”.

A number of interviewees highlighted that in comparison to the negotiated procedure, despite the lengthier dialogue period, the time taken from appointment of preferred bidder to contract close had generally been significantly truncated:

[the] amount of time being spent with the preferred bidder is much less; it took a lot of time in the past and it is now much quicker. We cannot say that it has reduced timescales overall, however; it has just reduced the end bit. The expensive period, the dialogue phase, is longer (Policy Maker 3).

This was not necessarily so, however, in relation to procurement involving private finance, where the poor economic situation in the UK was said to have caused problems closing deals that had reached the preferred bidder stage (Lawyer 21 (UK))

13.2.4 Uncertainty

Nine interviewees raised the uncertainty of the legal rules on competitive dialogue as a general issue. This does not include specific references to uncertain legal rules, which were made during the course of interviews. For example, the ambiguous and inconsistent wording of the Directive/Regulations was mentioned, plus the difficulty in discerning the relevance of case law in the context of competitive dialogue. The problems caused by the legal uncertainty are noted by HM Treasury research, particularly concerning post-dialogue issues. In view of the key role played by legal advisors in complex procurements, HM Treasury states that in seeking legal consensus on competitive dialogue it has engaged

with the Procurement Lawyers Association⁵⁷⁸ and the PPP forum to encourage wide debate on these issues.⁵⁷⁹

13.2.5 Complexity

14 argued that competitive dialogue procurement was complex. For example, due to the need to manage numerous dialogue meetings with multiple bidder. 3/14 commented that competitive dialogue was only complex due to the complex nature of the contracts it is used to procure:

... everyone seems to think it is very complicated and quite mysterious because it is new, it really isn't... there is nothing difficult in itself about going through competitive dialogue. ... [Y]ou do come across some fairly complex legal and technical issues; these are not issues that arise because you are dealing with competitive dialogue, they are issues that arise because of the nature of the contracts you are going out to the market with (Procurement Officer 2, body governed by public law).

UK government research also highlights complexity as an issue; this is said to derive from bureaucratic government approvals processes, duplication of public sector information requests to bidders, and poor guidance within departments (i.e. not standardised, not clear, not easily accessible).⁵⁸⁰

13.2.6 Participation

19 interviewees commented upon a difficulty in attracting suppliers to take part in competitive dialogue procedures or keeping bidders interested during the procedure so that they fully engage with the procurement and do not voluntarily drop out:

⁵⁷⁸ www.procurementlawyers.org/ (accessed 31/10/2011)

⁵⁷⁹ HM Treasury (2010), fn.198, Box 3.A

⁵⁸⁰ Cabinet Office (2011), fn.199, 31, 16, 18

- *[a] key issue is the willingness of developers to engage in a process that could potentially cost well over £100,000. The appetite is not there unless you are in ... London or the South East* (Procurement Officer 1, Body Governed by Public Law);
- *I have not seen any less interest, but certainly there is more reticence to become engaged when it is going to cost a bidder so much and they may not get the project. People are realising the implications more and more* (Lawyer 4, UK).

Lawyer 21 (UK) argues that the participation problem is more nuanced: “where there is a very high value contract, bidders are prepared to undertake the kind of effort needed to work up a tender. Where the process falls down is for the relatively low value (less than £10 million), as the bid costs are ... not in proportion to the value of the contract”. This view was reflected in four interviews.

Policymaker 3 distinguished between the impact of competitive dialogue on big and smaller contractors:

... smaller contractors find they cannot afford to bid. This is a real problem, seeing as though the object of the regulation is to open up the market and ... get the best possible competition. It is one of those laws of unintended consequences. Bigger contractors may be fine with the procedure ... From a macroeconomic perspective, if there are fewer people with the finance able to complete these projects and if they cost more and more to do then it is a bad thing. From a macroeconomic perspective we have some concerns ...

The argument that competitive dialogue may act as a barrier to entry for smaller and medium sized suppliers was a finding of HM Treasury research.⁵⁸¹ The argument was only repeated by two other interviewees; however, there was no specific question on this.

Regarding participation difficulties, it was clear from seven interview responses that the economic climate in the UK (2008-2009 recession) was a contributing factor, making firms hesitant about undertaking the work needed to participate in a competitive dialogue procedure.

13.3 Efficiency strategies

13.3.1 Introduction

In view of the above discussion, although one interviewee stated that it was not possible to run the process in a more cost-effective manner (Lawyer 10, Northern Ireland), a number of interviewees suggested ways in which they have sought to improve the efficiency of competitive dialogue. These are presented below under the following headings: planning and preparation, management of the dialogue stage, and interpretation of the legal rules.

13.3.2 Planning and preparation

Due to the emphasis guidance⁵⁸² places upon pre-procurement planning and preparation, the issue was discussed with all interviewees. All tended to reflect the views expressed in the guidance and recent government research,⁵⁸³ i.e. that competitive dialogue requires procurers to undertake a significant amount of work before OJEU notice publication. As will be seen however, 20/58 interviewees noted, in agreement with government

⁵⁸¹ HM Treasury (2010), fn.198, 2.17

⁵⁸² OGC/HMT (2008), fn.193, 5.1.1

⁵⁸³ HM Treasury (2010), fn.198, 3.2-3.9; Cabinet Office (2010), fn.199, 27

research,⁵⁸⁴ a problem of insufficient pre-procurement preparation and planning in practice. In terms of the work to be carried out pre-procurement, 18 interviewees spoke about the need to engage with the market, 13 mentioned the need for internal organisational preparation, 22 spoke of the need to plan the procurement process, and 20 interviewees commented on the need for authorities to narrow down its requirement/s.

Interviewees were not always in agreement about the extent of pre-procurement work.

For example, according to Lawyer 21 (UK):

... [planning and preparation] is important; however, speaking as someone who used to be an in-house public sector lawyer, I think it is self serving for professional advisors ... to say you need to do loads ... of preparatory work; it means you can get your fees upfront and who knows whether the procurement is going to take place in six months time. [planning and preparation] is helpful, but the idea that everything needs to be planned to the last detail strikes me as unnecessary.

In contrast, Lawyer 12 (UK) stated, “there is not enough [planning and preparation], there is never enough; even when there is a lot, it is never enough. [planning and preparation] is the key to a successful [competitive dialogue] ...”.

According to interviewees, appropriate pre-procurement preparation and planning can help to avoid legal challenge, and can lead to smoother more efficient procedures, and can attract bidders to the process. In accordance with guidance,⁵⁸⁵ 13 interviewees talked about how bidders will assess authorities at the outset to see if it is prepared and organised and likely to run a cost-effective process. For example, according to one Procurement Officer 10 (local government), “what we have got to do as a contracting

⁵⁸⁴ See HM Treasury (2010), *ibid.* 3.3; Cabinet Office (2011), fn.199, 4.4; Cabinet Office (2010), *ibid.* 27

⁵⁸⁵ OGC/HMT (2008), fn.193, 5.1.7; NAO (2007), fn.38, 2.10

authority is make our contracts as attractive as possible; if we look like a bag of spanners then they are not going to want to be involved because the cost will be huge for them”.

Despite the clear recognition of the importance of pre-procurement work, 20 discussed how for a variety of reasons (e.g. resource and time pressures) sufficient amounts of such work often fail to take place. For instance, one Procurement Officer 6 (central government) argued that:

from a best practice ideal world point of view public sector procurement organisations would be doing a lot of upfront work by default, but the reality ... is there are often political requirements to do things to certain time scales and to meet certain milestones ... I think it is a fault of public sector organisations as a whole (not just the procurement side) that getting out the contract notice is seen very much as a milestone, ... a flag that needs to be raised to demonstrate that you are doing something ... Doing three months or so of work before issuing the contract notice can look like you are delaying or prevaricating ...

From a local government perspective Procurement Officer 4 (local government) stated that “the issue all heads of procurement share is that nobody actually comes to speak to us until they actually want what is delivered, which is a year too late”.

Furthermore, the nature of the competitive dialogue procedure may encourage some contracting authorities to postpone work that could be carried out pre-procurement and require bidders to do this working during the dialogue stage. According to Lawyer 20 (England & Wales, London) “[when] [the competitive dialogue procedure] is commenced at too early a stage, it is often due to laziness on the part of the contracting authority

which wants to borrow the brain power of suppliers; this is not how a competitive dialogue should be conducted”.

The following are examples given of the type of work that needs to be done before formally commencing the procurement (the relevance of these factors will likely vary from project to project and sector to sector).

- **Market sounding.** 18 interviewees spoke about the need to engage with the market pre-procurement. The need to gauge the level of market interest, learn about the viability of a project, and raise awareness of major procurements was considered particularly important in light of the above mentioned participation difficulties.
- **Internal organisational preparation.** 13 interviewees spoke about the need for organisational preparation within an authority.
- **Planning the process.** According to 22 interviewees, the process needs to be thought through from start to finish. For instance, it is suggested that authorities need to be clear at the outset about the structure of the process (whether there will be a phased reduction and, if so, how many phases and how to run each phase) and the timetable it will work to. Furthermore, it was recommended that authorities plan for difficult issues (e.g. conduct ground surveys or obtain planning permission where it would be too expensive for bidders to do this individually). In view of participation troubles, two external legal advisor interviewees noted that authorities should think about the timing of the OJEU notice.

- Work on the authority's needs and requirements. A competitive dialogue where dialogue is used as “an exploration” (Lawyer 37, Scotland) or where it is used to obtain “consultancy services on the cheap” (Lawyer 2, England & Wales) was strongly criticised by five interviewees for leading to wasted time and money. 20 interviewees spoke about the need for authorities to put work in pre-procurement to develop the requirement/s:

... all too often people end up going into the dialogue stage of a procurement without truly understanding what it is they are after. I do not mean in micro detail, but they have not properly worked through what their objectives are, they have not worked out what the consequences of taking certain actions might be and so on and so forth. They then end up treating the dialogue sessions as discussion groups rather than a phased negotiation ...
(Lawyer 27, England & Wales).

6/20 interviewees who mentioned the need for pre-procurement work on the requirement spoke about this in regard to the need to work up qualification, selection and award criteria pre-procurement. According to Lawyer 12 (UK):

[t]o me logically what you need to start off with doing is having a pretty good idea of your spec[ification] and shape ... [this should] ... lead to award criteria, ... to detailed evaluation model, ... to pre-qualification questions, ... to what you need to put in your OJEU notice in terms of mandatory minimum standards. Before you go to OJEU, you should have worked out all these things. And with competitive dialogue, because they are typically more complex, you need to have done a lot more thinking.

13.3.3 Streamlining

In this section some of the various methods employed by interviewees to streamline competitive dialogue will be explored. These methods include limiting bidder numbers (highlighted by 23 interviewees), standardisation (seven), targeted dialogue (14), and the use of electronic procurement tools (two). These methods are generally in line with recommendations flowing from government research.⁵⁸⁶

HM Treasury research emphasises the need for early bidder down selection to minimise costs and procurement timescales.⁵⁸⁷ The research notes that there may be a reluctance amongst some local authorities to down select from 3-2 bidders, and 15% of survey respondents had invited final bids from at least 6 bidders. In addition, according to Cabinet Office research, bidders are staying in competitive dialogue processes too long and would deselect themselves if there were better feedback on their chances of success.⁵⁸⁸ 23 interviewees spoke about the need to limit the number of participants invited to dialogue (subject to minimum requirements) or the need to reduce bidder numbers during dialogue quickly in order to reduce costs:

... it is best to [reduce numbers] as quickly as possible, so as not to waste the money of bidders who are not right for the project. Otherwise, you can have inordinate amounts of meetings and ... it starts getting quite expensive (Procurement Officer 3, local government).

All policymakers interviewed argued that the standardisation had led to smoother competitive dialogue procurements. The comments of Lawyer 39 (UK) reflect this view:

⁵⁸⁶ See HM Treasury (2010), fn.198

⁵⁸⁷ Ibid, 3.20

⁵⁸⁸ Cabinet Office (2010), fn.199, 19

BSF ... is a standardised process. There are enough deals that have gone through; people are familiar with it. There are always some issues (often to do with land or planning), but it helps when you have a government department or QUANGO like Partnerships UK that standardises it. The market gets to know it; they know where they have some flexibility, where they can push things and where they cannot. Competitive dialogue is more challenging when you get out of that arena and you are dealing with most likely a body governed by public law that does not deal with these things very often ...

Nevertheless, 13 interviewees bemoaned an overly standardised approach (contracts and procedures) in certain sectors, typically education (BSF), health (LIFT) and waste, and too much interference from central bodies (e.g. Partnerships for Schools):

[i]n the schools sector it is very difficult because you have another layer of bureaucracy: Partnerships for Schools, standard documentation, standard procedures and standard processes. This adds additional complexity that is not required in the legislation. ... You find yourself having arguments with people saying, if we were in full control we would advise the authority that they are okay to close dialogue, but if they have not got a tick in a box for X, Y and Z then they will not let them (Lawyer 24, England & Wales).

Likewise, the recent Cabinet Office review highlights “endemic bureaucracy ... leading to excessive levels of approvals and governance”.⁵⁸⁹

The term “targeted dialogue” was used by Policymaker 3; it essentially refers to a situation where the authority does not dialogue on all issues, but instead only on a limited set of issues with the other issues being cast in stone and not open for dialogue. The 2010

⁵⁸⁹ Cabinet Office (2011), fn.199, p.5

Treasury review expressly endorsed the approach subsequent to the interview.⁵⁹⁰

Policymaker 3 suggested two different approaches: (1) at the outset, specify the items that are going to be the subject of dialogue and the items that are not going to be the subject of dialogue and must be accepted by participants; (two) allow the early phases of dialogue to be quite open enabling the “authority to get lots of ideas from the market” and then fix certain issues (e.g. the contract) (i.e. “controlled dialogue”).

Although not referring to it as targeted dialogue, 13 interviewees described how they had adopted such an approach. For example, according to Lawyer 41 (Scotland), when advising upon the procurement of a school, the only issues discussed in dialogue meetings related to certain elements of the design. The contracting authority had ruled out dialogue about the contract and the financials, which was “driven by the need to maximise market interest”. Lawyer 31 (England & Wales, outside London) described how his/her firm has:

... started to pioneer with some ... projects adopting ... aspects of the restricted procedure on the contractual side ... A first draft of the contract is prepared, typically around the same time as the OJEU notice ... and then amendments to that contract will be restricted as the dialogue progresses so that ... it does not descend into a legal free for all, which has tended to happen over the past couple of years.

Three with experience of targeted competitive dialogue were critical of the approach, for example, because the contracting authority refused to dialogue on matters that it was not possible for bidders to sign up to (e.g. a required type of insurance is not available in the UK) (Lawyer 36, UK). Lawyer 37 (Scotland) described his/her experience with

⁵⁹⁰ HM Treasury (2010), fn.198, 3.30-3.32

competitive dialogue as “competitive monologue” because in a PFI procurement the authority refused to negotiate the contract.

As a means of moving away from the idea of the necessity for expensive face-to-face meetings, Policymaker 1 spoke about his/her efforts to promote greater use of electronic procurement tools, particularly for early phases of dialogue where bidder numbers may be high. This was mentioned by few other interviewees; however Lawyer 39 (UK) spoke at some length about his/her experience of such methods:

[t]here have not been excessive meetings in the recent competitive dialogue that I have been on. ... My main bugbear ... is ... it no longer feel like dialogue: you are talking to an e-portal ... It does not feel commercial. It feels very procedural and very regulated.

13.3.4 Management

Interviews highlighted the strain running a dialogue places upon authorities, which can run for several months; involve several different phases; involve several different streams of meetings; involve several different bidders; and involve several different solutions. In the context of efficiency, 31 interviewees emphasised the need for authorities to be sufficiently resourced (staff, time, finance etc.), and to have strong management and organisation: [w]e had seven bidders and different streams [of meetings] with each; it was very difficult to manage and very resource intensive (Procurement Officer 5, local government).

In terms of management, it was argued that dialogue meetings must be tightly controlled. For example, so that they are only held where they have a clear purpose (Lawyer 23 and 27 (England & Wales)). Also, a large public sector team must be effectively coordinated together (Procurement Officer 11, local government, and Lawyer 13, England & Wales).

Although it was stated to vary from authority to authority, concerns over the capability of authorities (particularly small local authorities and bodies governed by public law) were expressed in 30/31 interviewees (all but one external legal advisor): “... competitive dialogue requires a higher degree of ... skill than most authorities possess” (Lawyer 17, UK). According to Policymaker 2, “... external expertise is being skimmed on”. These findings regarding authority capability are backed up by the similar findings of the Treasury and Cabinet Office.⁵⁹¹

13.3.5 Interpretation of the rules

Although interpretations of specific legal rules were looked at in chapters 11 and 12, when discussing efficiency strategies it is pertinent to report that in general terms 34 interviewees spoke about the need for a more flexible reading of the law. Similarly to the findings of the Cabinet Office, for many of these interviewees, the challenge climate and soft-law (see chapter 14) had led to a generally very rigid application of the legal rules, which was resulting in more time consuming and costly procurements. The following areas were raised where a more flexible approach might lead to a more cost effective procurement: the availability of the negotiated procedure, the rules on equal treatment and transparency, and rules governing work after close of dialogue.

First, 8/34 questioned the way in which the negotiated procedure was considered no longer available for PPP procurement. This issue has already been addressed in chapter 10, and is something discussed in both the HM Treasury and Cabinet Office research (see chapter 10).

⁵⁹¹ HM Treasury (2010), fn.198, 2.9; Cabinet Office (2010), fn.199, 24

Second, as regards the application of the equal treatment and transparency principles, 8/34 felt it has led to unnecessary meetings. Lawyer 22 (UK) stated:

it may be something which comes out of the feeling that you do have to specify the process very clearly upfront. So, you specify in advance all the areas where you think you might have things to discuss. So you pre-specify the agenda right at the outset of the process and then you find that you have probably covered most of the topics during earlier meetings but you are not sure that you really need them. Because of transparency and equal treatment and all of these sorts of things, you worry if it will be discriminatory to simply cancel these meetings.

Further discussion on the application of these procedural rules can be found in chapter 11.

Third, 18/34 interviewees noted that to streamline dialogue it has been necessary to take flexible reading of the work that can be undertaken once dialogue has been declared closed; that is to say, excessive meetings are the result of finalising issues in the competition when they could be finalised when there is only one bidder left in the process:

... authorities, in wanting to keep the competitive tension going whilst bemoaning the cost and expense, ... are also very rigid ... on the issue of fine-tuning and clarification. So, you have quite a few people not being very pragmatic ... (Lawyer 15,UK).

Policymaker 3 acknowledged the above view:

... the market would question how developed the contract actually needs to be before close of dialogue. Certain bits of the market would prefer to go back to the negotiated procedure, where there was substantial detail to be finalised with the preferred bidder. The market would like a flexible reading of the scope for dialogue post preferred bidder, but it is tricky because the main reason why the competitive dialogue came in was because Brussels felt there was too much scope for skulduggery ... (changing important bits of the contract ... in an unfair way).

HM Treasury research notes 49% of contracting authorities surveyed reported no difficulties post close of dialogue, but 86% of respondents to a general web based survey reported at least minor difficulties and 15% experienced considerable difficulties.⁵⁹² According to the research, disproportionate amounts of bid costs are being incurred by bidders prior to close of dialogue where an overly prudent approach is taken to the interpretation of clarify, specify and fine-tune.

13.4 Payments to bidders

Due to the complaints about high bid costs and participation difficulties, it is appropriate to consider the possibility of authorities reimbursing unsuccessful bidders' costs (see chapter seven). The express provision in the Directive/Regulations for authorities to reimburse bidders' participation costs was discussed with interviewees. 45/58 stated that this provision played no role in practice. The primary reason being the cost pressures upon public sector authorities and an expectation that bid costs will be priced into tenders.

3/58 interviewees described situations where they had been involved in competitive dialogues where bid costs (or aspects of bid costs) were reimbursed:

⁵⁹² HM Treasury (2010), fn.198, 3.37

- ... we made a token gesture of £1,500: a drop of oil to make the wheels go round. Because of the nature of the software application being procured, we thought suppliers would be a bit reluctant to share ideas ... It did help ... Although we have to be careful because we are giving away [public] money, ... if as a result ... it frees up people's tongues ..., I think it is a good thing ... I have mentioned the possibility in later ... meetings and have immediately been told that we will not be doing that (Procurement Officer 2, body governed by public law);
- ... we had a very special project where there was a parallel parliamentary process running; if this was binned, bidders would have expended all this money and then through no fault of their own the project would have been cancelled. Also, it was a very complex, expensive procurement where we anticipated a fairly long dialogue. ... The payment of tender costs was subject to lots of conditions (for example, it is only available where compliant bids are submitted). The payments were in the region of five-10 million pounds. The authority is happy to do this on the basis that the competition it generates ensures better value for money. For a £billion plus project, five-10 million pounds is not very much. ... We used it as a marketing tool (Lawyer 37, Scotland).

15 interviewees stated that although they had not advised upon reimbursement of bid costs they thought it would be beneficial in certain circumstances, for example where very high bid costs are expected and liable to discourage participation and when an authority wants to secure intellectual property rights.

All Policymakers interviewed agreed that the reimbursement of bid costs should be the exception. It may be an appropriate thing to do, for example, where the authority “asks bidders to go to another stage ... for more detail than what is normally done in the market to give the authority comfort over price and cost” (Policymaker 1), or “where schemes are cancelled through no fault of the bidders” (Policymaker 2). In view of the high bid costs

commonly associated with competitive dialogue, HM Treasury research notes that, although general government policy remains not to pay bid costs, in view of international success when paying bid costs the issue is something that needs to be looked at further.⁵⁹³

13.5 Concluding remarks

Chapter 13 has explored general issues raised in the interviews, such as cost, time, uncertainty, complexity and bidder participation difficulties. The findings very much support the conclusions of the 2010 HM Treasury review and 2011 Cabinet Office review.

⁵⁹³ HM Treasury (2010), *ibid*, Box4.A

14 Findings: regulatory compliance

14.1 Introduction

Chapter 14 will present the findings from interviews on the factors impacting upon approaches to interpretation in areas of legal uncertainty, specifically in relation to the legal rules on competitive dialogue. The approach to the interpretation of the legal rules on competitive dialogue, as identified in chapters 10, 11 and 12 appears to be generally broadly in line with the economic theories of compliance considered in chapter eight. According to these theories, the decision making of private companies under regulation is the result of a cost benefit analysis, where the likelihood and the expected detriment from non-compliance are weighed against the expected benefits of non-compliance.⁵⁹⁴ A significant proportion of interviewees suggested that likewise contracting authorities interpreting often uncertain areas of competitive dialogue will be strongly influenced by a consideration of the theoretical and practical risk of legal challenge and the consequences of legal challenge (e.g. procurement delay) weighed against other factors, such as benefits to be derived from a particular course of action (e.g. cost savings or improved value for money), internal or external pressures (e.g. time pressures and political pressures), and the alternative options open to the contracting authority (e.g. to restart the procurement) and the costs and benefits associated with the alternatives.

Chapter 14 will consider specific factors impacting upon contracting authority decision making in detail. As perceptions of the risk of legal challenge are often a key factor in authority decision making (e.g. see discussion in chapter 12 on preferred bidder negotiations), the chapter will begin with a consideration of interview responses to questions on the theoretical and practical risk of challenge and what impact, if any, this is

⁵⁹⁴ Becker (1968), fn.451

having. Although, the new remedies directive had only just been introduced at the time the interviews took place and interviewees had very little practical experience of the changes to the remedies system, interviewees were asked to give their views on the expected impact of the changes.

Braun's qualitative research into PFI procurement practice pre-competitive dialogue found soft law to play a significant role in guiding contracting authorities in their application of the legal rules.⁵⁹⁵ The impact of soft law on the decision whether or not to use competitive dialogue over other procedures has already been discussed in chapter 11. In section four the comments of interviewees in relation to the role played by soft law generally and in interpreting specific aspects of competitive dialogue other than the decision whether or not to use competitive dialogue will be considered. The chapter will conclude by looking at factors other than those relating to a cost-benefit analysis identified in interviews as impacting upon compliance. These include the procurement proficiency of authorities and also the desire to obey the law irrespective of legal risk.

14.2 Legal challenge

14.2.1 Introduction

Interviewees were questioned on their perceptions of legal risk, their experience of legal challenges, and how such perceptions and experiences impact upon contracting authority decision making under competitive dialogue. 19/25 interviewees did not view Commission challenge as a major threat when conducting competitive dialogue procurement. The main threat of legal challenge appears to be seen as coming from the market, i.e. aggrieved bidders. 26/50 interviewees had experience of formal legal challenge under competitive dialogue and stated the risk of challenge to be generally very

⁵⁹⁵ Braun (2001), fn.172

high. 24/50 had no such experience of legal challenge, but eight of these 24 still regarded the risk of challenge to be generally high. Interestingly, 46/54 interviewees noted a rise in bidder complaints, informal legal challenges and queries since the introduction of competitive dialogue (though not necessarily due to the introduction of competitive dialogue). In line with the theories of compliance discussed in chapter eight, 32/34 of the interviewees who perceived there to be a high risk of challenge under competitive dialogue spoke of this resulting in authorities becoming increasingly risk averse in their decision making.

14.2.2 Commission Challenge

In general interviewees did not regard the threat of Commission challenge for non-compliant conduct under competitive dialogue to be a major concern. There were no interviewees with experience of such a challenge and only 6/25 interviewees cited Commission challenge to be something they are wary about. For example, according to Procurement Officer 7 (central government), “we feel that we are being watched very carefully and being reviewed to see that the old ways under the negotiated procedure do not come back”. Likewise, Procurement Officer 4 (local government) stated, “we are always worried about the Commission stepping in for not following the procedures correctly; this guides what we do, particularly in relation to our larger tenders”. 3/6 interviewees (wary of Commission challenge) suggested the scope for negotiation with the preferred bidder under competitive dialogue to be an area the Commission may want to address in the future in order to provide clarity and to prevent UK reverting to old practices (i.e. extensive contractual negotiations with the preferred bidder) (other interviewees did not comment on this point).

The other 19/25 responses focused solely on the threat of market challenge, disregarding the risk of Commission challenge; for example, Lawyer 2 (England & Wales) stated “the

risk of a private sector supplier bringing a challenge is very high; I had not really thought about the Commission ...”. According to Policymaker 2, Commission challenge is “looked upon as being at the theoretical end of the spectrum”. 2/19 interviewees noted, however, that the possibility of Commission challenge may be something that is touched upon in legal advice: “[t]he Commission will sometimes feature in advice, but there is a perception that if you get picked up by the Commission you have been incredibly unlucky because they do not have a lot of time and are pretty selective about the cases they take on” (Lawyer 13, England & Wales).

According to interviewees, to attract Commission challenge the procurement would need to be high profile (e.g. procurements by government departments and high profile non-governmental organisations) (five interviewees) and/or concerning issues corresponding with Commission policy objectives, such as areas of widespread non-compliance (eight). For instance, Lawyer 8 (England & Wales) stated, “I do not think we are particularly concerned about Commission challenge but that may just reflect the fact that we are in [regional city] and not ... doing the mega stuff (relative to other things)”.

In addition, several reasons were given for the perceived minimal threat of Commission challenge. For example, the Commission’s limited resources (two interviewees) and a perception that there are other EU Member States more deserving of Commission attention (one) were said to make Commission challenge unlikely. Also, two interviewees stated that Commission challenge would not be a concern for individual authorities because the challenge would be made against the state.

14.3 Bidder challenges and complaints

14.3.1 Introduction

Interviewees were asked about their experiences of formal legal challenges in the context of competitive dialogue. 26/50 interviewees had encountered in practice in one way or another (24 of the 26 were external legal advisers often with experience advising a variety of clients, e.g. authorities, bidders, and funders) formal legal challenges in competitive dialogue procurements, and were of the opinion that formal legal challenges were more common than prior to 2006 and becoming increasingly so. 24/50 interviewees had no experience of formal legal challenges under a competitive dialogue procedure; however, 8/24 stated that they were aware of an increase in legal challenges from press reports and anecdotal sources (e.g. conferences).

Significantly, 46/54 interviewees noted a rise in bidder queries, complaints and informal legal challenges, i.e. “sabre-rattling” (Procurement Officer 10, local government; and Lawyer 20, UK). Clearly, despite bidders finding potential flaws in competitive dialogue processes, these disputes rarely find their way to the courts. The reasons for this will be looked at below. The following is a selection of quotes from interviewees describing their experience of bidder queries, complaints and informal legal challenges:

- *[p]eople are waking up to the fact that they are not able to spend huge amounts of money on coming second without knowing why they have come second. We are not seeing a flood of litigation, but people are more prepared to complain ... (Lawyer 17, UK);*
- *... there are loads of complaints. As to whether people have got the money and will to go to court that is a different matter. Lots of people write initial letters of complaint (Lawyer 39, UK).*

20/46 interviewees that spoke about an increase in queries and complaints under competitive dialogue specifically mentioned Freedom of Information requests as a tool that aggrieved bidders will employ to put pressure on authorities. However, some of those interviewees noted that such requests are rarely fruitful.

14.3.2 Reasons for high legal risk

A number of reasons were put forward for why theoretically the level of legal risk under competitive dialogue is high in comparison to complex procurement under the negotiated procedure: cuts in public spending, high bid costs, greater bidder familiarity with the procurement rules, a more litigious culture, and increased prescriptiveness of procurement regulation. These are broadly in line with the reasons suggested in chapter eight as having the potential to impact on perceptions of legal risk. The reasons for the high level of legal risk will be presented below; however, these reasons should be read in light of the statements of 13 interviewees that it is impossible in complex procurements to run a risk free procurement process: “[t]o be honest with you, with the best will in the world, with all the discretion there is in the procurement process, I defy anybody to say what a perfect procurement should look like; there isn’t one. There is always going to be the potential for challenge” (Lawyer 4, UK).

The main reason for the high theoretical risk of legal challenge relates to the UK’s struggling economy at the time the interviews were conducted. 25 interviewees (others did not comment) stated that, due to the economic situation and ensuing cuts in public sector spending, major capital projects were becoming less frequent, making such work more valuable to private sector companies. This was said to make private companies, particularly incumbent public sector suppliers, less inclined to accept failed bids in

competitions for a major contract, as, for example, they may not get another opportunity to compete for such work:

I have seen a greater desire and willingness to challenge. In the past ... in the UK ... you ... lost a contract but you are not going to make too much fuss because there is another one coming up and you want to be in the good books of the authority. That is no longer the case. I have seen a marked difference, even if not necessarily litigation there is definitely queries of 'what can we do, can we stop this'. Losing bidders are much less likely not to accept it. It is a lost opportunity for them. If they think they can do something about it they will. Opportunities are not so many, so if they have lost something they are much more keen to challenge (Lawyer 19, UK).

A second factor contributing to increased risk under competitive dialogue was the high costs of bidding. It was stated by 18 interviewees (others not commenting) that, because of the significant investment generally expected in the preparation of bids under competitive dialogue, there was a greater financial incentive for unsuccessful bidders to challenge:

- *[t]he stakes are a lot higher. Bid costs are higher; so, if you are finding yourself losing at the last leg and you have spent £2million in bid costs ... are you going to walk away feeling happy or are you going to be looking for reasons why that is the wrong decision (Lawyer 7, UK);*
- *... it costs so much to compete in a competitive dialogue. If you have a board of directors saying, 'hang on, you have spent £4million and we have not got a contract', there is a great pressure to challenge (Lawyer 40, UK).*

As mentioned in chapter eight, heightened bidder awareness of rights and remedies under EU procurement law was mentioned by 15 interviewees (others not commenting), for example bidder knowledge that they cannot be blacklisted for future public contracts. According to Lawyer 21 (UK), “there is an upward trend in challenges. It is difficult to say why, but the degree of awareness of bidders of the law is increasing. ... [There has been] a gradual increase in awareness since ... the 2004 directives”.

20 interviews (others not commenting) described how there had been a shift towards a more litigious culture, for example because legal challenges themselves were fuelling further legal challenges:

[the rise in the number of challenges] antedates the new remedies directive. It may be a self-fuelling thing: if a few people do it then other people see that they are doing it and so it gets going for that reason (Lawyer 5, UK).

A further reason for increased legal risk highlighted by 16 interviewees (others not commenting) was the greater regulation (including case law on transparency and the Freedom of Information Act) that has occurred since the introduction of competitive dialogue:

[f]reedom of information and case law, the Regulations as well. Increasing levels of transparency requirements from case law, coupled with freedom of information, has enabled people in parallel to get all the information. People now have much more information and ammunition to decide whether or not something is unfair. In addition, there has been an increase in complexity; there are more things to get wrong in procedures (Lawyer 41, Scotland).

In addition, four interviewees stated (others not commenting) that the rise in procurement challenges was down to the ease with which bidders were able to mount challenges. Of these four, Lawyer 31 (England & Wales) noted that he/she had heard anecdotally that bidders are now able to obtain commercial insurance covering the legal costs of challenge. The author can find no evidence of such insurance, however.

Also, in response to questions on reasons for increased legal risk, four interviewees stated that this was often down to authorities needlessly exposing themselves to risk, e.g. due to insufficient work pre-procurement, a failure to seek timely legal advice, and/or a lack of internal skill, experience and/or resources.

It was highlighted in chapter four that procurement disputes in Scotland, unlike England, Wales and Northern Ireland, may potentially be brought before one of two courts: the Sheriff Court or the Court of Session. Those interviewees operating predominantly in Scotland were asked for their view on whether this impacted at all upon compliance levels in Scotland; however, in the context of competitive dialogue procurement disputes, which are invariably high value, all Scottish interviewees did not feel there was any impact, particularly as only the Court of Session had the power to award injunctions.

14.3.3 Reasons limiting risk of legal challenge

Regardless of reasons for a high theoretical risk of challenge discussed above, many interviewees explained that a high practical risk of challenge was not inevitable and this would need to be considered on a case by case basis. For instance, had the aggrieved bidder gone away to focus on different work or was the bidder still on the scene, asking questions and seeking further information? If an aggrieved bidder is displaying signs that it is looking for reasons to challenge then the level of practical risk is heightened.

Although not asked any specific questions targeted on this aspect of competitive dialogue practice, a limited number of interviewees discussed reasons limiting the risk of challenge. It will be seen that some of the reasons (i.e. fear of being prejudiced in future contracts, and the costs and time associated with litigation in the UK) mirror those found by Pachnou's 2003 qualitative research into the UK's system of procurement remedies.⁵⁹⁶ It should be pointed out that the present research is a study of perceptions from the contracting authority perspective, and does not seek to determine the actual reasons behind any bidder reluctance to bring legal challenges or see them through.

Six interviewees spoke about bidders being reluctant to bring challenges against contracting authorities due to a concern that this may prejudice future chances of success (other interviewees did not comment on this):

[t]here is still massively a fear of biting the hand that feeds; it does happen and people do get prejudiced. You would not complain about certain things; it would be silly. If you are going to end up working with them you will be with some of the people you criticised and people take things very personally. The London Borough [Councils] talk amongst themselves (Lawyer 39, UK).

Similarly, one legal advisor stated that relationships between authorities and bidders may reduce the risk or perception of risk of challenge. According to Lawyer 2 (England & Wales), "... there are some council members and procurers who believe that they have strong enough relationships with the bidders not to have to worry about challenge, but I think that is probably more in the minority now".

⁵⁹⁶ Pachnou (2003), fn.455

Five interviewees spoke about how the costs and time needed to mount a legal challenge act as a disincentive for challenge, particularly, according to Lawyer 18 (UK), for small and medium sized businesses: “SMEs, they do not want to go to court; they may not have the resources. ... The recession has had various implications: ... companies do not want to waste time and resources litigating, so that has given authorities a bit a carte blanche to do whatever they like”.

The uncertainty of many areas of competitive dialogue and thus the uncertainty of challenge outcome was said to exacerbate the time and cost disincentive. This was highlighted as a disincentive in four interviews. As Lawyer 13 (England & Wales) commented in regard to potentially unlawful negotiations post appointment of a preferred:

we will put a letter in for a bidder saying to the authority that this looks like a quite substantial change, but the fact is because the law is slightly uncertain it actually decreases the risk of challenge. If you are a bidder, unless you are very grumpy, you are not going to be prepared to go to court and risk £100k or thereabouts where the law is not very clear. Even if you do win, you have only bought yourself a lottery ticket and the right to have another go in circumstances now where the authority really hates you.

Linked to the cost deterrent to mounting a legal challenge, three interviewees cited the requirement in the UK for the claimant applying for an interim injunction to provide a cross undertaking in damages (chapter four) as often dissuading legal challenge: “[t]he biggest impediment to litigation in the UK is the cross-undertaking in damages; if that were ever to go there would be an explosion, basically” (Lawyer 21, UK).

In addition, three interviewees questioned the high risk of challenge because these processes are run in a legally robust and transparent manner. For example, Lawyer 1 (Scotland) stated:

... I think that on complex projects ... the likelihood of a challenge is probably less likely even though there is more at stake in terms of bid costs simply because ... as legal advisors are there along the way the process probably tends to be more robust than if councils were going out to procurement and doing it themselves and I would say that given the robustness of the process that has been applied people might be more inclined to take a risk because they know that they can defend what they have done. So, there may be a technical breach of the rules, but you could argue it is still as fair and transparent and the likelihood of a risk if going to be less because of that fairness and transparency ...

Also, as mentioned in chapter 12 on interview findings for issues arising following the close of dialogue, in relation to the possibility of a bidder bringing a challenge against violations of the procurement rules occurring in the preferred bidder stages of the procedure, the aggrieved bidder may have difficulty uncovering the necessary information that provide grounds for challenge.

14.3.4 The impact of perceived high legal risk on behaviour

Most of those interviewees that perceived there to be a high risk of market challenge under competitive dialogue were asked about how this impacted upon contracting authority behaviour. In line with the economic theories on compliance discussed in chapter eight, 32/38 interviewees stated that the greater risk of challenge under competitive dialogue meant that greater emphasis was placed upon legal compliance in decision making, i.e. authorities are generally showing greater caution when applying the rules. 6/38 interviewees disagreed with this view, arguing that the perceived high risk of

challenge had not impacted upon the way in which contracting authorities run complex procurements.

The following are a selection of quotes from 32/38 interviewees that felt the high risk of challenge under competitive dialogue was causing authorities to put greater emphasis on their compliance objectives:

- *... the change in ... challenge culture over the last five-10 years has made ... authorities very much more well behaved in relation to the procurement rules. I do not think they take them lightly and I think they work quite hard in getting it right (Lawyer 7, UK);*
- *... in view of the current climate where there is greater fear of challenge, where there was legal grey areas in the past I think contracting authorities were happy to let it slide, now they feel they are under a lot more pressure to make sure everything is documented properly, everything is transparent and they can justify decisions (Lawyer 40, UK).*

9/32 who described contracting authorities as more cautious when applying the legal rules in recent years, spoke about how the risk of challenge had led to greater awareness of the rules amongst authorities and more resources being devoted, for example, to education.

For instance, Lawyer 2 (England & Wales) stated:

... there is a lot more emphasis on training ... , making the procurement team more aware of procurement issues. ... Take a care project, for example; in the past ... you would not be drilling down to the people who are evaluating the care as to how to do their job and what they can do. ... Recently, I set aside two days to discuss evaluation criteria and it is quite a bizarre experience

because you have got, for example, care professionals sitting in the room looking at you as if to say do we have to go into this.

12/32 describing authorities as more cautious spoke about contracting authorities' focus on compliance obstructing the achievement of efficient procurement processes (for example from inefficient dialogue due to a strict interpretation of equal treatment rules) or the achievement of value for money (for example from not being able to negotiate with the preferred bidder a strict interpretation of the application of the rules on award criteria, or from devoting resources to compliance rather than value for money):

[the risk of challenge] makes [authorities] focus on compliance rather than getting the right result. It is a bit of a tightrope. What you are trying to do is stop clients falling off one side (getting sued), but falling of the other side means you do not get the bids you want ... (Lawyer 41, Scotland).

Interestingly, of the total 38 discussing impact of risk of challenge on behaviour, seven spoke about authorities that have been the focus of procurement law challenge becoming highly compliance orientated in future procurements:

[m]y remit, number one, there will be no successful legal challenges. Everything else is subsidiary to that. My position is down to the fact that we lost a court case ... Since then the authority has been very conscious of its reputation. ... It is incredibly embarrassing ... We are quite a vulnerable buying authority, high profile enough that if someone wins a case against us it is going to make the papers (Procurement Officer 8, body governed by public law).

In addition, a limited number of interviewees noted that competitive dialogue procurement disputes may not be reaching the courts because contracting authorities can be quite responsive to challenges and complaints, for example rewinding procedures. As discussed in chapter 12, restarts and rewinds are often seen as a last resort when a competitive dialogue has progressed to its latter stages; however, this does not appear to be the case where the procurement is not so advanced. As Lawyer 11 (Scotland) emphasised:

... the case reports of these things reaching courts is no way indicative of the level of problems that there actually are. [NAME OF LAWYER] has so far got three procedures abandoned this year where he has been acting for aggrieved bidders. [He/She] has been winding up the authority about non-compliance. In one of those it is a national project; they started the procurement in 2008, after about a year it got abandoned, they started all over again, made a different mistake, and it has been abandoned again. That is just natural. [He/She] has had three so far this year; multiply that up over the course of the year, say 10 or 12 over a year and then multiply again because there are lots of other firms that are in this area. You just get an idea of the extent of procedures that are actually facing problems. ... They are not coming to the courts because they are getting abandoned and started again or they are winding the clock back within the procedure ...

14.3.5 The new remedies directive

28 interviewees spoke freely about what they perceived to be important in relation to the introduction of the amendments to the remedies system. The Public Contracts (Amendment) Regulations 2009 transposing the new remedies directive applies to procurements commenced on or after 20 December 2009 (see chapter four). The interviews were predominantly conducted in early 2010; thus, interviewees lacked practical experience of the new remedies system.

19/28 interviewees stated that they expected the introduction of the new remedies directive to generally lead to a greater threat of formal legal challenge and more caution from contracting authorities when applying the legal rules. 3/28 interviewees did not anticipate there to be any changes following the introduction of the remedies amendments, and 6/28 interviewees were unsure what, if any, impact there would be.

Six interviewees spoke about the provision for automatic suspension following legal challenge as the significant development in relation to competitive dialogue procurement. According to interviewees, it “[gives] bidders ... more encouragement to ... take a pop at the procuring authority” (Lawyer 3, England & Wales). As Lawyer 17 (UK) explained:

[p]eople are waking up to the fact that they are not able to spend huge amounts of money on coming second without knowing why they have come second. We are not seeing a flood of litigation, but people are prepared to complain. Reversing the burden from now on puts bidders in a far stronger position; on the back of that I think we will see a complete sea change. What is there to lose now? An authority is more likely to respond to a threat of legal challenge and say okay we will go back to a previous stage or we will change this or do that. Given the effect of me doing that, you will take me very seriously. It will cause delays. We are going from one extreme to another.

It was suggested in three interviews that it was not clear whether or not the cross undertaking in damages (highlighted above as a barrier to legal challenge) could still be justified under the new remedies regime: “[t]he cross undertaking ... I do not think that is what Europe intended. I think they intended to give people rights. I think the way the UK legislation is drafted is quite friendly to the public sector ... and there will be a question over whether the Commission is happy with that” (Lawyer 39, UK). As

discussed in chapter four, the case law seems to confirm that the same principles apply in to a consideration of whether or not to lift a suspension as applied under old case law on awarding injunctions.

4/8 interviewees noted ineffectiveness as likely to significantly impact upon competitive dialogue procurement practice; however, four other interviewees disagreed with this view, citing, for example, a reluctance shown by the UK courts' to find against contracting authorities when requested to grant an injunction. As will be discussed in the section immediately below, there were some additional comments on how ineffectiveness may encourage bidders and funders to become even more concerned to ensure that the legal rules are followed correctly.

14.3.6 Impact of risk of challenge on funders

In view of the introduction of the ineffectiveness remedy in particular (see chapter four), nine interviewees considered that bidders and funders may become more concerned that the legal rules are correctly observed; for instance, it was suggested by these nine interviewees that the growing practice of insistence upon contracting authorities providing indemnities for bidder/funders against successful challenge may become even more common:

... the bank thinks that ... the contract might be ineffective ... it will make ... sure that the rules have been applied. ... [Y]ou get people asking for indemnities from the authority. I have encountered cases where such indemnities were given and I think they are probably enforceable. ... [I]t is a matter of pressing the authority and its advisors quite hard on how they can provide reassurance that they have complied with the procedure (Lawyer 5, UK).

The example was given of amendments to tenders or the call for tender that are outside the scope of the OJEU notice (i.e. may necessitate the restart of the procurement). It was suggested that this could potentially give rise to the availability of ineffectiveness and, thus, funders may be reluctant to accept such a risk without an indemnity. Some interviewees felt that the ineffectiveness remedy may deter material changes that are bidder or funder driven. Lawyer 7 (UK) stated:

[b]idders are often the beneficiaries of a process not being carried out correctly; so, that will be an interesting dynamic, ... particularly if the bidder whose been preferred has since managed to negotiate changes which are beneficial to it but might raise the concerns of its own financiers that the project is at risk on Presstext principles, needing to be re-advertised. I think we are still trying to work out the extent to which the new remedies will impact on lateral changes and on extensions by time of contracts, but there must be potential there for everybody to get more concerned about what has actually gone on in the process and whether a line has been crossed where really the project should have been re-advertised and we are in effect directly awarding something that was not advertised.

14.4 Soft law

Chapter eight discussed the 2001 research of Braun, which found government guidance to have played a key role in the development of PFI procurement practice under the negotiated procedure.⁵⁹⁷ According to Braun, non-binding guidance from UK central government were being regarded as authoritative interpretations of the law even where these interpretations were not in line with the Commission's view. Since the introduction of competitive dialogue, a range of guidance documents have been made available (chapter seven). In their discussion of the role played by guidance, the vast majority of

⁵⁹⁷ Braun (2001), fn.172

interviewees concentrated on guidance from OGC (particularly 2008 guidance)⁵⁹⁸ because, as mentioned by some interviewees, this is the most important guidance. The guidance that Braun found to be influential in practice were clear statements of law (i.e. on use of the negotiate procedure). Likewise, with respect to clear statements (i.e. the decision to use competitive dialogue) the findings suggest guidance to have played a major role in shaping UK practice (chapter 10). However, it will be seen that more generally due, in particular, to the generic nature of the guidance its role is limited.

The 2006 and 2008 OGC guidance was seen by most interviewees (40/45) as having some influence in broadly setting out a basic practical framework as to the way in which a competitive dialogue procedure is to be conducted. The OGC guidance was commonly referred to as a useful reference document or a helpful introductory text to best practice; however, these interviewees did not see themselves constrained to conduct competitive dialogue strictly in line with the best practice or legal interpretations as set out in guidance. The 40/45 interviewees made clear that they would be prepared to depart from the guidance where it conflicted with their view of the law or best practice; one example of this that was given related to reserve bidders. According to Lawyer 32 (England & Wales), the OGC guidance advises against keeping a reserve bidder, but he/she felt a reserve bidder can be beneficial and advises in favour of their use. The following are quotes from the category of 40 interviewees that expressed that no great emphasis was placed on the role of OGC guidance:

- *I refer to the OGC guidance but it is not binding. You make a note of it but ... do not rely on it heavily. ... It is useful background information; I would put it no higher than that. My primary source is the Regulations and experience ...* (Procurement Officer 10, local government);

⁵⁹⁸ OGC/HMT (2008), fn.193

- *[t]he OGC stuff is okay; you read it. Everyone read it to start with. These guys have negotiated in Europe so they know what they are trying to achieve, but I do not think I have got the OGC guidance out for a couple of years now. I will not stick to it rigidly (Lawyer 13, England & Wales).*

4/45 interviewees viewed OGC guidance as authoritative and sought to strictly follow such guidance when conducting competitive dialogue procurements, and 1/45 was not aware of any OGC guidance.

The predominant reason for the general minor role of guidance in competitive dialogue was said to be the generic nature of the guidance. 26 interviewees criticised the guidance for being too generic to be of any real practical use. For example, as stated by Lawyer 39 (UK):

a lot of the stuff ... that requires legal advice goes beyond the OGC guidance, stuff that is specific to the deal. Government guidance is there so that the Commission knows that the Member State is doing things by the book and it understands the general approach, but on specific deals ... the deal is run as the law firm instructing the government department thinks the deal should be run. Generally procedures are in line with the guidance but the guidance is necessarily quite generic. ... Often you can pick up guidance and it will not address the specific question you have.

13/26 that commented upon the generic nature of OGC guidance cited the failure of the OGC guidance to adequately address controversial areas, such as the scope for negotiation post close of dialogue and the application of the award criteria during dialogue. In this respect, the guidance is generally not controversial enough to prevent

authorities from doing what they would like to do for commercial reasons. The following comments are examples of the above view:

- *... the OGC guidance does not help ... There is no real clarity there by what is meant by 'fine-tuning'. ... [T]hey need to get off the fence and effectively say, 'this is what it does mean' because I have read [the guidance] a few times and you think to yourself, 'well what exactly is it saying?' and because of that you take the cautious route and you waste money (Lawyer 2, UK);*
- *... one area it would be really helpful to have guidance on it the one area they dodge: Lianakis, Lettings etc. It would be really helpful if someone was to stick their head above the parapet and actually give us some guidance on it because I think evaluation is probably the most difficult area to get right in competitive dialogue ... [T]he OGC and HM Treasury guidance, it is pitched at too high a level. It does not go into the detail that we need (Lawyer 26, UK).*

Policymaker 3 noted the difficult balance that must be struck when giving guidance in uncertain, controversial areas:

[i]t is tricky for us to comment on these things. There are areas where you would like to give a lead to the market but it is a hard balance. Sometimes you would like to say more than you think you can. If you end up putting out a piece of guidance that turns out to be wrong it would be a very tricky situation. What would be easier is for the private sector ... to themselves come up with what they see as guidance. They do not have the same relationship with Brussels.

Policymaker 3 explained that this was why the Procurement Lawyers Association (an independent organisation of EU procurement lawyers) had been asked by the UK government to look at certain issues in relation to competitive dialogue. Nevertheless,

Policymaker 3 did argue that there were still some practical areas where government guidance could be beneficial, such as pre-procurement preparation and planning, targeted dialogue, bidder numbers etc.

Also, eight interviewees criticised the quality of the OGC guidance. For example, Lawyer 19 (UK) stated:

[t]hat is the problem with soft-law and why we (the legal community) are generally not overly keen with OGC guidance. ... Before they come up with papers they should consult us because small local authorities, people who do not have the luxury of going to external legal advisors, are just going to read the guidance and interpret it as law; that will create problems for the future.

In addition, in accordance with Braun's findings,⁵⁹⁹ 20 interviewees (others not commenting) stated that comfort was derived from the support of guidance, for example, as stated by 2/20 interviewees, because such guidance might be taken into account if the matter were to come before a domestic court:

It is all helpful, but a lot of it just says what we all know. We had to advise on a single bidder situation and the OGC guidance confirmed our previous advice. ... There are some helpful views that could support you. There is an advantage in having OGC say these sorts of things. If the OGC is taking the same view then it is unlikely that someone is going to challenge on that basis. The courts are likely to be influenced by OGC guidance ... (Lawyer 29, England & Wales).

It was suggested by some of the 20 interviewees that talked about gaining comfort from the support of guidance that due to the uncertainty of many aspects of the legal rules and

⁵⁹⁹ Braun (2001), fn.172, 191

the lack of case law, although most comfort was gained from the support of OGC, some comfort was taken from any supporting sources.

In relation to guidance and standard documents issued by Partnerships for Schools and the Department of Health, 10 interviewees (others not commenting) commented how under these programmes the advice and guidance issued by these policymaking organisations was mandatory and looked upon by contracting authorities as authoritative:

[i]f you are doing a project driven by Partnerships for Schools you have to read their guidance because they are such control freaks that if you step momentarily out of line then they will haul you over hot coals and they will make more work than actually doing the competitive dialogue if you are not careful (Lawyer 23, England & Wales).

14.5 Contracting authority skill, expertise and experience

A further matter impacting upon compliance that was apparent from 47 interviews was the expertise, experience, resources and approach to legal advice of contracting authorities. It was seen in chapter eight in the discussion of the compliance literature that a lack of competence or lack of awareness of the legal rules can lead to non-compliance, for instance inadvertent breaches of the law or even poorly calculated deliberate breaches (e.g. due to not knowing the potential consequences of successful legal challenge). The procurement proficiency of contracting authorities was said by most interviewees to vary from contracting authority to contracting authority, depending, for example, on the size of the authority, the resources available and the procurement experience of the authority and its workforce.

Because the type of contracts procured under competitive dialogue tend to be high value and complex, it is most common for external legal advisors to be brought in to advise the

contracting authority (see chapter 10). For example, according to Procurement Officer 10 (local government):

... local authorities could be perceived not to have the resource ..., but that may not be the entire reason why they would outsource it. In light of the fact that some of these projects are tens of millions of pounds if not hundreds of millions there is a risk profile that the internal legal could not accept. I cannot imagine any authority would run a PFI procurement without any external help; there is an inherent risk in doing that and getting it wrong would be bad.

However, the extent to which external legal advisors are utilised was explained by most interviewees to depend on the procurement and the authority involved. For example, in some procurements, e.g. the first time a contracting authority had procured a certain type of project under competitive dialogue, the external lawyers may take on a significant lead role akin to a project manager. In other procurements, for example where personnel within the contracting authority are experienced in complex procurement under competitive dialogue, the external lawyers may have more of a support role, providing advice as and when needed.

The latter approach is not necessarily problematic from a compliance perspective, as numerous examples were given of specific city councils with highly proficient internal procurement departments. Nevertheless, the practice of obtaining external legal advice as and when problems are encountered was noted to have led to difficult compliance decisions. 14 interviewees cited situations where external legal advice was obtained at too late a stage, such that it was not possible for the procurement to continue without substantial costs being incurred or an increase in the challenge risk. In this regard, interviewees highlighted as a problem the failure of some authorities to obtain needed

external legal advice pre-procurement and in the drawing up of the contract notice. For example, scenarios were cited where the contract notice had been drawn up without external legal advice and was not sufficiently flexible to cater for any subsequent changes in project scope.

Five interviewees stressed the importance of education over further guidance and standardisation:

- *... the drive towards trying to standardise processes is not always good. This is just a personal view, but you should actually just be making people better at their job and then standardisation and guidance and things are more tools ...* (Lawyer 12, UK);
- *OGC should not be issuing flow charts etc. for the proverbial monkey to follow; they should be conducting an education exercise ...* (Lawyer 14, England & Wales).

14.6A desire to obey the law

As highlighted above, it is evident that in competitive dialogue a number of considerations will impact upon authority decision making, particularly in areas of uncertainty. However, the approach taken may depend upon the type of contracting authority: a small number of interviewees (procurement officers at central government or external legal advisors that predominantly advice central government) distinguished the approach of local government, which was said to be quite commercial in their application of the Regulations, and the approach of central government.

It was spontaneously noted by four interviewees that central government, seeing itself as the lawmaker, is less inclined to accept legal risk than local government and seeks to observe the law simply because it is the law:

- *... there is also a desire to comply with the law in any event in the case of government departments. ... [G]overnment lawyers are on the whole less inclined to take a pragmatic approach. ... [I]t is not just an economic matter ... If I said that I would be misrepresenting it because there would also just be the desire to comply irrespective of economic observations* (Lawyer 5, UK);
- *[a]t a local government level, my feeling is that people are quite private sector in the sense of, 'if we can get away with it then that is great'. For central government there is a consciousness of adverse publicity as well as a direct financial problem and there are more procurement people around there who still feel that ... government bodies ought to be doing the right thing regardless of the risk of being caught ...* (Lawyer 12, UK).

As a result of these comments, the observation that contracting authorities might be motivated to comply with the law because it is the law was put to a small number of other interviewees (local government advisors) but interviewees did not regard it as featuring at all in decision making.

14.7 Concluding remarks

Chapter 14 has considered the findings on compliance. As has been explained, in terms of the cost-benefit analysis and the role of soft law in contracting authority decision making, the research very much backs up the findings of Braun in 2001.⁶⁰⁰ In addition,

⁶⁰⁰ Braun (2001), fn.172

the findings highlight other factors relevant to compliance under the legal rules, in particular the procurement proficiency of authorities.

15 Conclusions

15.1 Introduction

The PhD thesis has examined the operation of the legal rules on competitive dialogue in the UK for PPP projects, and perceptions of the legal rules.

The research set out to identify perceived positive aspects of competitive dialogue in facilitating best practice; perceived problems, including any legal uncertainty and constraints on best practice; strategies to conduct the process within the constraints; and the factors that influence compliance and approach to legal risk. It had two primary objectives: (1) to provide information that will assist in policymaking on complex PPP procurement procedures at both EU and national level; and (2) to enhance understanding of the way in which regulated persons respond to legal rules that conflict with their legitimate needs, and to uncertainties in the law, and the factors that influence this response.

In order to comprehensively satisfy the above aims and objectives, adopting a socio-legal perspective on regulation, the author followed an analysis of the legal rules on competitive dialogue (chapters six-seven) with an empirical study of the law in action (chapters 10-14). The analysis of the EU rules identified and explored a number of legal grey areas. The author then went out into the field of study intermittently from January 2010 to March 2011 to conduct 58 semi-structured interviews with individuals with experience of interpreting and applying the legal rules in practice (see chapter nine).

In this concluding chapter an overview will be provided of the legal rules on competitive dialogue, the analysis provided of those legal rules, and the empirical findings on how these rules are being interpreted, applied and perceived in practice in the UK.

15.2 Findings

15.2.1 The decision to use competitive dialogue

Competitive dialogue may be used where a contracting authority wishes to award a complex contract (Art.29(1)/Reg.18(2)) (chapter six). Chapter six identified a number of legal questions surrounding the availability of competitive dialogue and the definition of a complex contract. For instance, it is unclear whether or not competitive dialogue is to be regarded as a standard procedure to be interpreted broadly or an exceptional procedure. Although contrary to the Commission's view, in chapter six a strong argument was presented for competitive dialogue to be viewed as a standard procedure (e.g. because of the structure and transparency of the process). Further points of uncertainty relating to the precise meaning of "particularly complex contract" include a lack of clarity over the discretion an authority has to choose to procure under competitive dialogue and the scope of the phrases technical complexity and legal and/or financial complexity.

In addition, chapter six highlighted uncertainty over the relationship between competitive dialogue and the negotiated procedure, the procedure of choice for PPP procurement prior to competitive dialogue. The grounds for using the negotiated procedure closely correspond to the definition of "particularly complex contract"; thus, in cases of overlap the availability of the negotiated procedure is not clear.

The above issues were examined in the qualitative interviews. In particular, the majority of interviewees indicated that competitive dialogue was to be viewed as a standard

procedure and was to be interpreted broadly. This is in line with the figures on the use of the procedure, which show that there has been a heavy take-up in UK of competitive dialogue in comparison to most other Member States (see chapter five).

In conformity with the Commission's explanatory note⁶⁰¹ and the view of most commentators (see chapter six), virtually all interviewees agreed that competitive dialogue was to be interpreted as available, not only where the contracting authority has no idea how its needs and requirements can be met, but also where the contracting authority is aware of a possible solution/s but is not sure how best to meet its output needs and requirements.

A significant number of interviewees considered financial and/or legal complexity to be the most obvious and a non-controversial ground for justification to use competitive dialogue for the procurement of PPP projects.

According to most interviewees addressing the issue, the impact of competitive dialogue on the availability of the negotiated procedure, the wording of the grounds for which had not been varied by the Directive, was to render it essentially a redundant procedure in the context of UK PPP procurement. Despite some limited comments, the interviews on the whole failed to elucidate on the precise relationship between competitive dialogue and the negotiated procedure. It is therefore clearly desirable that HM Treasury, in accordance with statements made in its most recent research,⁶⁰² publish guidance on the availability of the negotiated procedure.

⁶⁰¹ Commission (2005), fn.190, 2.2

⁶⁰² HM Treasury (2010), fn.198, 2.40

In addition to the examination of the pre-identified legal uncertainties, a key finding of the research interviews was that, rather than the decision on choice of procedure being based on an analysis of the wording of the legal text, the practical reality of decision making at this stage entailed a consideration of various factors other than the binding law. For example, the perceived low risk of legal challenge for an unlawful decision to procure under competitive dialogue meant that many interviewees felt it was in reality a free choice, despite the complexity threshold. It was suggested by interviewees as more sensible to procure under the more flexible competitive dialogue than under the restricted procedure. The HM Treasury 2010 review also notes risk aversion to be a reason why competitive dialogue may be being seen “as the default process for all but the most straightforward procurements”.⁶⁰³

It is also evident that clear policy statements from OGC have played a substantial role in steering contracting authorities away from use of the negotiated procedure towards competitive dialogue. The HM Treasury 2010 review recognises that the statements may have been too strong, and have been “interpreted as an implied ban on everything but competitive dialogue”.⁶⁰⁴ The findings of Braun’s 2001 research likewise found the standard use of the negotiated procedure for PFI to have been strongly influenced by government guidance.

15.2.2 The procedure: OJEU notice to close of dialogue

15.2.2.1 Introduction

The discussion in chapter seven and 10 of the thesis covered the following topics: pre-procurement technical dialogue; the drafting of the OJEU notice; qualification and

⁶⁰³ Ibid, 2.36

⁶⁰⁴ Ibid, 2.36

selection to participate in dialogue; confidentiality and cherry picking; the structure of dialogue; and the reduction of bidders and/or solutions during dialogue.

Although the interviews provided no major insights into the drawing up of the OJEU notice and qualification and selection, in relation to other aspects of the process a number of points of interest arose out of the interviews. These main points of interest will be considered in the sections below.

15.2.2.2 Pre-procurement technical dialogue

The Directive/Regulations do not explicitly regulate the planning and preparatory stages of the procurement process. The interviews were clear that in the same way as other procedures pre-procurement technical dialogue was possible under competitive dialogue. The interviews were not clear on the most appropriate way to conduct such technical dialogue, with few interviewees discussing the point in any depth. However, the use of a PIN to prepare the market was accepted as being relatively common practice by some interviewees, as was the conduct of pre-procurement technical dialogue with a limited, targeted number of bidders (i.e. rather than conducting such dialogue with all potential bidders declaring an interest in the procurement).

15.2.2.3 Confidentiality and cherry picking

A standard approach to the treatment of confidential information was discernable: the descriptive documents explain that bidders must label anything they regard to be confidential and do not want to be shared amongst other bidders. If the contracting authority disagrees with a bidder about the confidentiality of information and wants to share the information with other bidders, the authority will warn the bidder of its intention to share. The two parties will then try to come to an agreement, but if this is not possible the bidder is likely to be given the option to withdraw the information. The

above approach was cited by a significant number of interviewees and there were no conflicting approaches put forward; therefore, this would appear to be a relatively standard approach, particularly as the approach was broadly endorsed in BSF documentation.⁶⁰⁵

The standard required for protection under the Regulation's confidentiality rules is not clear; that is to say, it is not clear whether the confidentiality of information is to be assessed in accordance with domestic rules (e.g. the law of confidence or confidentiality under the Freedom of Information Act) or whether the Directive has created a new EU requirement of confidentiality. Due to it being apparent that most disputes over confidentiality are resolved amicably, the standard of confidentiality does not appear to be a major issue. Nevertheless, most interviewees stated that, under the law and in practice, more information is treated as confidential under the Directive/Regulations than would be the case under other domestic rules on confidential information (i.e. contracting authorities are highly/overly respectful of bidder confidentiality claims). As explained in chapter 12, the primary reason driving this behaviour is commercial: a strict approach to confidentiality is seen to encourage openness during the dialogue stage. It was also mentioned spontaneously in some interviews that in addition to the confidentiality rules contracting authorities will often sign up to confidentiality agreements with bidders (the frequency of this practice is not clear from the interview data).

The sharing of confidential information is permitted provided bidder agreement has been obtained. The majority of interviewees stated that they had never needed to seek such agreement. This suggests a contracting authority seeking agreement to share confidential information in practice is a relatively rare occurrence.

⁶⁰⁵ PFS, *BSF template: invitation to participate in dialogue ("IPD") (volume 1 - instructions and guidance to bidders)*, (2008, London), p.27, para.6

15.2.2.4 Dialogue

The Directive/Regulations do not regulate dialogue in any great detail; thus, subject to the principles of fairness and transparency, contracting authorities are essentially free to operate dialogue as they see fit. For reasons of efficiency, and in keeping with pre-competitive dialogue PFI procurement practice and guidance (see, for example, OGC/HMT 2008 guidance and BSF documentation), dialogue will typically be conducted with each bidder separately, be divided into different work streams (e.g. a technical work stream, a legal work stream, and a financial work stream), and be broken down into a series of bidding phases over the course of which bidder numbers are reduced and the level of detail in which bids are considered is ramped up.

15 interviewees suggested that the reference to equal treatment is of real practical importance (other interviewees did not comment on this matter). A strict approach to equal treatment due to a perceived high risk of challenge has, according to the above mentioned interviewees, resulted in highly/overly structured dialogue, e.g. equal sets of meetings for all bidders regardless of need involving discussion of only pre-identified issues. The strict application of the rules is not in line with best commercial practice (as noted by 8/15 interviewees (others not commenting)).

In view of high bid and administration costs associated with complex procurement, there is a strong incentive for a quick reduction of bidder numbers during dialogue. As was discussed in chapter seven, for some time (including complex procurement pre-competitive dialogue) it has been standard UK practice for bidder numbers to be reduced early on the basis of only outline solutions, and, according to all but one interviewee this remains the case.

Although commercially necessary, there is the potential for unfairness if outline bids are evaluated against the full set of final award criteria, i.e. because a bidder's outline bid is likely to be scored differently to the fully developed final bid. Thus, it is uncertain whether sufficient aspects of solutions must be touched upon at this early stage to allow full application of the headline award criteria. The vast majority of interviewees took an approach in practice where different elements of solutions were considered at different stages and the award criteria and weightings were varied accordingly; the example given was the avoidance of financial issues in the early stages of dialogue.

The interviews revealed that the application of the legal rules on award criteria in competitive dialogue to be a major cause for concern amongst practitioners. In particular, there is uncertainty over the extent and timing of award criteria disclosure and also the extent to which published award criteria may be subsequently varied. The interviews suggest that legal practice is highly variable, and that this is an area where central guidance would be greatly welcomed. Reflecting the fact that competitive dialogue is used where contracting authorities lack knowledge/awareness of the best solution/s, it may be argued that it is necessary that authorities have sufficient flexibility to allow award criteria to develop (within limits) as the authority learns about the potential solutions available in the market. In line with this argument authorities should be encouraged to keep award criteria at a high level in the early stages, and become more specific after early bidder reductions.

Regarding uncertainty over the scope for changes to advertised award criteria, here the majority position amongst interviewees was that there is some scope, e.g. for non-material changes (chapter 11).

15.2.3 The procedure: final tenders to contract signature

15.2.3.1 Introduction

The following section will present some of the key legal issues arising after the formal close of dialogue and the interview findings on these points. The operation of the final stages of competitive dialogue is of critical importance in the UK. A rigid approach to the legal rules at this stage, such as the work that can be left to be finalised after identification of the most economically advantageous tender, would result in a substantial transformation of UK practice from that identified by Braun.⁶⁰⁶

15.2.3.2 Bidder numbers

Although in the legal analysis some uncertainty was expressed over the minimum number of bidders permitted at the final tender stage, it was clearly accepted in practice that a minimum of two bidders could be invited to submit final tenders (provided there are sufficient bidders left in the process). In the main in practice, two-three bidders were considered an appropriate number at the final tender stage. This position is backed up by guidance⁶⁰⁷ and stems from the financial necessity to minimise costs.

15.2.3.3 How final are final tenders?

The Directive/Regulations provide that final tenders should contain all elements required and necessary for the performance of the project. In addition, there are express restrictions on the work that can be undertaken after identification of the most economically advantageous tender. As discussed in the legal analysis (chapter seven), it is not practical or reasonable to expect final tenders to comprehensively cover all matters of detail; however, the precise extent to which issues must be resolved during dialogue is a critical legal grey area.

⁶⁰⁶ Braun (2001), fn.172

⁶⁰⁷ OGC/HMT (2008), fn.193, 5.4.4

Although the majority of interviewees adopted a narrow interpretation of the law (chapter 12), most interviewees (25) stated that a strict approach to the requirement for final tenders was not adopted in practice (e.g. because of commercial pressures). 10/25 interviewees adopting a flexible approach in practice noted that under competitive dialogue final tenders are more final than they would have been in the past under a negotiated procedure.

Despite the approach adopted by the majority, the interview findings still suggest that a strict literal approach to the requirement for final tenders is reasonably prevalent in the UK. The following reasons were given for this: the high risk of legal challenge from incomplete bids leading to post tender negotiation; the benefits for the contracting authority (more certain and competitive bids); the nature of the contract being procured, i.e. for less complex contracts it may be less problematic to require a higher degree of bid development; and a policymaker requirement (e.g. for approval of the appointment/interim final business case).

15.2.3.4 Amendments to final tenders

Despite extensive discussion in the legal analysis (chapter seven), for many interviewees in practice the significance of the scope for amendments to tenders (“clarify, specify and fine-tune”) appears to be limited. This is because any issues that might have needed clarification, specification, or fine-tuning have been adequately resolved during the dialogue stage. Indeed, a significant 11 interviewees spontaneously noted it as common for the contracting authority to hold a dry run final tender stage immediately prior to the close of dialogue, thus giving the contracting authority greater flexibility to fine-tune than would be the case had the dialogue stage been formally closed. The practice of dry-run final tenders appears to be the result of a desire to minimise legal risk (i.e. in relation to

legally risky negotiations post close of dialogue) and coincides with interim project approval stages in certain PPP investment schemes.

15.2.3.5 Changes at the preferred bidder stage

In long, complex procurements a degree of change to a preferred bidder's tender or the call for tender is often unavoidable. As explained in chapter seven, the legal rules (Art.29(7)/Reg.18(28)) are uncertain and inconsistent in this area. The Commission has opined on the scope for changes to tenders in the context of the negotiated procedure (the London Underground Decision)⁶⁰⁸ and the CJEU has ruled upon the scope for changes to concluded contracts (*Presstext*);⁶⁰⁹ however, the extent to which these decisions are helpful to interpreting the scope for preferred bidder negotiations under competitive dialogue is not clear.

According to interviewees the uncertainty of the law means there is a level of legal risk attaching to any change at the preferred bidder stage. 25 interviewees stated that legally the most they would be comfortable stretching the interpretation of Art.29(7)/Reg.18(28) to cover would be where the change affects the preferred bidder's score to the detriment of the contracting authority but would not impact on the award decision. 13 interviewees viewed the law as narrower than this.

The discussion in chapter 12 on the approach to the uncertainty surrounding the scope for changes after the appointment of a preferred bidder was enlightening in terms of contracting authority decision making at this late stage in the procedure where significant time and cost has been incurred by all parties. Here, it was observed that, regardless of the law, decisions on whether or not to allow a potential unlawful change at the preferred bidder stage will very often come down to an assessment of the real, practical risk of legal

⁶⁰⁸ London Underground, fn.326

⁶⁰⁹ *presstext*, fn.261

challenge and the consequences of legal challenge (successful or unsuccessful) (e.g. procurement delay). This will be weighed against the necessity of the change and the alternative options available, such as rewinding the process short of restarting and abandoning the process and restarting.

Because of non-legal pressures (e.g. financial and time) and legal and practical difficulties associated with alternative options, the interview data revealed that faced with the decision whether or not to continue despite the occurrence of a potentially unlawful change at preferred bidder stage in most cases the authority concerned would be inclined to go ahead with the procurement. It was also apparent that the abandonment and restart of a competitive dialogue procurement that has reached the preferred bidder stage would be an extremely rare occurrence due to the high level of investment that would have been put in to getting to that late stage; no interviewees had experience of such an event.

15.2.3.6 The Alcatel requirements

The interviews revealed three main approaches to the *Alcatel* standstill and information requirements: to seek to comply with the requirements immediately on identification of the preferred bidder only; to seek to comply with the requirements at a later point close to contract signature; or to combine both approaches and seek to comply with the requirements at both points (see chapter 13). A common practice is not apparent, with interviews suggesting that interpretation of the law and practice is highly variable.

15.2.4 Competitive dialogue: general issues

As with other research in the area of complex procurement (i.e. the 2008 CBI research,⁶¹⁰ 2010 HM Treasury research⁶¹¹ and 2010 Cabinet Office research),⁶¹² it is evident from research interviews that key non-legal issues are the time and cost (particularly bidder

⁶¹⁰ CBI (2008), fn.254

⁶¹¹ HM Treasury (2010), fn.198,

⁶¹² Cabinet Office (2010), fn.199; Cabinet Office (2011), fn.199

participation costs) of competitive dialogue. Complex projects (such as major PPP projects) are by their nature costly and time consuming to procure; however, a number of reasons were given as to why under competitive dialogue the cost and time of complex procurement had increased, the critical reason being said to be the need to work up multiple bids to a higher level of completion than was previously the case under the negotiated procedure. Excessive meetings were also mentioned as a factor.

As with the findings of the recent HM Treasury research⁶¹³ and Cabinet Office review,⁶¹⁴ in order to minimise the time and cost of competitive dialogue procurement, great emphasis was placed in interviews upon the need for high levels of pre-procurement planning and preparation, and also strong management of the process. Sufficient planning and preparation should facilitate what HM Treasury now terms “targeted dialogue” where the extent of costly and time consuming meetings is limited to only what is necessary.

15.2.5 Regulatory Compliance

The examination of the literature on regulatory compliance highlighted a number of explanations for legally compliant behaviour. For example, economic theories were considered where compliance is said to result when any benefits expected to be derived from non-compliance are outweighed by the likelihood and severity of sanction.

Braun relied upon the above mentioned economic theories in his qualitative study of PFI procurement pre-competitive dialogue and the qualitative findings of the current thesis are very similar in this respect. As was seen in chapter 14, where strict compliance with regulation is in conflict with other procurement pressures (e.g. time pressures, cost saving pressures and value for money pressures), contracting authorities will assess the likelihood

⁶¹³ HM Treasury (2010), fn.198, 3.2-3.9

⁶¹⁴ Cabinet Office (2010), fn.199, 10; Cabinet Office (2011), fn.199, 4.4

of challenge and the consequences of challenge, and weigh this against the other pressures they may be faced with (e.g. an existing contract may be expiring and there may be strong pressure to ensure a new contract is in place) in deciding how to proceed. For instance, it was observed that no interviewees had experience of restarting a competitive dialogue procurement that had reached the preferred bidder stage. In this situation, the cost and time expended in getting the procurement to the final stages are often so great as to nullify the deterrent of the threat of legal challenge.

An increase in legal risk was not yet evident for the time period covered by the study from the number of disputes reaching the courts. A number of factors (such as high participation costs), coupled with an increase in bidder complaints and queries, was said by most interviewees to be resulting in authorities becoming more risk averse in their decision making.

Also, despite the above, as explained by interviewees, legal risk is assessed on a case by case basis and there remain a number of deterrents to formal legal challenge: a bidder fear of getting a bad name, bidder relationships with contracting authorities, the cost and time of mounting a legal challenge, and the uncertainty of the law.

In addition to economic theories of compliance, a number of interviews confirmed the discussion in chapter eight that legally risky/non-compliant behaviour may also be down to a contracting authorities' lack of proficiency or a lack of resources (i.e. what Kagan and Scholz termed the "organisationally incompetent entity").⁶¹⁵ For example, for some complex procurements there is a concern that (costly) legal expertise that does not exist in-house is not being sufficiently utilised (particularly early on in the process).

⁶¹⁵ Kagan & Scholz (1984), fn.482

As with Braun's findings, OGC and HM Treasury guidance was found to play a key role in steering contracting authorities towards particular interpretations of the law. However, this was only the case in relation to one specific issue where the OGC 2006 guidance is clear and unequivocal in relation to the move away from the negotiated procedure to competitive dialogue for the vast majority of complex PPP procurements.⁶¹⁶ For the most part, guidance was observed to play only a limited role in practice because, for example, of its generic nature. There are obvious reasons why the OGC and HM Treasury would not want to threaten UK procurement practice by being too specific in controversial areas. The OGC's use of alternative means to clarify the law and establish best practice, such as through the work of the Procurement Lawyer's Association (a wholly independent organisation), may be more effective than traditional guidance.

15.3 Concluding remarks

Despite being available in the UK for over five years, the legal rules and practical operation of competitive dialogue remain highly uncertain in many critical areas. When the procedure was first introduced, leading commentators were keen to ensure that competitive dialogue was viewed as facilitating wider adoption of what had become recognised as best practice for PFI procurement under the negotiated procedure, and discouraging any non-transparent, anti-competitive behaviour which was not in the interests of procuring authorities. This meant the legal rules needed to be interpreted and applied in a commercially sensible manner, consistent with the types of projects procured under competitive dialogue.⁶¹⁷ As we have seen from the interviews, in many situations this has been the case (see, for example, interview findings in relation to the level of development of final tenders).

⁶¹⁶ OGC (2006), fn.187, section 2

⁶¹⁷ Arrowsmith (2004), fn.325; Arrowsmith (2005), fn.46; M.Burnett, "Conducting competitive dialogue for PPP projects – towards an optimal approach?" (2009) 4 *EPPL* 190

However, the legal rules on competitive dialogue coupled with a great increase in perceived levels of legal risk (which continue to grow) has meant that some have adopted or are moving towards narrow interpretations of the legal grey areas, which in many cases is standing in the way of efficiency and value for money. To tackle this problem UK government should consider guidance in areas where it considers practitioners may need support to apply the law in a manner suitable for the procurement of particularly complex contracts.

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