ASSESSMENT REPORT

Procurement of PPP projects

Prepared as part of the Twinning Project CZ/2005/IB/FI/04

Version: final draft for approval PSC

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Legend of abbreviations:

APC	Act on Public Contracts
CA	Concession Act
CD	Competitive dialogue
EC	European Commission
EU	European Union
ITPD	Invitation to Participate in the Dialogue
MEAT	Most economically advantageous tender
MoF	Ministry of Finance of the Czech Republic
MoJ	Ministry of Justice of the Czech Republic
MS	Member State (the Netherlands and / or the United Kingdom)
MS STE	Member State Short Term Expert
OBC	Outline Business Case
OJEU	Official Journal of the European Union
PPP	Public Private Partnership
PUK	Partnerships UK
RTA	Resident Twinning Adviser
STE	Short-term expert
UK	The United Kingdom
VfM	Value for Money
NL	The Netherlands

1. Introduction

This inception report has been prepared for the Ministry of Finance (MoF) in the Czech Republic. It has been developed with the assistance of the Scottish Executive in the United Kingdom and the Ministry of Transport, Public Works and Water Management in the Netherlands, under the auspices of the EU Twinning Initiative[1]. Whilst there are 7 components to this initiative, each covering a different PPP related element this paper relates solely to Component 3: PPP Procurement Methodology.

The primary purpose of the inception report is to highlight a number of issues arising from the current institutional framework on procurement of PPP projects in the Czech Republic, and – based on best NL and Scottish practice – to provide some recommendations to minimize the risks involved in the procurement of PPP projects. In this respect the term risk is perceived as impediments to the obtainability of value for money objectives, and sources of non-compliance with EU legislation.

In terms of content, the document includes a set of observations and recommendations further to a series of interviews arranged under the Twinning Initiative. These were attended by procurement experts (MS STE) from the Scottish Executive[2] and the Dutch Ministry of Transport[3], and coordinated by the Resident Twinning Adviser (RTA)[4]. The interviews were held with representatives from the Czech Ministry for Regional Development (MfRD)[5], the Czech Ministry of Finance (MoF)[6], the PPP Centrum[7], the Anti-Monopoly office[8], and a private sector lawyer[9]. All interviews were conducted in Prague on May 23rd 2007. Furthermore, the MS STE have had access to various (unofficially) translated Czech key legislation on the procurement of PPP projects.

The content of the report is as follows. Chapter two addresses some important aspects relating to the procurement of PPP projects. Chapter three contains the findings of the experts. Last, Chapter four summarizes some key recommendations concerning potential measures that could be taken by Czech public authorities to ensure obtaining the desired outcome of the PPP procurement process.

Note: this report is written solely for the purpose of assisting Czech public authorities to facilitate its PPP procurement practice. No review is made of specific local private sector adviser practice concerning its role and content in PPP procurement procedures, as such assessment would exceed the scope of the assignment of the Member State partners under the Twinning initiative.

[1] This initiative was instigated on 4th October 2006. Its principal purpose is to facilitate the provision of support to the Czech Government from PPP centres of excellence in various EU Member States. The initiative is designed to assist the Czech Government with developing appropriate Czech specific PPP guidance based on best practice procedures; and help support its implementation.
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[3] Mrs Madelène van den Berg
[4] Evert-Jan Schuurman (Dutch Ministry of Transport, Public Works, and Water Management)
[5] Mr Jaroslav Kral and others
[6] Mrs Katerina Helikarova, Ms. Vladimira Trojanova;
[7] Mr Filip Dapak (Director); Ms. Miroslava Moravcova
[8] Mrs Jindriska Koblihova, Mr. Pavel Herman
[9] Mr Richard Bacek (Partner Cameron McKenna Prague)

2. Institutional framework on PPP procurement

The competitive dialogue procedure (CD) is a new procedure introduced in the public sector procurement directive (2004/18/EC) (hereinafter: 'the Directive'), which should have been implemented by EU Member States by 31 January 2006 at the latest. In the directive the CD procedure is addressed in recital 31, and by the articles 1 (definition) and 29 (process). The CD procedure is for use in the award of complex contracts, where there is a need for the contracting authorities to discuss all aspects of the proposed contract with candidates. Such dialogue would not be possible under open and restricted procedures. It is expected that the CD procedure will become the standard for procuring PPP projects.

This chapter addresses three key topics relating to the procurement of PPP projects:

- The implementation of EU Directive 2004/18/EC
- The framework of the Competitive Dialogue procedure (including best MS practice)
- An summarized overview of the working mechanism of the 'most economically advantageous tender' criterion (MEAT).

2.1 Transposition of EU Directive 2004/18/EC into national legislation

EU Directives need to be implemented by national legislation. The implementation needs to take place within the period stated in the Directive and can be done in various ways. Basically, EU Member States are free to choose the mode by which implementation takes place. However, two forms of transposition of EU directives are commonly used: implementation by means of dynamic reference to a directive, or by means of static reference to a directive. In the first case the content of national legislation will automatically adopt future changes in directives' provisions and terminology without any additional action required from the national legislator. In the second case – static reference – the transposition takes the form of adopting current content of the directive; in case of future changes in the provisions of the directive the national legislation needs to be adjusted accordingly.

In the Netherlands and the UK (including Scotland) the common legislative approach concerning the implementation of procurement Directives is to stay as close as possible to the exact text included in the Directive. Primary reason for this is to prevent omissions or duplication of provisions and terminology. A second motive is that the time frame for implementation does often not allow for including more detailed, or additional, topics. The Netherlands makes use of the technique of dynamic reference to transpose EU directives, provided the nature and content of the respective directive make this approach feasible. Concerning the Directive 2004/18/EC both countries did not choose to introduce new categories of contracts in addition to those categories addressed by the Directive: the Public Contract[10] and the Public works concession[11]. Concerning 'Service concessions'[12] - which

[10] 'Public contracts' are contracts for the 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 within the meaning of this Directive
[11] 'Public works concession' is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment
[12] Service concession' is a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment

are not incorporated in the Directive – both countries adhere in principle to the procurement regulations applicable to Public works concessions.

The problem with PPP contracts is that it is not always certain which regime should be made applicable. In 2004 the European Commission took the initiative to publish a Green Paper on PPPs. After consultation with public and private parties it is now considering whether the need for avoidance of legal risks concerning PPP contracts makes it necessary to propose legislation. The EC (Internal Market) provides on its website the following summary of the current state of affairs:

"The Green Paper analyses the phenomenon of PPPs with regard to Community law on public procurement and concessions. Under Community law, there is no specific system governing PPPs. PPPs that qualify as "public contracts" under the Directives coordinating procedures for the award of public contracts must comply with the detailed provisions of those Directives. PPPs qualifying as "works concessions" are covered only by a few scattered provisions of secondary legislation and PPPs qualifying as "service concessions: are not covered by the "public contracts" Directives at all. Nevertheless, all contracts in which a public body awards work involving an economic activity to a third party, whether covered by secondary legislation or not, must be examined in the light of the rules and principles of the EC Treaty including in particular the principles of transparency, equal treatment, proportionality and mutual recognition."

Note:. Most of the contractual PPPs in the Netherlands and the UK (including Scotland) are considered to be Public contracts (i.e. based on unitary fees to be paid by the procuring authority) and follow the provisions of the Directive. In both countries the rules for procuring Public works concessions follow the general framework for procuring Public contracts, except for specific matters relating to the distinctive nature of the Public works concessions.

The EU Public Procurement Directive (2004/18/ES) applies to public services, works and supply contracts. The common element of these contracts is that the remuneration is paid by the authority. A concession is different in that respect. Its main remuneration is the right to exploit the works or services in relation to third parties (for example, the users of a certain type of infrastructure - bridges, car parks, etc).

Although the Directive contains some provisions on public works concessions, it does not apply to public services concessions. However, the European Court of Justice has ruled that contracting authorities nevertheless must ensure a transparent selection process and a level playing field for bidders when awarding a service concession. The court derived these requirements (in Teleaustria, Parking-Brixen and a number of other cases) from various EC Treaty principles, especially those governing non-discrimination, equal treatment, proportionality and mutual recognition. In most cases these principles will imply a duty to advertise a concession, even where that is not strictly required by the Directive or the relevant member state legislation implementing the Directive.

Example of national practice: Concessions in UK law

The Public Contracts Regulations 2006 implement the Directive in the UK (Scotland has separate, but very similar, implementing regulations). The Regulations define a public [works] [services] concession contract as "a public [works] [services] contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the [work] [service] or [works] [services] to be carried out under the contract" (Reg 2(1)).

The UK regulations generally do not apply to public services concession contracts (Reg 6(2)(m)), but do apply in part to some (but not all) public works concession contracts (Reg 5(3)).

The only situation in which the UK regulations do apply to public services concession contracts is where a particular type of contracting authority (a 'public service body') grants to a person special or exclusive rights to provide a service for the benefit of the public. In this situation, the contracting authority must impose an express duty on that person not to discriminate on the grounds of nationality when hiring or purchasing goods or in specifying the member state from which those goods must originate.

In relation to works concessions, the UK Regulations only apply to contracts above a certain estimated value (approximately 5.3m euros, where the estimated value is based on what the authority would have to pay were it to procure the works other than by way of concession). Even where the estimated value is above the threshold, the Regulations will not apply if the contract falls into one of several categories (including where the contracting authority is a utility; where the principal purpose of the contract is to provide telecommunications networks/services; where the contract is classified as secret, or relates to internal security; where the award of the contract is governed by different procedures; etc).

Where the Regulations do apply to a works concession contract, they impose only limited obligations on the contracting authority (compared with the obligations imposed on contracting authorities letting contracts to which the Regulations apply in full). The obligations include a requirement to advertise in OJEU, to wait a prescribed minimum time to allow prospective tenderers to express interest or submit tenders, and to provide certain information relating to the tender to those who expressed interest (Reg 36). However, the Regulations do not apply the full gamut of procedural rules which apply in relation to the award of other types of public contracts, for example the detailed rules regarding use of open, restricted, negotiated and competitive dialogue procedures.

For information purposes the various contract categories defined in the Directive are summarized in **Annex 1** to this report. This annex also provides – from the Directive perspective - a flow chart for decision making on the obligatory or voluntary use of the competitive dialogue in case of complex contracts.

2.2 The competitive dialogue procedure

In this section the key stages of the competitive dialogue will be discussed. In order to support Czech procurement authorities setting up the necessary institutions to run a CD procedure successfully the Twinning MS partners have included some relevant experiences gained to date. The main features of the new CD procedure are:

- Dialogue is allowed with selected suppliers to identify and define solutions to meet the needs and requirements of the contracting authority;
- The award is made only on the most economically advantageous tender criteria (MEAT);
- Dialogue may be conducted in successive stages, with the aim of reducing the number of solutions/bidders, and
- There are explicit rules on post-tender discussion.

2.2.1 Under what circumstances can the competitive dialogue be used?

Directive 2004/18/EC, Article 1(11)(c) sets out that contracts can be considered as particularly complex where contracting authorities:

- Are not objectively able to define the technical means capable of satisfying their needs or objectives and/or
- Are not objectively able to specify the legal and/or financial make-up of a project.

This definition is given further context in the first sentence of recital 31 which states:

"Contracting authorities which carry out particularly complex projects 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 can offer in the way of technical solutions and/or financial/legal solutions."

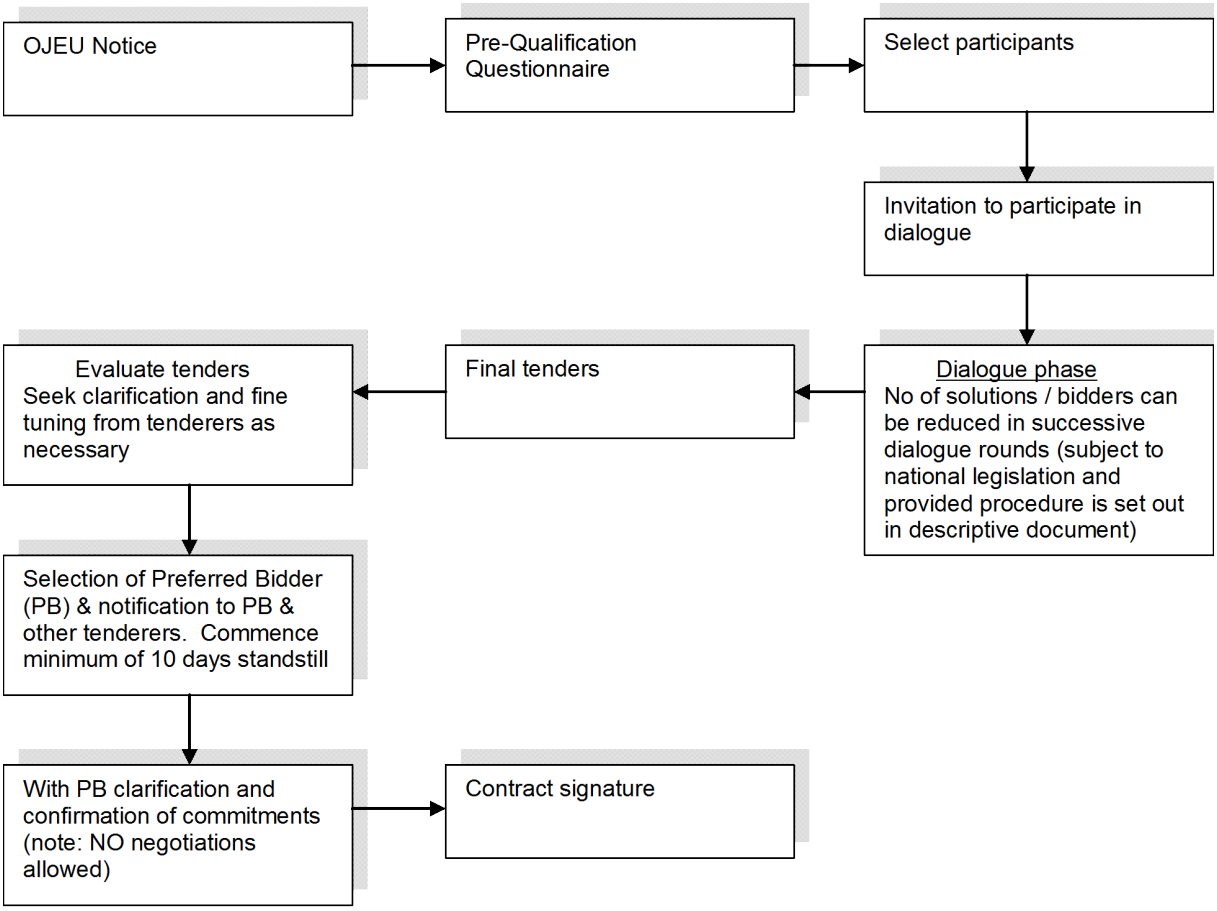
Recital 31 goes on to use integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing, the financial and legal make up of which cannot be defined in advance, as examples of complex projects where the contracting authority might not be in a position to be clear about its requirement or be able to know what the market could offer.

In many complex public investment projects, contracting authorities will seek to explore what the best solution might be to fit their needs. Where the contracting authority is not able to define the technical means of satisfying its needs at the outset and consequently the use of the CD procedure is justified as technical complexity exists. For PPP contracts, it is often the case that the financial or legal make-up cannot be defined in advance, because issues as risk allocation, how the project is going to be carried out and financed and who is going to be responsible for which services, will be the subject of discussions with the potential providers. The European Commission regard the Pimlico Schools case, where the contracting authority sought proposals, which offered different ways or combinations of ways of meeting the need, such as rebuilding the school on the existing or new site, refurbishing the school and/or the sale of all or part of the school's land, as an example of legal or financial complexity. The same applies to many asset based PPP projects, where services are also provided, such as schools, hospitals and prisons, where the legal and financial make up is not able to be determined in advance. In such circumstances the use of the CD procedure is justified. See for more information the flow chart provided in **Annex 1** to this report.

2.2.2 Structure of the competitive dialogue process

Figure 1 provides a flow chart of the competitive dialogue process. The procedure comprises a sequence of steps to be taken by the procuring authority. Every step should result in a defined deliverable. The conclusion of a particular step can be perceived as a 'milestone' which enables the authority to move on with a next step.

Figure 1: Overview of stages competitive dialogue procedure



The basic characteristics of each stage are outlined below. Furthermore, some relevant Member State best practice is summarized. As the new EU legislative framework on the competitive dialogue is just over a year in force, current practice is limited in most EU countries.

Stage 1: OJEU Notice
Contracting authorities are required to publish a contract notice in the Official Journal of the European Union (OJEU) setting out their needs and requirements, which are defined in the notice itself/or in a 'descriptive document' at the stage of the Invitation to participate in the dialogue (see Stage 4). The term 'descriptive document' is used here in contrast to the use of 'specification', to cover the broader approach in competitive dialogue of setting out needs and requirements for which different solutions will be proposed.

Stage 2: Pre-Qualification Questionnaire
The minimum statutory time period from dispatch of OJEU to return of expressions of interest is 37 days. Given the complex nature of a PPP project and procurement under the new rules, it is advisable to allow candidates a minimum of 52 days to submit notice of interest.

Stage 3: Selection of participants to the dialogue
The selection process, following the expressions of interest, is carried out in accordance with the relevant provisions of the Directive's Articles 44 to 52; these articles also cover the selection process for the restricted and negotiated procedures. A ranking mechanism can facilitate the selection of interested private parties: for example points can be awarded based on the proven experience a party can bring in.

In the Netherlands and the UK a thorough screening (know as pre-qualification) of would be-participants takes place within the framework of regulations concerning the integrity of the firm and its management, respectively. The purpose of this screening is twofold: to prevent public sector entities getting involved with mala fide companies, and to ensure fair competition (maintaining level playing field).

Stage 4: Invitation to participate in the dialogue ('descriptive document')
Following the selection of candidates there is an Invitation to Participate in the Dialogue (ITPD). The ITPD should comply with the requirements of Article 40 of the Directive. The aim of the dialogue/iteration phase is 'to identify and define the means best suited to satisfying [the contracting authorities] needs.' These needs should have been set out by contracting authorities before engaging in procurement by means of a 'descriptive document'. The document should spell out in detail the requirements and the process of the dialogue. In broader terms the document should address the remaining stages of the procedure. The dialogue stage should be used to attain as much detail as possible in order to facilitate the final bid stage. A CD procedure should not be regarded as a free option for authorities to market test ideas.

A well-drafted and comprehensive descriptive document is vital to the smooth running of the CD procedure, and to limit costs on both the public and the private sector side. In addition, a standard form project agreement, the output specifications, the award criteria (including weighting), the payment mechanism and other documents should be drafted to accommodate the procedure. The ITPD is one of the most important documents in the CD procedure as it sets the scope, content and rules of the dialogues. Omissions at ITPD stage might negatively affect the subsequent stages of the procurement process.

Contracting authorities can reduce to three the number of candidates they intend to invite to dialogue provided this is sufficient to ensure effective competition. Where there is not a sufficient number of candidates meeting the selection criteria, the authority can proceed with the candidate(s) which do meet these criteria.

Stage 5: Dialogue phase
The Directive does not set out in detail how the dialogue should be conducted, but says that contracting authorities may discuss all aspects of the contract with the chosen candidates as long as the principle of equal treatment is followed. Following existing practice, it is likely that discussions will mostly be between the contracting authority and the providers about their own solutions. It is important to recognize that the dialogue phase is the phase in the procedure that offers the greatest flexibility. During the course of the dialogue contracting authorities may ask the participants to specify their proposals in writing. On the basis of written proposals (these could be 'outline solutions', 'project proposals', or 'tenders') the number of solutions can be reduced by applying the award criteria in the contract notice or the descriptive document. The number of bidders is likely be reduced as a consequence of reducing the number of solutions. The adoption of this approach needs to be set out in the contract notice or the descriptive document. The dialogue phase ends when the procuring authority is in a position to identify the solution or solutions which may meet its requirements.

Other important points with regard to the dialogue phase are:

- Successive stages: The dialogue may be conducted in 'successive stages' which means that it is permitted to reduce, in stages, the number of solutions (which can be equivalent to proposed tenders/bids) discussed and/or bidders involved. This reduction must be carried out by applying the award criteria which are either set out in

the OJEU notice or in the ITPD or 'descriptive document' issued to bidders at the start of the dialogue phase. The OJEU notice or 'descriptive document' must indicate if there is an intention to use successive stages. There is no limit on the number of stages which can be used provided that, at the end of the dialogue, there are sufficient bidders to allow for a genuine competition (usually a minimum of 2). This is insofar as there are enough solutions or suitable bidders.

- Equal treatment: The contracting authority must ensure equal treatment throughout and cannot provide information in a discriminatory manner which might give some bidders an advantage over others.

- Confidentiality: The contracting authority cannot reveal one bidder's solutions or other confidential information to other bidders without their permission.

- Payment to bidders: The contracting authority "may" agree (but is not obliged) to make payments to bidders participating in the dialogue.

It cannot be ruled out that – inherent to the subject of the dialogue or to particular solutions proposed – risks exist which likelihood or impact cannot be determined during the dialogue phase. Sometimes it might be the best way to agree upon a mechanism to identify the risk, to measure it, to quantify it, and subsequently to allocate it. Such a solution can prevent moving the risk issue to the Final Bid stage. The primary reason for working this way is that at Final Bid stage no fundamental changes can be made to the participants' proposal(s) (including price aspects). The results of the discussions with the participant will be laid down in writing (see further Stage 6).

The formal decision to announce 'conclusion of the dialogue' needs to be taken with great care. After the formal conclusion of the dialogue (which decision should be recorded in writing for audit and governance purposes) opportunities for testing assumptions or rescoping the project will be limited. Where the procurement is conducted in successive stages, the conclusion of the dialogue can occur after submission, clarification and evaluation of initial tender responses and a reduction in the number of participants as a result of that evaluation (i.e. prior to the formal Invitation to submit Final Tender). It is important to stress that the procuring authority should be confident that the remaining participants (= bidders) have sufficient information/clarity to be able to submit fully developed and 'final' bids at the next stage of the procurement when only 'confirmation, clarification or fine-tuning' is permitted. If there is a subsequent need to go beyond 'confirmation, clarification or fine-tuning' then this may require a cancellation of the procurement process and a re-procurement. This is because in the CD procedure there is not much flexibility to leave matters open and/or to negotiate with bidders once Final Tenders have been submitted.

Stage 6: Call for Final Tenders

Based on the solution(s) identified during the dialogue phase the procuring authority may invite remaining participants to submit a Final Tender. There need not to be a single solution and so variant bids are permitted. Each bidder can submit a Final Tender based on the solution(s) which they have developed in the course of the dialogue. Confidentiality of solutions must be preserved (unless bidders have waived this).

The new rules expressly permit a reduction in the number of participants and allow successive stages to take place. It could be considered to reduce the amount of candidates allowed to enter the tender stage to two. This would be prudent because of the cost and the other resource implications of seeking Final Tenders from more than two bidders., from both the public and the private sectors' perspectives. However, in exceptional situations the inclusion of three bidders could be considered, depending on the specific circumstances. In

case where four candidates are selected to receive the ITPD, it may also be advisable to reduce the number of participants first from four to three at an earlier stage of the bid deliverables process. This will depend on the nature of project in question and the appetite of the participants. It would be prudent to reserve this right to do this in the ITPD (see Stage 4)

The remaining participants are asked to submit their final offer on the basis of the solutions discussed and presented during the dialogue. This is done in a formal way by means of an Invitation to submit Final Tender. This document, whilst separate from the ITPD, will read like a supplement or addendum to the ITPD and should specify at least:

- All those changes to requirements set out in the ITPD which have risen from the Competitive Dialogue process or
- Reference to previous amendments or addenda which recorded these changes throughout the process (since it will be good practice to issue such addenda following any decision to modify requirements)
- A detailed content for Final Bids
- The deadline for submission of Final Bids and other formalities
- For each participant individually, any specific terms agreed with that participant during the Competitive Dialogue phase and in relation to Pre-Bid deliverables (or reference to documentation and minutes where these are already set out). This does not mean that participants are not free to alter those positions; rather it alerts the participant to those aspects of their anticipated Final Bid which will be expected and favoured (e.g. a preferred design)
- A restatement of the bid award criteria. No changes can be made at this point from those set out in the ITPD, other than by way of further explanation.

These final tenders need to contain *ALL* the elements required as necessary for the performance of the contract (Note: no subsequent Best and Final Offer is allowed as under the competitive negotiated procedure). It is sensible for these tenders to be as complete as possible, because although there is some scope for post-tender discussion with the candidates who have submitted final tenders, limits are placed on these discussions as set out below (see Stage 7).

Contracting authorities may reveal solutions or aspects of solutions of other candidates on condition that the candidate agrees to such disclosure. This means that where an authority identifies a particular solution or aspects of one or more solutions as being of real interest, the possibility exists for other candidates to submit tenders including that element. The possibility of sharing information is probably best addressed at the outset of the dialogue phase (see stage 5).

The ability to pay bid costs (Directive, Article 29(8)) is not limited to the competitive dialogue procedure, but is included explicitly here in recognition that complex contracts require a lengthy procurement and engender significant costs. Undoubtedly, high bid costs and long procurement times can represent a concern for the public and the private sector. However, the CD procedure should not lead to an increase in bid costs. Regardless of this, during all procurements contracting authorities should work in partnership with bidders to ensure that bid costs are kept to a minimum, ensuring value for money.

Stage 7: Post-tender discussions with candidates who have submitted final tenders

The provisions on post-tender discussions (note: NO negotiations!), firstly with the candidates who have submitted final tenders and subsequently with the tenderers or preferred bidder, who has submitted the most economically advantageous tender, are set out in the Directive in Article 29(6) and 29(7) and are referred to in recital 31. A similar approach

in emphasising that these discussions should not distort competition or cause discrimination is adopted in both cases.

In looking at final tenders, contracting authorities can ask tenderers to clarify, specify and fine tune, and provide additional information, as long as this does not involve changes to the basic features of the tender, which would likely distort competition or have a discriminatory effect. The Directive, recital 31, adds that fundamental aspects of the offers should not be altered. From this it is clear that discussions can lead to changes to the tenders to clarify, fine tune and provide additional information, as long as fundamental aspects of the offer, such as price and risk allocation, are not altered. In other words: commercial negotiation at this stage is limited. The same applies to major design changes. The dialogue conducted should guarantee 'no surprise' in Final Tenders. However, the process of fine-tuning may highlight matters that, for a variety of reasons, may fall to be resolved after the formal appointment of the Preferred Bidder. For such matters that can legitimately be considered as further clarification or confirmation of commitments, the procuring authority is advised to first identify their potential cost consequences.

The Directive does not contain a requirement that the whole procedure is solely dialogue driven. Restricting the interaction with bidders to clarification and presentation style meetings is unlikely to generate the level of detail needed for Final Bids and final selection. The benefits of planning the process of detailed development will be realised at the Final Bid stage, and particularly in the final phase to financial close. Historically, under the Competitive Negotiated Procedure, the process to financial close has often taken longer than planned, as parties have turned to finalise under-developed aspects of the Project. This is avoidable with the use of a well-drafted ITPD, a focus on the Pre-Bid Deliverables (with full feedback) and genuine commercial negotiation on all aspects of each Bidder's proposals.

Interestingly, Article 29(3) of the Directive includes a specific reminder of this nature. The procurer "*may discuss all aspects of the contract with the chosen candidates during this dialogue*". This does include price (see also Stage 5). In short: submitting a comprehensive and well targeted 'descriptive document ' prior to start the dialogues is key to obtaining the desired results.

Stage 8: Selection of Preferred Bidder

The tenders are evaluated against pre-determined award criteria, which allow for the most economically advantageous tender (MEAT) to be selected. The award criteria need to be given relative weighting[13]. Where it is not possible to establish weighting in advance, the order of importance of the award criteria in descending order should be listed, rather than relative weighting. Proposals which are submitted and evaluated in the course of the dialogue need not cover 'all matters necessary for the performance of the contract' as this is only a requirement at the Final Tender stage. For example, proposals regarding price may be reserved until the Final Tender stage. The evaluation of such proposals must nevertheless be made based on the award criteria specified in the OJEU notice or 'descriptive document(s)'.

Clearly, if not all elements are considered when evaluating proposals in the course of the dialogue then not all elements of the award criteria will be relevant. For example, the first stage of the dialogue will not consider price although price will inevitably be one award criterion, to be applied later in the process. The award criteria themselves and their relative importance should not change in the course of the process – as this would be contrary to the principles of equal treatment and transparency. There should, however, be sufficient scope within the weighting attached to the criteria to take account of the flexible nature of the

[13] The Ministry of Transport of the Netherlands uses as a rule of thumb a 60% price and 40% non-price weighting of award criteria

dialogue phase and the fact that not all elements of the contract may be considered when reducing the number of bidders and/or solutions in the course of the dialogue. It may therefore be preferable to express the weighting attached to award criteria as a range (as is permitted by the Directive) to cover any variance in weighting applicable at the successive stages of the dialogue and the Final Tender processes. In addition, and to observe principles of transparency and equality, it should be clear to bidders at each stage of the process (whether during the dialogue or subsequently) the criteria which will be applied when evaluating proposals and the applicable weighting for that particular stage.

Having selected the Preferred Bidder, that bidder may be requested to clarify aspects of its Final Tender or confirm commitments contained in the Final Tender. This is under the condition that this does not have the effect of modifying substantial aspects of the Final Tender and does not risk distorting competition or causing discrimination. The reference to 'clarification, confirming commitments' and not 'modifying substantial aspects' of the Final Tender suggests that there should be some scope for amendments and discussions with the Preferred Bidder prior to contract close. Although this is rather restrictive it should still be interpreted in the context of a procedure which has been specifically designed to deal with 'particularly complex projects' and which therefore demands a greater degree of flexibility than would be permitted, for example, under the open or restricted procedures.

Stage 9: With PB: clarification and confirmation of commitments
In working with the tenderer selected as providing the most economically advantageous tender, the contracting authority can ask the Preferred Bidder to clarify aspects of the tender or confirm commitments contained in the tender as long as this does not have the effect of distorting competition. The Directive, recital 31, also says that competition should not be distorted or restricted by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous tenderer. This makes clear that the practice of keeping a reserved bidder in play is discouraged. There is some debate as to how the words 'clarify' and 'confirm' can be interpreted. In simple terms, any clarification or confirmation that does not have the effect of modifying *substantial* aspects of the tender is permitted. For example: in case of a hospital design it is suggested that exact room layouts can be developed as clarification if they are of the sort that have no or minimal impact on design, and the tender has provided a pricing structure for them. It is for this reason that detailed exemplar room layouts are requested in the Final Tender.

Traditionally, for PPP contracts, work is done with the Preferred Bidder to make sure that extraneous bid costs are not imposed on all the candidates. This work would be done with whoever were to be chosen as the Preferred Bidder and so should not be regarded as distorting competition. Examples of this work include the fleshing out of design, finalising the contract documents, due diligence for financial backers and final consultation with the workforce and its representatives. If required a debt funding competition might be hold.

Stage 10: Contract signature
The procuring authority has to officially inform the unsuccessful bidders of the outcome of the selection process prior to concluding the contract with the Preferred Bidder. A ten day standstill period should be obeyed (Alcatel jurisprudence, currently codified in the Directive).

2.2.3 Organization of the selection procedure

It is highly recommended to have established a professional team of experts prior to release of OJEU notice. The team should at least consist of a contract manager (commercial), an environmental expert, an engineer, a financial specialist, and a lawyer. These persons

should preferably be recruited from within the procuring authority. Additional expertise might have to be obtained from the private sector, especially when the procuring authority's own experience is low and/or the project involved is a major one. The capacity of the team should be sufficient to run the whole selection procedure according to the appropriate requirements. Sufficient cover of experts should be available in case of sickness, leave, etc. as non-availability of experts is no argument to justify delays in the process.

It is recommended to create disciplinary working groups that each have their own reviewing tasks. 'Chinese walls' should be established between working groups to prevent bias and crossover effects. A bid coding mechanism could facilitate this process. At specific times during the various selection stages (i.e. prior to invitation to participation in the dialogue, during the dialogue, during the Final bid selection process, during stage of clarification of Preferred Tender) key players should meet to discuss the outcome of reviews. It is advisable to appoint an 'auditor' to ensure that all procedures are followed correctly. The involvement of an independent auditor generates confidence among both public and private stakeholders in the process.
A key part of running a successful selection procedure is the equal treatment of participant/bidders. Anonymity of the participants should therefore be guaranteed. Coding of proposals/bids and requiring selection team members to maintain strict confidentiality can support this process.

Furthermore, a vital element in every procurement procedure is that it is ensured that all the participants/bidders are provided with the same information. The selection team has to play an important task in this regard.

A key principle in communication with the participants/bidders is that all communication should be in writing. In this respect an important point is what and how to record the content of meetings. Different models can be used, but the most vital issue is that the process of dialogue should not be endangered by a too formalistic/legalistic approach adopted by the procuring authority. Furthermore, please keep in mind that all information the procuring authority provides to one participant/bidder should be shared with the other participants in the process as well. Striking a balance between maintaining confidentiality on one hand, and ensuring equal treatment on the other hand might turn out to be a demanding task for the selection team.

Members of the selection committee should be available for clarifying outcome of decisions to unsuccessful participants that would like to inquire why they are not allowed to proceed to the next stage of the procedure. It is important that the selection team members are sensitive and eager to understand what private parties actually imply to say when submitting questions.

It is difficult to give an accurate estimate of the total duration of a CD procedure. Experience shows that it can vary from 8 months to two years. Without any doubt it can be stated that adherence to tight timetables is key to running the selection procedure smoothly. This requires a high level of skill and determination of the contract manager, particularly as the contract manager will be responsible for informing the relevant public sector stakeholders, discussing open issues with them, and ensuring the outcome of these discussions are communicated to the participants/bidders. As a golden rule to maintain momentum: when receiving a participants' request for information -> reply in writing within a maximum of 5 working days. Carry out evaluations within a maximum period of 10 working days. And, because failure is human, maintain the 'four eyes' principle: when one expert drafts an answer as a reply to a request for information/clarification, another expert should check the document before it is sent out.

2.2.4 Transaction costs

The procurement stage of PPP projects is costly in terms of money and effort, as many steps are involved to reach contract signature with the Preferred Bidder. Substantial outlays are made by both the procuring authority and the bidders. It is important to realise that these costs will – indirectly – be paid by the tax payer. The Preferred Bidder's transaction costs are included in the unitary fee. The excluded participants may receive a fee to compensate for the cost of participating in the tender procedure.

The ex ante transaction cost relate to the following two elements:

- Cost involved in carrying out research and obtaining information:
- Cost involved in carrying out negotiation and decision making

An efficient process requires that these costs will be kept low. Procuring authorities should design the whole selection process with the efficiency objective in mind, without losing effectiveness. This requires that all relevant information is available when needed, the selection process is designed well, and informed decisions should be taken on the inclusion of multi-stage selection mechanisms without loosing competition among private sector parties. For example, asking participants in the dialogue procedure to work out in detail particular solutions (e.g. detailed design) whilst it is already known that such solutions might be inferior to other solutions is a way of destroying capital. A two, or three stage dialogue process could prevent such cost.

Also, the procuring authority should keep a keen eye on its own needs: Do the offered solutions just meet or perhaps exceed the requirements as set out in the descriptive document? In the latter case the authority might end up with solutions whose specifications require a higher price to be paid. Considerations of affordability require procuring authorities to ensure that final solutions are congruent with earlier communicated needs. If it turns out that the earlier published needs might not have been stipulated accurately, or have changed during the course of the procedure, the procuring authority should consider restarting the whole process again. Which is – undoubtedly – a costly event.

Lastly, the tool of market testing prior to OJEU could facilitate the process of defining the content of the OJEU and the descriptive document. In particular, when procuring authorities are uncertain about what kind of information the market needs to be enabled to provide high quality input in the selection process, prior market testing might improve the quality and duration of the tender process, resulting in lower transaction costs.

2.3 Award criterion in CD procedures: most economically advantageous tender

Directive 2004/18/EC, Article 29 sub 1, states that when the use of a CD procedure is required the sole criterion for assessing bids is the 'most economically advantageous tender' (MEAT). On first sight this criterion does not provide much certainty about its content and practical application. However, procurement practice provides a general picture about the workings of the MEAT criterion (or better: the MEAT criteria (plural), because the term 'most economically advantageous tender' comprises various aspects of the bid that can have an effect on its valuation). Based on long standing practice of the Dutch Ministry of Transport a clarification on the MEAT criterion is provided below. The objective of the text is to provide a general picture on the application of the MEAT criterion. This report is less suitable for including a detailed discussion about how to operationalise the term, due to the fact that the

content of a MEAT criterion is project specific and can only be determined after thorough analysis.

2.3.1 The philosophy behind MEAT

When procuring a public sector investment project the award criterion 'lowest price' is always considered as the primary benchmark for selecting bids. The advantage of this criterion is its simplicity and objectivity. However, the procuring authority might want to attach value not only to the actual price of the tender, but to qualitative elements as well. The procuring authority can therefore include elements in the package of bid assessment criteria that address qualitative aspects. The following are quite common examples:

- Innovation
- Sustainability
- Aesthetics
- Process management (e.g. risk control, quality control)
- Mode of execution of the assignment (e.g. via Plan of Approach)
- Disturbance of traffic flow
- Environmental factors
- Safety
- Earlier delivery of Availability
- Functionality of the deliverables

The advantage of including qualitative award criteria in the tender procedure is that it facilitates the procuring authority to satisfy specific needs. In other words: the inclusion of non price award criteria enhance the chances that the winning bid will result in deliverables that are tailor-made. However, the other side of the coin is that formulating transparent, objective and verifiable non-price award criteria requires more effort than applying the simple price only criterion. Also, legal risk increases when non-price award criteria are included in the bid assessment procedure. In various situations the public authority can choose which award criterion to apply: lowest price or MEAT. However, in case of a complex project in terms of the EU Directive 2004/18/EC the competitive dialogue procedure (CD) is required, in which case the only bid assessment criterion allowed is MEAT. It can be assumed that PPP projects will mostly be procured by the CD procedure.[14]

2.3.2 Theoretical concept of MEAT

The MEAT principle

When use of MEAT is made, tender assessment is on both a quantitative and qualitative level.. The qualititative criteria are announced before the invitation to tender, but preferably at the stage of ITPD. Each criterion is monetised (i.e. an economic value is attached to it) in local currency. It is important to understand that although non-price award criteria are not stated in monetary terms, when applying them their added value effect (to the procuring authority) can be calculated in terms of money. This requires transformation of the assessment criteria into quantifiable units.

In order to estimate the economic value of a tender the total (monetised) score on the MEAT criteria is added to the actual bid price. In theory, the impact of the MEAT score on the total

[14] In the Netherlands and the UK (including Scotland) the competitive dialogue is the sole procedure to be used in case of PPP projects. In this regard the CD procedure has taken over the former negotiated procedure with publication.

tender price can be: negative, neutral, or positive. In case of a positive MEAT impact on the actual bid price the fulfilment of the 'non-price award criteria' has a positive added value to the procuring authority. In case of a negative MEAT impact it means that the fulfilment of the 'non-price' award criteria adds negative added value to the actual tender price. In case the impact of the application of the MEAT criteria on the tender is neutral, it implies that the 'non-price' award criteria have no impact on the actual tender price. Notice that the MEAT values are 'fictive' (i.e. they exist only in the mind of the procuring authority and are used for bid selection purposes). In every case, the actual tender price is the base line for the bid assessment calculations. The actual bid price is the monetary amount stated in the tender: the price that – according to the bidder – has to be paid by the procuring authority provided his tender will win the competition.

The principle of MEAT application is rather straightforward. The actual tender price (concrete) and the allocated monetized MEAT values (fictive) together build up the fictive tender price that is used by the tender assessment committee. The most economically advantageous tender is that tender which results in the lowest fictive tender price for the procuring authority. In case a bid shows a positive compliance with the MEAT criteria the monetized value of these criteria will be subtracted from the actual tender price; in case of negative compliance with the MEAT criteria the actual tender price will be raised by the monetized amount of the MEAT score. Both the case of positive added value and the case of negative added value are presented in **figure 2**.

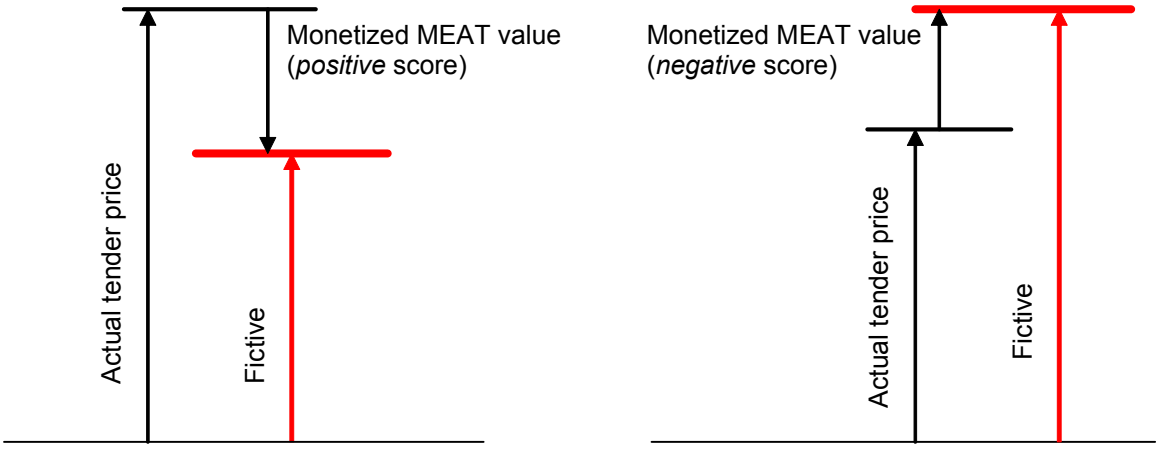


Figure 2: Principle of calculating fictive tender price by using MEAT criteria

Application of MEAT as an overall bid assessment criterion involves three key aspects:

1. The definition of the individual MEAT criteria;
2. The establishment of a score mechanism to assess compliance with the criteria;
3. The design and implementation of a transparent and objective bid assessment procedure.

The first two aspects are addressed by the MEAT model provided in this chapter. The third aspect concerns proper project and process management of the total procurement procedure. In Chapter 2 of this report various instruments are mentioned to support the establishment of a transparent and objective tender assessment procedure. For more general information on process and project management in PPP projects see the reports produced under Components 2 and 4 of this Twinning initiative[15].

[15] Component 2 fact-finding report 'Risk analysis & Risk management in PPP projects', and Component 4 fact-finding report 'PPP process guidance methodology'.

Within the MEAT model three different kinds of award criteria are identified:

The ***price*** criterion: a price award criterion establishes a direct relationship between the bid price and the MEAT-value. Examples of this relationship are: the actual bid price, depreciation, residual value, spillover effects). The price criterion – provided the content of competing bids is comparable – is the most straightforward criterion to assess bids;

The ***performance*** criterion: a performance award criterion is stated in terms of a performance unit of analysis. The primary function of including performance criteria is to enhance the functionality, efficiency, efficacy of the subject of tendering, increasing life cycle of investment, or reduction of collateral costs The MEAT value is obtained by means of multiplying the performance unit of analysis with the value per unit of performance. Performance criteria should be fully objective and transparent. This makes them attractive to use, because both public and private sector can calculate their impact. For example: an earlier availability of 4 weeks at € 10.000 per week results in a MEAT value of € 40.000;

The ***quality*** criterion: A quality award criterion is operationalised by allocating points for compliance. Next, the MEAT value will be obtained by multiplying the allocated points with a (predefined) monetary value per point. The total value of the points concerning the quality criterion in relation to the points allocated to the other criteria (i.e. price and performance) is fixed. The advantage of the quality criterion is the fact that it enables the procuring authority to include 'hard to measure' aspects of a bid. However, the disadvantage is that it is difficult to estimate the importance to those 'soft' elements of the bid. The raking of qualitative criteria might be difficult. Nevertheless, in practice extensive use of quality criteria is made. For example: A procuring authority uses a 30% quality and 70% price assessment of the bid. Every bid will be assessed taking this division of points into account. It means that the final award criteria framework will have to be published by sending out the invitation to tender at the latest, but preferably at the stage of ITPD.

IMPORTANT: the MEAT award criterion can only be applied for bid assessment purposes; not for selecting bidders (i.e. pre-qualification). Criteria concerning bidders ('participants') selection relate to company characteristics, like financial credibility and deployable knowledge and expertise. Criteria relating to the bid assessment only concern aspects of the bid itself.

3. Key Observations by Twinning PPP procurement Experts

The twinning procurement experts have made various observations with respect to the current approach to procuring PPP projects in the Czech Republic. It is taken into account that at present no experience at the central government level has been gained regarding the procurement of PPP projects. Therefore, the MS experts focused on institutional aspect that are key to enable adequate procurement of PPP projects. The findings are based on interviews with various key stakeholders at the Czech central government level, one interview with a private sector lawyer, and review of key legislation on procurement[16]. The findings are summarized below. The findings are grouped according to their relevance to the key areas in procurement practice:

- Procurement Law
- Project Governance
- Value for money (Vfm)
- Project Management

3.1 Procurement law

Observations

PPP projects in the Czech Republic are implemented under one of two relevant legal regulations: the Public Procurement Act[17] and the Concession Act[18]. The Public Procurement Act provides a general legal framework for the procurement of public works contracts, public supplies contracts and service contracts. The Concession Act provides the framework and broad parameters for the procurement of concession contracts. In addition to this, the Concession Act regulates the (procedure and content of the) approval process for both concessions and 'above-the-threshold-public contracts that comply with the provisions of Article 156 of the Act on Public Contracts. Both Acts became effective on 1st July 2006.

The characteristics of a PPP project dictate which of the two Acts will be used to procure the project. The Public Procurement Act is used unless there are sufficient criteria to justify use of the Concession Act. However, there is significant difference of opinion on the exact criteria for making this decision. The prevailing view among many legal experts in the Czech Republic is that the Concession Act is only used when demand risk is transferred substantially to the private sector partner, along with the opportunity for the private sector partner to receive – a substantial part, or the majority – of income out its contract with the public procuring authority[19].

It is clear that the application of this rule is the source of considerable dissatisfaction within both public and private sectors. Procuring authorities are not certain which Act should be used for projects. The decision as to which Act should be used is left to procuring authorities, who will have varying degrees of relevant experience. The consequences of a flawed

[16] Based on unofficial English translations of procurement legislation provided at the website of the Czech Ministry for Regional Development (see: http://www.mmr.cz/index.php?show=001023000000)
[17] Act No 137/2006.
[18] Act No 139/2006.
[19] Interpretation of the required scope of the third party revenue conditions vary among Czech legal experts.

decision are serious: if an Authority (or the Competition Office) decides that the wrong Act has been chosen, the procurement must be re-started.
The coexistence and interdependence of the two Acts is confusing, as the Acts are frequently subject to each other, and different expertise / methodologies are needed for each Act. The primary reason for the occurrence of this effect is the fact that the terminology used in the Directive 2004/18/EC is not fully transposed into national procurement legislation. For example, the Directives' terms 'Public works concession' and 'Service concession' cannot be traced in the Act on Public Contracts. Instead, the Concession Act defines the term 'Concession contract'. But this term does not stipulate whether it regards a public works concession, an/or a service concession. A legal omission is the fact that the definition of a Concession contract pursuant Clause 1(3) does not include reference to the criteria stipulated in Clause 16(1) concerning the – deemed – existence of a Concession contract. in Furthermore, the criteria for determining the existence of a Concession contract deviate from those stipulated in the Directive. To further complicate matters, some Public contracts which OBCs contain specific elements are required to not only fulfil the requirements of the Act on Public Contracts, but to comply with procedural provisions stipulated by the Act on Concessions as well[20]. As a consequence of the unclear criteria for distinguishing so called 'Clause 156 Public contracts' and Concession contracts it cannot be determined at the outset of a particular procurement procedure which legislative route needs to be followed. Moreover, it appears that the primary concern of the Concession Act is to provide rules for budgetary control and monitoring of investment decisions at the central, regional and local level. To summarize: the Concession Act ambivalently aims to regulate both the procurement and the budgetary and political control of particular types of contracts procured by public authorities. The result is that the contract categories defined in the Directive have no one-to-one equivalent at the national legislative level and that procurement rules are mixed up with internal public sector procedures. **Annex 2** to this report provides an overview of Czech procurement terminology with regard to the stipulated contract forms. This Annex includes also a flow chart which indicates which questions need to be asked to arrive at certainty at to the type of contract, and as to the type of procurement procedure that needs to be followed. to When comparing these contract categories with the contract categories specified in the Directive (see **Annex 1**) major differences in terminology can be identified. The differences in terminology result in different legal reasoning, which is clear when comparing both flow charts. From this point of view it is our observation that the current Czech procurement legislation does not reflect in full the content and structure of the Directive.

The competitive dialogue procedure is only available under the Public Procurement Act. It is accompanied by a concession dialogue which is almost identical. It is unclear why the procurement of a Concession contract could not take place by means of the regular competitive dialogue. Furthermore, it would appear that clear criteria should facilitate the choice for the most feasible procurement route for a Concession contract. In this regard the Directive stipulates that he competitive dialogue procedure should only be used when projects meet minimum technical complexity criteria, or whether their legal or financial make-up prevent to define the appropriate procurement route in advance. Currently in the Czech Republic there seems to be no guidance (apart from Section 24 of the Act on Public Contracts) that sets out that, and based on which criteria, this decision is to be made. Mentioned issues are important for maintaining VfM in the public sector interest, as discrepancies and inconsistencies in the use of either of the Acts or dialogue procedures will lead to market / industry uncertainty.

In the UK and the Netherlands, nearly all PPP projects are procured under the competitive dialogue procedure, as it is felt that the PPP structure itself is sufficiently complex to justify the competitive dialogue.

[20] Pursuant to Act on Public Contracts, Clause 156

Based on the interviews held with Czech legal experts it appears that a consistent and comprehensive regulatory embedment of the asset ownership in a PPP project is still not fully ensured due to insufficient coordination among legislation. Note: In the UK and the Netherlands all assets constructed in PPP projects are legally in the ownership of the procuring public authority at all times, although the site/facility is leased to the private sector partner for the concession period, who in turn leases it back under the PPP contract. However, the MS experience referred to does not prevent public authorities to choose for tailored made solutions, if necessary or appropriate.

3.2 Project governance

Observations

The Ministry for Regional Development (MfRD) is the body responsible for all procurement policy and legislation, including PPPs. However, although the MfRD has responsibility for monitoring adherence to this legislation, the constitutional framework of devolved budgets has led to the MfRD having no authoritative control over procuring departments either in central or local government.

The Ministry of Finance (MoF) is responsible for financial aspects of PPPs in the Czech Republic, but neither MfRD or MoF routinely have any involvement with projects in procurement, either by a seat on the project board or alternative means.

The two bodies did not give the impression of a strong working partnership in the sector, and there is therefore significant potential for either overlap or non-coverage of policy areas.

It is not clear whether there is a coordination mechanism to ensure a coherent policy on the institutionalization of procurement for major projects (including PPPs) at the central government level. In principle, the choice could be made between a central procurement unit that carry out procurement for all sector ministries (note: like the position of the CFCU as contracting authority for EU Twinning projects on behalf of Czech beneficiaries), or decentralized units at sector ministerial level. In both cases it is advised to create nuclei of procurement expertise.

3.3 Value for Money (VfM)

Observations

When an infrastructure need is identified by a procuring authority, there is no clear process for it to follow to assess which would be the optimum procurement route. In a transparent policy context, value for money must be the over-riding principle against affordability, etc. There is no guidance that sets out how the project risks should be assessed to help decide the optimum procurement route, nor is it clear what level of substantiating evidence is required for a decision.

There is wide variation in the application of bid evaluation criteria. The Competition Office advised that all public procurements are obliged to adhere to the criteria principles of efficiency, effectiveness, and economic viability. It is not clear, and there appears to be no formal government position, on the process to assess cost against quality. Problems have been experienced by different consultancy firms giving different advice on bid evaluation criteria.

The Competition Office takes a statutory interest in checking projects against its own legal and anti-discriminatory criteria, but there does not appear to be any central driver for standardization of bid assessment criteria.

3.4 Project management

Observations

The MS Twinning experts did not meet directly with any parties directly procuring projects during this fact-finding mission. However, there is a strong and concerning message that there is no genuine desire to build up PPP specialist expertise within the public sector, and that most tasks (including the project manager role) are outsourced to external private sector consultants.

External consultants provide valuable contributions to a public sector procurement team, but they should not take the place of strong leadership and accountable responsibility by key individuals or teams within the public sector, and cannot take the place of a public sector risk owner.

The PPP Centrum was set up by the MoF but is – for the time being – not funded by it, and now has to subsist on a fee-paying basis. The PPP Centrum only advises public sector clients. There is excellent “public sector” resource and knowledge within the PPP Centrum that is currently not optimally used by cross government authorities to disseminate practical knowledge on procurement, and to act as a prominent entity to monitor new forms of procurement (e.g. the application of the competitive dialogue).

4. Recommendations

Based on the findings stated in Chapter 3 we would like to present a few recommendations that are summarized below.

A. Recommendations on procurement law

It is understood that both the Public Procurement and Concession Acts will need revision in November of this year to take account of EU limit changes. It is recommended that consideration be given to either making the Concession Act a "stand-alone" Act that does not interact with the Public Procurement Act, or even for a dedicated Act covering PPP to be introduced. An alternative would be to fully integrate the procurement of concessions into the Act on Public Contracts. The result would be that one single act is covering the procurement of the various types of contracts. Under the last scenario, the Concession Act could focus on budgetary control issues relating to PPP contracts procured under the Act on Public Contracts. The current uncertainty over which Act to use needs to be resolved. It is recommended to adhere to the terminology provided in the Directive 2004/18/EC. Any deviation from it will definitely result in confusion concerning the exact meaning of the national contract terms used. Annex 1 to this report provides a flow chart that might be helpful for legislative adjustments.

Concerning the use of the Concession Act by procuring authorities the MfRD is currently preparing a detailed methodology for PPP projects; adherence to this will be mandatory for central government and obligatory for local government. This is to be commended, although a similar methodology will be needed for the Public Procurement Act if dedicated PPP legislation is not prepared and passed. Chapter 2 of this report contains the basic information that could be used to draft guidance on the competitive dialogue procedure.

B. Recommendations on project governance

There is no public sector body with clear overall responsibility for PPP policy. The split of responsibility between the MfRD and the MoJ is not transparent, with both bodies wary of each other's involvement. It is recommended that lead responsibility for PPP policy and legislation is assumed by one of the bodies, so that a strong and focused PPP implementation policy can established within central and local government. A strong steer on PPP policy is needed from a single source within government, so that the regulations, criteria, procedures and best practice for procurement are easily understood throughout public and private sectors. Further, this would also assist by providing a single point of contact in central government for PPP policy.

Also, it would be recommended to make a fundamental choice concerning the institutional model to deal with procurement. Regardless the choice made, (a) strong procurement unit(s) should be the result. Concerning MS practice we could mention that in Scotland, procurement at the government level is carried out by a central unit. On the other hand, in the Netherlands procurement is decentralized and carried out by sector ministries. In both cases units are set up that are capable of handling complex procurement routes themselves. External legal advice is only obtained for dealing with specific and technical issues, or – in case of risky legal enterprises like PPPs – to review deliverables originally produced by civil servants.

C. Recommendations on Value for money

Procedural mandatory guidance should be prepared that guides procuring authorities through making comparative value for money assessments. These assessments should be carried out throughout project development and procurement stages, and assess both quantitative and qualitative aspects of the various options. The principle behind the assessment is to give authorities confidence that their chosen procurement route is correct and remains correct. The Scottish Executive (Financial Partnerships Unit) has prepared extensive VfM guidance[21] which could be a useful basis for such documentation in the Czech Republic.

As with other recommendations, the role of a central government source of PPP expertise is crucial. Basic bid assessment criteria should be applied uniformly across the Czech Republic market. The availability and use of uniform, adequate, and substantiated award criteria would also facilitate the work of the Competition office. A MEAT model like the Dutch MoT one presented in Chapter two of this report could provide basic guideline to work out guidance on award criteria.

D. Recommendations on project management

Procuring authorities should move as soon as possible to recruit their own internal project managers for projects, under the rationale that public sector PPP expertise should be developed and cultivated. A strong, thinking public sector client will lead to more efficient procurement and a better value deal for the public sector.

In line with the first section of this report, it is recommended that central government moves as soon as possible to rationalize the responsibility for PPP policy into one source, and should then start to fund and develop a strong unit of specialist public sector expertise that can monitor projects and disseminate guidance and best practice examples. The PPP Centrum would appear to be the ideal team for this crucial role that leads the development of the PPP market in the Czech Republic, provided it maintains to keep a non-commercial position.

Annex 1: Directive 2004/18/EC (on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts): Overview of contract categories and their suitability to be used in the competitive dialogue procedure

Annex 2: Transposition of terminology Directive - Contract types pursuant to Act on Public Contracts (Act 137/2006 Coll.),and Act on Concession Contracts and Concession Procedure (Act 139/2006 Coll.)

[21] Available at www.scotland.gov.uk/ppp - follow link to publications