Chances for the Competitive Dialogue

An economic impact assessment of changing procurement legislation for the competitive dialogue procedure.

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Chances for the Competitive Dialogue

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Foreword

In “What next for competitive dialogue, after the recent European Commission consultations?” (Burnett, 2011) Michael Burnett discusses the possibilities of abolishing the competitive dialogue. Burnett considers abolishment due to the competitive dialogue allegedly being surpassed in applicability by the implementation of the open negotiated procedure in “the proposal for a Directive of the European Parliament and of the Council on public procurement”. (European Commission(a), 2011) But to what extent is this consideration for abolishment correct?

The competitive dialogue is one of several procedures, as prescribed by procurement legislation, through which governmental organizations may obtain contracts. As the name suggests it entails a dialogue between the procuring agency and several market parties. The aim of this dialogue is to come to the optimal solution that matches the needs of the procuring agency.

The issues Burnett discusses are improved communication between the contracting authority and the bidder during the dialogue and enhanced competitive tension which allows the contracting authority to achieve better value for money. Another two issues put to the fore are a better price discipline and the general perception that the competitive dialogue does not expose the contracting authority to a greater legal risk than alternative procurement procedures.

Burnett then continues to state that the competitive dialogue was created to address the award of complex contracts in a way which is transparent, competitive and minimizes legal uncertainty. And these items are unlikely to cease to be relevant as an issue. “The reasons for its creation are still valid and the abolition or substantial modification of competitive dialogue would return Contracting Authorities to the same unsatisfactory choices which they faced prior to its creation” (Burnett, 2011, p. 3) Burnett’s main point here is that it is not appropriate to use amendments to the public procurement rules to respond to the current crisis.

2 Michael Burnett is the author of “Competitive Dialogue – A practical guide” (Burnett & Oder, Competitive Dialogue – A practical guide 2009, EIPA Maastricht) and founder of the European Institute of Public Administration’s (EIPA) PPP – forum.
3 (European Commission(EC) (a), the proposal for a Directive of the European Parliament and of the Council on public procurement, 2011, EC Brussels) Henceforth referred to as the proposal and this author is referenced as: “European Commission (a-h)”
However, both the Dutch government and the European commission are proposing new legislation be implemented. The reasons they give partly stem from an economic viewpoint and are used as means to combat the financial crisis. As such these “not appropriate” changes may have further impact on the applicability of the competitive dialogue procedure.

According to Burnett: “No-one has ever claimed that using competitive dialogue is an easy option but the stakes in terms of the need to improve Europe’s infrastructure and services and the effective implementation of key European policies, such as compliance with environmental legislation and the completion of the Internal Market, at an affordable cost are too high for it to fail.” (Burnett & Oder, 2009, p. 2)

It is this essential claim of affordable cost that must be tested. If the new methods through which the competitive dialogue may be used do not allow for an implementation at an affordable cost, then other methods of procuring large scale construction projects may be better suited to responsibly spend public funds.

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4 The new methods referred to stem from the new Dutch procurement law (Dutch Government (e), Nieuwe regels omtrent aanbestedingen [Aanbestedingswet 200.] 2012, Dutch Government ’s Gravenhage) and the proposal for a new European Directive. (European Commission (a), 2011) What these new methods entail will be explained in chapter 4.2.
Executive summary

The competitive dialogue is a procedure used by Rijkswaterstaat to obtain the most economically-effective contract available for ‘particularly complex’ projects. The procedure entails a dialogue, which may be phased, with the aim of developing one or more suitable alternatives capable of meeting its requirements. Due to changing legislation several issues will influence the policy for the application of the competitive dialogue. This changing legislation takes the form of a proposal for a new Directive on public procurement by the European Commission and a new Dutch procurement law.

This anticipatory research poses the question: *To what extent is the competitive dialogue implementable in an economically viable manner?* To answer this question the research analyses the aforementioned changing legislation. In addition, the current policy of Rijkswaterstaat is reviewed and a cross comparison with the new legislation is performed to see what policy adjustments must be made.

The research finds several chances for improvement on the implementation of the competitive dialogue procedure. These chances are translated into scenarios and their effect is analyzed using a Multi Criteria Analysis. Finally, these effects are measured against cases where the competitive dialogue has already been implemented.

The report concludes that the competitive dialogue procedure is economically viable under the current form of implementation by Rijkswaterstaat because it leads to the expected value on a project’s Critical Success Factors. When the new Dutch procurement law comes into effect the current form of implementation of the competitive dialogue procedure remains economically viable because very little policy adjustments are necessary. However, in both the current and upcoming legislation there is room for improving the cost-effectiveness of the procedure by limiting the gold-plating effect, this effect is the addition of burdens by national legislation or policy in contrast to the minimum demands stemming from European guidelines.

The report is written in the English language yet may contain references in Dutch. It encompasses 85 pages and 25102 words.
Samenvatting
De procedure van de concurrentie gerichte dialoog wordt door Rijkswaterstaat gebruikt om de meest economisch-effectieve contracten te verwerven voor projecten die als ‘bijzonder complex’ worden aangeduid. De procedure bevat een dialoog, die gefaseerd mag worden, met als doel het ontwikkelen van een of meerdere geschikte alternatieven die aan de eisen voor het project voldoen. Door veranderende wetgeving zijn er verschillende zaken ontstaan die van invloed zijn op de toepasbaarheid van de concurrentie gerichte dialoog. Deze veranderende wetgeving omvat een voorstel voor een nieuwe richtlijn voor aanbestedingen door de Europese commissie en de invoering van een Nederlandse aanbestedingswet.

Dit vooruitkijkend onderzoek stelt de vraag: In hoeverre is de concurrentie gerichte dialoog implementeerbaar op een economisch verantwoorde manier? Om deze vraag te beantwoorden wordt de voorgenoemde veranderende wetgeving onderzocht. Daarnaast wordt ook het beleid van Rijkswaterstaat onderzocht en een kruisvergelijking gemaakt met de nieuwe wetgeving. Dit laatste wordt gedaan om te zien welke beleidsaanpassingen dienen te worden gemaakt.

In dit onderzoek worden verschillende kansen gevonden die de implementatie van de concurrentie gerichte dialoog zouden kunnen verbeteren. Deze kansen worden vertaald naar scenario’s en het effect van die scenario’s wordt geanalyseerd door middel van een Multi Criteria Analyse. Ten slotte worden deze effecten in contrast gesteld met casussen waarin de concurrentie gerichte dialoog is toegepast.

Het rapport concludeert dat de procedure van de concurrentie gerichte dialoog economisch verantwoord is onder de huidige vorm van implementatie door Rijkswaterstaat. Dit, aangezien de verwachte waarde wordt gecreëerd in de gecontracteerde projecten. Deze waarde is gemeten aan de hand van de Kritische Succes Factoren van de projecten. Wanneer de nieuwe Nederlandse aanbestedingswet wordt geïmplementeerd blijft de procedure van de concurrentie gerichte dialoog economisch verantwoord, aangezien aanpassingen in het beleid nauwelijks noodzakelijk zijn. Echter, in zowel de huidige als de aankomende regelgeving zit ruimte voor verbetering van de kosten effectiviteit van de procedure door het gold-plating effect te verminderen, dit effect is de verzwaring van lasten door nationale regelgeving of beleid ten opzichte van in Europese richtlijnen gestelde eisen.

Het rapport is geschreven in het Engels, maar kan referenties in het Nederlands bevatten. Het rapport omvat 85 pagina’s en 25102 woorden.
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Introduction

The National Directorate General for Public Works and Water Management (Also known as Rijkswaterstaat, hereafter referred to as RWS) has built up experience with procuring large construction and infrastructure projects over the last forty years. These projects surpass the threshold of €5 million and thus fall under both Dutch and European legislation. Having implemented the policy of contracting large scale projects (€60+ million) through the use of so called Design – Build – Finance – Maintain (DBFM) contracts, the directorate has chosen the competitive dialogue procedure as the means to procuring those contracts.

In the European Parliament resolution of 25 October 2011 on modernization of public procurement (2011/2048(INI) the European parliament responds to the outcome of the market consultation from the Green Paper on the modernization of EU public procurement policy towards a more efficient European Procurement Market, Synthesis of replies. The European parliament has determined that a new set of procurement guidelines is necessary to improve the cost-effectiveness of public procurement spending in the European Union.

At the same time, after over ten years of debating and debunking several proposals, the Dutch government is on the verge of implementing national procurement legislation. The “Aanbestedingswet 20...” will deal with all public procurement in the Netherlands, including those projects below the financial thresholds for which EU procurement legislation has been developed.

This report delves into this changing legislation and the effects this will have on the implemented policies. In addition, the report strives to assess whether the use of the competitive dialogue procedure is economically viable under the new legislation.

To clarify what changing legislation in this context could entail the following metaphor may be of use: A man is used to building Lego houses by only using blocks from the 1970’s. Then someone introduces a set of Lego bricks from the 2010 range which has new colors, shapes and sizes, and tells him some of the 1970 bricks are now out of production. He knows that he is capable of building the house with only the old bricks but now he needs to assess each new brick on the possibility that it improves the original design (making it faster to build, more efficient (less blocks), or more stable) and need to decide if it is worth buying these new blocks. In this metaphor the 1970 bricks represent the current set of legislation, while the 2010 range of bricks is representing the upcoming legislative framework. Because nobody likes spending money on things that they will not use, assessing what is needed is important. Thus we see that the economic impact of changing legislation can be compared to everyday examples.

Chapters 1 and 2 contain the main research question, an explanation of the methods used and the choices that led up to this research. In chapter 3 we will discuss the background of the competitive dialogue. This chapter is meant for those readers who have no prior knowledge of the subject matter. The changes in legislation are explained in chapter 4. The Rijkswaterstaat policy on the implementation of the competitive dialogue procedure is set forth in chapter 5. In chapters 6 and 7 the economic viability of the new ways of implementation are tested. The conclusions in answer to the research questions from chapter 2 are set forth in chapter 8. Chapter 9 contains the recommendations to RWS and chapter 10 is about the discussion for further research. The final chapters contain the list of literature and references used and a set of common terms and abbreviations.
1 Research questions
This chapter contains the objective of the research as well as the research questions in the form of an Issue tree. Through this method the main issue is subdivided into manageable, mostly factual, questions which if combined should lead to a clear and encompassing answer.

1.1 Objective
The objective of this research is to find economically viable methods of implementing the competitive dialogue for RWS in the Netherlands.

1.2 Scope of the research
The scope that this research encompasses is based on the competitive dialogue procedure as will be implemented by RWS when the new Dutch procurement law comes into effect\(^5\). In addition an analysis is made on what effect the proposal for a new Directive on European procurement legislation will have once that Directive is implemented\(^6\).

Economic viability is measured based on the available data. The economic viability is indexed\(^7\) against the current policy of implementation for the competitive dialogue.

It is assumed that the reader has a basic understanding of economic, project management and legislative principles that deal with the construction industry.

1.3 The research questions
This report has as its main research question the following:

To what extent is the competitive dialogue implementable in an economically viable manner?

The research is further split into four sub-sections, each of which strives to give part of the information necessary for answering the main research question.

I. What is the Competitive Dialogue?
   i. What does the Competitive Dialogue entail?
   ii. When was it implemented?
   iii. For what reason was it developed?

This sub-section gives the main definition and background of the Competitive Dialogue procedure. Through these questions the historical and social framework is given.

II. What are the changes to the legislative framework?
   i. What is the current legislative framework?
   ii. What is the upcoming legislative framework?

The questions for sub-section II are intended to give an overview of the legislative situation in which the Competitive Dialogue procedure operates. By contrasting the current and upcoming framework we can examine the changes that may influence the competitive dialogue procedure.

\(^5\) See chapter 0 for further information on the new Dutch procurement law.

\(^6\) Ibid.

\(^7\) Indexing entails the measuring of the in- or decreasing effect in contrast to a starting point. In this research that starting point is the current policy by RWS.
III. How is the Competitive Dialogue implemented?
   i. How is it implemented by Rijkswaterstaat?
   ii. What legislative freedom arises from the new directive?

To see how the changes derived from subsection II. will affect the Competitive Dialogue, we must also understand the methods through which the procedure is implemented. Therefore, the implementation policy of Rijkswaterstaat is analyzed and the freedom available for differentiation is sketched.

IV. What is considered economically viable with regards to the competitive dialogue?
   i. What is the definition of economically viable?
   ii. When is an implementation of the Competitive Dialogue economically viable?

The final sub-section is focused on defining economic viability and the specification of the Competitive Dialogue as being such. By first defining economic viability as a concept, we can next analyze cases of implementation of the Competitive Dialogue procedure within this economic context.

In chapter 3 of this report the answers to sub-section I. and its subsidiary questions are presented. Both for readers that are familiar and as well as those un-familiar with the Competitive Dialogue procedure, this chapter may prove insightful into the origins of the procedure. This chapter also describes the upcoming legislation that will influence the procedure. Chapters 4 and 5 will be dealing with answering the questions posed in branches II. and III. These chapters sketch the impact of the changing procurement legislation on Rijkswaterstaat’s implementation policy.
Lastly, the questions posed in branch IV Of the issue tree will be answered in the chapters 6 & 7.
1.4 Issue tree
By using an issue tree the research question can be subdivided into several factual sub-questions. Using the MECE (Mutually exclusive – Collectively Exhaustive) (Rasiel, E., 1999, chapter 1)\(^8\) division ensures that each aspect of the research is covered. Through the use of literature and case studies each lowest-level question is answered. By answering these lowest level questions the answers to the higher levels should become evident.

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2 Research Methodology
Within this chapter the methodology used in this research paper is explained. First the main literary references and method of studying them are defined. Next the methodology behind the case studies and interviews is given. And finally, the methods used to quantify the research findings are explained.

By studying the available literature, both praise and criticism of the Competitive Dialogue can be assessed. In addition, this allows us to take stock of the changes in legislation. The next step is to analyze how the current form of implementation compares up to the definition of economic viability, which is best done through the use of a case study. Finally, through the use of a multi-criteria analysis the impact of the changing procurement legislation can be evaluated.

2.1 Literature
Significant research has been done into the application of public procurement in both the Netherlands as well as European wide. The basis of this report is founded on that preceding research⁹, and strives to put this literature into contrast with the issue at hand. By using existing research the conclusions drawn in this report will both be based on common knowledge as well as reproducible.

The competitive dialogue procedure has been in place for several years and relevant experiences with the procedure have been documented. Several common acceptances with regard to implementation will be discussed and weighed on their benefit towards a cost effective application.

2.2 Case studies
In addition to literary research, several cases where the competitive dialogue procedure has been used will be evaluated on the basis of the procedure’s cost effectiveness and overall benefits.

DBFM-Contract:
All the studied projects where contracted through the use of a DFBM setup (Design, Build, Finance and Maintain). This entails that the winner of the contract is not only responsible for the construction and design of the project, but must also acquire the necessary financial backing and management for maintenance of all current and new infrastructure for an extended period of years. In this way the procuring agency strives to obtain the optimal lifecycle cost, being able to spread costs and benefits over the entire use of the system.

Over the next couple of pages the different cases will be discussed. Each of these cases had a specific aspect to the project which made it interesting for this report. These reasons for choosing each particular case are explained in the description, and in addition the project planning is given to enable the reader to place each case in its context.

⁹ see chapter 11 for a complete list of references and literature used
2.2.1 Haringvliet- en Volkeraksluizen
This project entails the renovation of the electro technical systems of the Haringsvliet sluice-gate, the bridges of the Goereese sluice-gate and the Volkeraksluice. And also includes the to-be-constructed operation building for the Volkerak sluice complex. The purpose of the renovation is to secure the quality of the complex following the new regulations on water safety and the economic viability of the waterways.

Reason for inclusion into the case study:
The project places itself in the top 20 of projects for RWS based on the volume of work and is thus interesting to this research based on its scope. (Rijkswaterstaat (a), 2008)\(^\text{10}\)

Project planning:
Start: September 2007
Time of delivery: June 2011

2.2.2 KOSMOS projects
The KOSMOS projects have been set up to fix the backlog in maintenance on the “artworks” (Bridges, waterways, sluices etc.) which fall under the jurisdiction of RWS. The main issue with these projects was to get the market more involved while minimizing traffic nuisance during construction. (Hoezen (a), 2012, p. 71)\(^\text{11}\)

The KOSMOS projects are part of the effort to change the way RWS works in conjunction with the market. They are aimed at increasing the public focused network management and professionalizing the project ownership of RWS. In KOSMOS the market is far more responsible for setting the scope, preparation and building phases of the project. (Hoezen (a), 2012, p. 71)

This case study encompasses several different projects. In the dissertation by Mieke Hoezen (Hoezen, M.(a)) several of these projects are used in contrast to each other. The summarized outcome of this research will be used to measure the viability of the KOSMOS projects as a whole. (Hoezen, M. (b), 2011)\(^\text{12}\)

Reason for inclusion into the case study:
This case encompasses a larger group of projects where the Competitive Dialogue procedure was implemented, which allows for a broader perspective on the effects of its implementation in conjunction with the cooperation between Rijkswaterstaat and the market.

Project planning:
Because this case study involves an amalgam of projects no concrete project planning can be given.

\(^{10}\) (Rijkswaterstaat (a), Evaluatie contracteringsprocessen Rijkswaterstaat Haringvliet- en Volkeraksluizen, 2008, RWS Utrecht) Henceforth this author is referenced as: “Rijkswaterstaat (a-f)”


2.2.3 A15 Maasvlakte – Vaanplein
The A15 is a very important connection between Rotterdam Harbor and the industrial areas in the rest of Europe. The project involves the capacity extension and management of around 37 kilometers of the A15 national roadway between the Maasvlakte and the crossroads Vaanplain.

Reason for inclusion into the case study:
The Contract has a runtime of twenty-five years and a financial scope of €1.5 Billion, making it the largest project ever placed in procurement by RWS. (Rijkswaterstaat (b), 2011)

Project planning:
Start: In 2011 the first preparatory works, such as acquiring permits and transplanting cables were started.
End of 2011: starting first visible works

2.2.4 A12 Utrecht Lunetten – Veenendaal
Because of constant traffic jams the A12 between Utrecht Lunetten and the city of Veenendaal has been widened by RWS. The capacity of this stretch of road has been added to by building extra traffic lanes. (Rijkswaterstaat (b), 2011)

Reason for inclusion into the case study:
This project is especially interesting for this research because it is currently two years ahead of schedule, which is a situation almost unheard of in the construction sector

Project planning:
August 2012: extra traffic lanes open between the cities of Driebergen and Veenendaal. This is two years ahead of schedule.
March 2013: Total project completion.

2.2.5 Coentunnel 2
The Coentunnel has been a bottleneck in the traffic of the Northern part of the province North-Holland. Because of this RWS is building a second tunnel. To prohibit traffic from transplanting to the A10 West, another roadway, the “Westrandweg”, will be build.

Reason for inclusion into the case study:
In the Coentunnel 2 project the minimization of Nuisance was deemed a critical success factor. Through the use of sound barriers along the A8 and A10 the impact of sound nuisance was kept to an acceptable level. To keep the air quality within the norm several air barriers will also be erected during the project.
In addition, the involved market parties have complained about the imbalance of the design restitution to the transaction costs.
Estimated total project cost €1.2 Billion
Transaction costs as stated by bidders was €7-€8 million.
The transaction cost as estimated by the procuring agency was €4 million.
The design restitution was set at €2 million.

13 (Rijkswaterstaat (b), Evaluatie DBFM aanbestedingen ‘ervaringen delen werkt, 2011, RWS Utrecht)
14 See chapter 5.1 for a further explanation on critical succes factors.
During the procedure for the Coentunnel 2 project there was a lot of discussion about the risk allocation in the contract. This lead to an extension of the procedure and incurred further costs for all involved parties. (Hoezen, M. (b), 2011)

**Project Planning:**
2012: partial opening of the new roadway “Westrandweg”.

Spring 2013: Full opening of the “Westrandweg” for traffic.
- Opening the new tunnel for traffic.
- Start of renovation of old tunnel.

2014: re-opening old tunnel to traffic.

2.2.6 A1/A6 Diemen- Almere Havendreef Schiphol Amsterdam Almere SAA
The A1/A6 Project is aimed towards improving the accessibility of the region. Its secondary goal is to create a means to connect several ecological zones. (Rijkswaterstaat (c), 2012)\(^\text{15}\)

The A1 will be transplanted and broadened to 5 traffic lanes per side. To accomplish this, several power pylons will have to be moved. In addition several other works are part of the project.

**Reason for inclusion into the case study:**
This project was selected because it incorporates several non-financial project goals as critical success factors.

- Accessibility of the region is guaranteed
- Improving the environment in Muiden by placing sound barriers and transplanting the A1.
- Higher traffic flow-through in 2020
- Connecting the ecological zones
- Implementation in an ecstatically fitting manner.

**Project Planning:**
Start: In May 2011 RWS organized an ‘Industry day’ to start the procurement process.
Award of contract: 2013

2.3 Quantification and Multi Criteria Analysis

Because not all of the cases studied have all required data, a quantification step is taken to look at each case’s most important numerical markers. As markers the following are chosen, based on the combination of markers providing for an all-round perspective of the effects of the Competitive Dialogue procedure.

The (calculated) transaction costs and the financial scope of the projects put the financial cost of the project in contrast to the cost for implementation of the Competitive Dialogue. The build speed of a project is one of the factors that a may be influenced by a well thought out contract as is the purpose of the procedure. These two markers thus give the financial perspective.

The nuisance and innovation of a project give the case study its societal impact. And the efficiency and the cooperation in a project are chosen as markers that shed light on how a case study was experienced by the involved parties.

This quantification is necessary to appropriately make all the cases comparable on the effects of the Competitive Dialogue procedure. Without this step the cases could be individually assessed, yet the effects of implementation of the Competitive Dialogue procedure may then be based on issues that are only available in a specific case study instead of an underlying issue with the procedure itself.

These quantifications will be assessed through a multi criteria analysis for which several scenarios will be written. The use of an un-weighted multi criteria analysis on scenarios enables us to assess the effect of theoretical future situations in an unbiased manner. The scenarios are explained in chapter 6, and in chapter 7 they are weighed against the performance of each of the cases. This last step is taken to perform a reality check on the chosen scenarios and place the upcoming legislative changes into a real-world example.
3 The competitive dialogue
To get a better understanding of why the research in this study is necessary this chapter will describe the development of the competitive dialogue and strive to explain the reasoning behind the changing legislation. To understand the competitive dialogue, we must first understand the principles on which it is based.

3.1 The History of the competitive dialogue
Procurement by the public sector is governed by legislation cascaded down from the European Union. There is a general requirement that the following principles, derived from the Treaty on the functioning of the European Union (European Union, 2008, Art.10, 15, 18, 37, 157) 16, should be applied to all public procurements:

- Equal treatment
- Non-discrimination
- Transparency.

The first European Procurement Directive (number 71/305) was created in 1971. In the same year the first Dutch Uniform Tender Regulation (Uniforme Aanbestedingsregelement, UAR) was created as an implementation document of the Directive 1971. Both of these had a limited applicability, only for contracts for works, yet it is through this double instrument that the construction industry has already been dealing with guidelines of public procurement law for decennia. (Pijnacker Hordijk, 2010, p. 2) 17

In the Netherlands, the UAR1986 formed the real start of the development of public procurement law (Kennisportal Europese aanbesteding, 2012) 18. Compared to the UAR 1971, this version was considerably more detailed. In addition to the legislation, there had also been a growing amount of case law concerning public procurement. The procurement Directives have raised many questions of interpretation, with some cases necessitating rulings by the European court of Justice. This combination of both national and European wide directives as well as principles taken from the case law has resulted in a much further-reaching system of obligations than initially set out. 19

The preceding Directives, Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, were found to not offer sufficient flexibility with certain particularly complex projects. This being due to the fact that the use of negotiated procedures with publication of a contract note is limited solely to the cases exhaustively listed in those Directives. Therefore a new award procedure, the competitive dialogue, was introduced in Directive the Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts 2004/18/EC, also referred to as the “Classic Directive”. (European Commission (b), 2004) 20

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19 Ibid.
3.2 Current state of Legislation

3.2.1 What is the competitive dialogue?

Directive 2004/18/EC defines the competitive dialogue as follows in Article 1 clause 11C:

“‘Competitive dialogue’ is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.” (European Commission (b), 2004, Art.1 CL.11(c))

This definition explains to us that the competitive dialogue is one of several procedures through which governmental organizations may commission projects to market parties. As the name suggests a dialogue between the procuring agency and several market parties is held. This dialogue entails that the procuring agency and the economic operators will meet several times to discuss the contract requirements. The aim of this dialogue is to come to the optimal solution that matches the needs of the procuring agency before deciding to whom the contract is awarded. In addition Directive 2004/18/EC states on the competitive dialogue that:

- Member states may or may not allow its contracting authorities to use the procedure. (European Commission (b), 2004, note 16)
- The procedure should be carried out in transparent conditions, for which non-discriminatory criteria are implemented when selecting competitors. (European Commission (b), 2004, note 39)
- The procedure may be set up in stages. At each stage the number of selected competitors may be reduced based on previously indicated award criteria. (European Commission (b), 2004, note 41)
- In article 29 the European Commission explains in which circumstances the dialogue may be applied. This will be further explained in paragraph 3.2.3. (European Commission (b), Art.29)
- The minimum time limit for receipt of requests to participate shall be 37 days from the date on which the contract notice is sent. (European Commission (b), Art.38 Cl.3)
- All invites to participate shall be made simultaneously. (European Commission (b), Art.40)
- The minimum number of competitors invited to tender shall be 3. (European Commission (b), Art.44 Cl.3)
- The weighing of the EMVI criteria is specified in the descriptive documentation. (European Commission (b), Art.53 CL.2)

Because there is a direct communication connection between the procuring agency and the economic operators there is also a risk of insider information. This was for example the case in Heijmans Infra versus RWS21. In this instance RWS disqualified Heijmans Infra from partaking in the dialogue procedure because one of their project managers had been directly involved in the preparation of the procurement documentation. Other than these types of rulings that deal with conflicts during the procedure, there is very little case law relating to the competitive dialogue.

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21 [LJN: BK0706,Voorzieningenrechter Rechtbank ’s-Gravenhage , 345286 / KG ZA 09-1086, 2009] as found on www.rechtspraak.nl
3.2.2 Why was the competitive dialogue procedure needed?
Before the competitive dialogue procedure was introduced, contracting authorities faced a dilemma in determining how best to proceed in procuring complex contracts. Procuring agencies had the choice between the restricted procedure and the negotiated procedure, but:

- The restricted procedure constrained competitive innovation between suppliers and prohibited negotiations once the award process had started. This was restrictive, particularly for PPP (Public Private Partnership) contracts. Because the contracting authority may not have incorporated the most innovative solutions into the award specification. (EIPA, 2009, p. 18)\textsuperscript{22}

- The negotiated procedure, which does allow such competitive innovation, and in particular it allows post offer negotiations. However, this procedure was intended to be an exception and was designed so it would be difficult to justify using. (European Commission (h), 1992, Art.11(2)(b))\textsuperscript{23}

In reality the boundaries of both procedures were unclear. In the restricted procedure post-offer clarification became quasi-negotiation. Contracting authorities often hid behind legal opinions justifying the negotiated procedure which were far from satisfactory explanations. Neither of these types of action was challenged on a regular basis because:

- Losing bidders moved on to the next opportunity or were reluctant to be seen to be slighted in fear they prejudice their chances for future opportunities with the contracting authority.

- Variation in the assessments by the Member States meant that these practices did not come to light in a consistent way. And as such where much more difficult to collectively challenge.

- The European Commission focused its resources on challenging the use of the negotiated procedure without prior publication rather than those procedures where some notification was made. (EIPA, 2009, p. 19)

This situation was deemed unsatisfactory, because it was forcing contracting authorities to choose between the need for flexibility and the need for legal certainty. The European commission recognized this situation but did not want to widen the scope of the use of the negotiated procedure with notice and thus proposed a new procedure, which became the competitive dialogue. The European commission stated that: “\textit{In response to the finding that the “old” Directives, Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, do not offer sufficient flexibility with certain particularly complex projects due to the fact that the use of negotiated procedures with publication... is limited solely to the cases exhaustively listed in those Directives}”. (European Commission (c), 2005, p. 1)\textsuperscript{24}

\textsuperscript{23} (European Commission (h), Directive 92/50, 1992, EC Brussels)
\textsuperscript{24} (European Commission (c), Explanatory Note - Competitive Dialogue - Classic Directive, 2005, EC Brussels)
3.2.3 Under what circumstances can the competitive dialogue be used?

According to the Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (2004/18/EC) the competitive dialogue may be used in circumstances where the contracts are “particularly complex”. The second paragraph of Article 1(11)(c) (European Commission (b), 2004) of Directive 2004/18/EC envisages two cases of contracts that are deemed as being particularly complex:

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

According to the explanatory note on the classic directive (European Commission (c), 2005):

"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. This situation may arise in particular with 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." It is therefore usable for large scale construction projects for which complex long term contracts are necessary.

In the Decree on procurement rules for public projects (Besluit aanbestedingsregels voor overheidsopdrachten, BAO) (Dutch Government (c), 2005) which is the Dutch implementation of directive 2004/18/EC, the competitive dialogue is defined as: “A procedure in which all entrepreneurs may take part and in which the procuring party will be in dialogue with the entrepreneur admitted to the procedure, with the aim to search one or more solution which fulfill the needs of the contracting authority and on which grounds the selected entrepreneurs will be invited to apply”

So we may conclude that the competitive dialogue is a negotiation procedure which is meant for ‘especially complex’ projects, such as Design & Construct contracts and in Public-Private Partnership projects. (Pijnacker Hordijk, et al., 2010, p. 185)

The methods through which the competitive dialogue may be applied are given in the General Directive for works (ARW2005) (Dutch Government (a), 2005, Art.29). And the methodology of using the competitive dialogue as explained in the ARW2005 corresponds to the one in the BAO. The provision in the ARW2005 is valid for both European as well as for national procurement projects. (Dutch Government (c), 2005, p. II) In the Decree on procurement in special sectors (Besluit aanbestedingen speciale sectoren, BASS) and in the Guideline semi-public agencies (Richtlijn Nutssectoren) there is no provision to implement the competitive dialogue, as following the Bass a negotiation procedure can be used in all cases. (Dutch Government (b), 2005, Art.37)
3.2.4 Experiences and applicability of the Competitive Dialogue procedure

Since its introduction the Competitive Dialogue procedure has been used for procuring a diverse set of projects, and the experience with projects procured through the use of the Competitive Dialogue has been evaluated. As was noted in the A15 Maasvlakte- Vaanplein case (Rijkswaterstaat (b), pg.32), when compared to other procurement procedures the Competitive Dialogue is generally seen as a good method for acquiring increased value of the bids for a future project. However, the involved market parties also note that they felt obliged to participate in each phase of the dialogue, which is not mandatory for handing in a bid, to not be seen as un-cooperative.

For the case of Haringvliet- Volkeraksluizen (Rijkswaterstaat (a), pg.10) both RWS and the other involved stakeholders note that in hindsight the combination of this dual project led to an overly complex set of award criteria. This notion of hard to quantify award criteria crops up in multiple procurement evaluations (Hoezen, M. (b)) and seems to stem from the fact that all projects where the Competitive Dialogue is implemented are deemed ‘particularly complex’.  

Both RWS as well as involved market parties state that the average of approximately 13 months for the procurement procedure of the Competitive Dialogue is very (or even too) long. (Rijkswaterstaat (a), pg.12) Especially the involved market parties would appreciate an earlier limitation (trechtering) of the involved parties to optimize the involvement and keep high quality proposals achievable.

In her dissertation (Hoezen, M. (a), pg.98-99) Mieke Hoezen explains her findings on the influence of procurement procedures on negotiations and commitments. She states that the intensive interaction between procuring agency and contractors creates a situation in which the formal legal contract and informal psychological contract develop at the same time. This results from the get-to-know-process already happening during the procurement process, in contrast to traditionally procured projects where this happens after the contract is awarded. When these processes are started during the procurement of a project, they will diminish post contractual renegotiations. However, and this is echoed in the evaluation of the A12 Utrecht Lunetten – Veenendaal Case study (Rijkswaterstaat (b) pg. 43), this is only possible if a mutual understanding and trust in each participants capabilities exist. Rijkswaterstaat is considered an advanced and professional procuring agency when it comes to the Competitive Dialogue (Rijkswaterstaat (f)). There is however no such certification of any size for market parties, making it difficult to assess their capability before entering into the Competitive Dialogue procedure.

This last bit is perhaps better explained through the use of a hypothetical case; the application of the Competitive Dialogue procedure for a small (in financial) scope, yet highly innovative project.

Let’s for example assume that RWS would like to run a pilot on energy reclamation through asphalt. Having designated a 100m stretch of road with a semi-constant traffic flow, they approach the market with a contract that entails the running of this pilot for 1 year and the construction of the proposed system.

If for such a project several inexperienced and/or unclear in qualification parties are attracted, time will have to be spent on clarifying what the actual question is. On the other hand, if one or more

28 See chapter 5.2.3 for a further explanation of the ‘particularly complex’ notion of the Competitive Dialogue.
29 See chapter 5.1 for the RWS policy on “trechtering”
experienced parties are attracted the dialogue can be focused on the discussion of possibilities and pitching of new ideas. There is even a clause in the legislation that enables the use of the Competitive Dialogue procedure for awarding non-commercial research projects with such a situation in mind. (European Commission (a) Art.24 CL1)

In this hypothetical case, RWS would have to set the EMVI criteria in such a manner that they do not limit the technical feasibility of the project. They could, for example, only specify 1 criteria, awarding the contract to the project with the highest energy return rate to cost. However, even in such a small project the nuisance of constructing and/or running the project could still be an issue. Instead, with experienced and capable bidders the dialogue could focus on optimizing the innovation of the proposals.

Concluding we can say that the Competitive Dialogue could in theory be a useful tool for small scale innovative projects. However, the problem with a project that is small in scope is that the time required for the dialogue does not diminish proportionally in comparison to larger projects. This in turn means that the costs of using the dialogue are proportionally greater and thus making it much harder to recoup. Therefore, the Competitive Dialogue will in most cases be an inefficient procedure for small scope projects. The exception to the rule might come about if we drastically change the form in which the competitive dialogue is implemented. By only using one instance of dialogue we could mitigate the additional costs while still allowing for some discussion and therefore the Competitive Dialogue might in such a case be cost-efficient for a small scale project. This would however defeat the purpose of an iterative design process through the dialogue.

Another method through which the procedure could be implemented for a small scope innovative project is by keeping the specifications of the EMVI criteria to an abstract level, because the more you specify the criteria, the more specific the testing of the design needs to be. This testing takes time and effort. However, abstract criteria will make comparing different solutions difficult and may lead to lower competition and thus a higher price, thereby negating any benefit that may arise from the added dialogue. Therefore, even though there are possibilities to adapt the Competitive Dialogue to a small scale innovative project, the changes that would be needed to make it cost-efficient are so demanding that it defeats the core purpose of the Dialogue itself.
3.3 Proposal for a new directive

On the 27th of January 2011 the European Commission published a market consultation in the form of a so called Green Paper\(^{30}\) (European Commission (d), 2011)\(^{31}\) wherein the market is asked for its opinion on the current state of EU public procurement policy through a series of prescribed questions.

3.3.1 Synthesis of replies to the green paper

Out of more than 600 replies to the green paper, approximately 32 replies came from Dutch institutions and/or market parties. (European Commission (e), 2012, p. 4)\(^{32}\) And out of the total number of replies, 40% came from businesses and 29% from public authorities. The remaining replies come from individual citizens, legal experts, civil society organizations and the official replies of the Member states. So a significant amount of replies stem from sources that are directly influenced by changing legislation in the Netherlands.

The aforementioned stakeholders in public procurement have put a significant (ranging from 65%-85% of respondents) emphasis on simplification of the procedures. For instance, a strong majority of stakeholders support the idea of allowing a greater use of the negotiated procedure. (European Commission (e), 2012) Another issue that many stakeholders feel strongly upon is the alleviation of the administrative burdens associated with public procurement, such as requiring supporting documents for the fulfillment of selection criteria only from the winning bidder.\(^{33}\)

98% of civil society organizations\(^{34}\) put emphasis on the strategic use of public procurement to reach the Europe 2020 societal goals. (European Commission (g), 2012)\(^{35}\) However, in contrast businesses seem reluctant to the idea of using public procurement in support of other policy objectives, including the ideas for green and social procurement. (European Commission (e), p. 15)

A majority of respondents from all stakeholder groups are of mind that the new Directive should explicitly allow contracting authorities to take into account their previous experience with one or several bidders. Respondents are aware of the risks and drawbacks of such a suggestion yet balance this against the potential financial gains.

Another item of note is the emphasis on the improvement of SME (small medium enterprise) access to public contracts. In general public authorities are skeptical about mandatory splitting of contracts into lots.

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\(^{30}\) A Green Paper is the first document published on a specific policy. This is circulated among interested parties to gather information and to strike up a debate. The objective is to arrive at a general consensus before making the official policy document, the white paper. Source: http://europa.eu/legislation_summaries/glossary/green_paper_en.htm

\(^{31}\) (European Commission (d), Green Paper on the modernisation of EU public procurement policy, 2011, EC Brussels)

\(^{32}\) (European Commission (e), Green Paper on the modernisation of EU public procurement policy Synthesis of replies, 2011, EC Brussels)

\(^{33}\) The issue to alleviate the administrative burden by handing in standardised supporting documentation has been implemented in the new Dutch “aanbestedingswet” (Law 32 440, Art 2.85)

\(^{34}\) Which includes; contracting firms, RWS, engineering agencies and similar.

\(^{35}\) (European Commission (g), Europe 2020, 2012, EC Brussels) Available at: ec.europa.eu/europe2020/index_en.htm
3.3.2 The Green Paper

The Green Paper on the modernization of EU public procurement policy towards a more efficient European Procurement Market engages a broad spectrum of issues. (European Commission (d), 2011) 36

For the purposes of this study only the following questions merit any value towards the implementation of the competitive dialogue:

Q3, Q14-17, Q19-20, Q65, Q70.1.1, Q92-93.

- Question 3 refers to reviewing and simplification of the definition of “works contract” which could lead to a broader possible implementation. If the specific list annexed to the Directive is omitted this could allow contracting authorities to broaden the scope of what they see as “works”. However, most of the work performed by RWS clearly already falls in this category, so this broadening would not be of great benefit to RWS.

- Question 14 challenges the level of detail of the EU public procurement rules. Less detail could also lead to a broader spectrum of instances but would also entail a greater burden on Member states to clarify the EU procurement Directive. This could lead to differences between Member states and counteract cross-border procurement.

- Question 15 and 16 ask the respondents to state which improvements can be made for alleviating the administrative burdens/reducing the transaction costs. Lowering the transaction costs will directly benefit the competitive dialogue procedure on its economic viability.

- Question 17 specifically asks if the competitive dialogue should be maintained, modified or abolished. As was discussed in the Foreword and paragraph 3.2.2, the abolishment of the procedure would set public procurement back to a situation where complex projects struggle to find the optimal solution.

- Question 19 and 20 deal with the incentive for more negotiation in public procurement and with the question if negotiation has a place in all types of contracts or only under certain conditions. If it was found that negotiation would be of benefit to all types of contracts then a wider application of the competitive dialogue procedure would be the logical conclusion.

- Question 65 refers to the possibilities of in the competitive dialogue being used to take environmental, social, accessibility and innovation policies into account. The possibility of a heavier focus on non-financial criteria gives the competitive dialogue procedure added benefits in creating value.

- In accordance to Question 65, Question 70.1.1 states the possibility to abolish the criterion of the lowest price only to stimulate policy objectives. This was implemented, and was already the case for RWS (see chapter 5).

- Question 92 and 93 deal with protection of intellectual property, property rights and innovative solutions within the procedure of the competitive dialogue. Negotiation may lead to grey areas where ideas have no clear owner. Chapter 5 explains how RWS strives to mitigate this effect.

3.3.3 The new proposal

On the 20th of December 2011 the European Commission published the Proposal for a Directive of the European Parliament and of the Council on public procurement. (European Commission (a), 2011) In this proposal the Commission has set forth a new guideline on how public contracts may be procured above the given financial thresholds. (European Commission (a), 2011, Art.4) This proposal is a combination of the responses to the in 3.3.2 discussed green paper and developments in procurement legislation stemming from experience with previous iterations of these guidelines. (European Commission (e), 2012, p. 2) The proposal is based on Articles 53(1), 62 and 114 of the Treaty on the functioning of the European Union (TFEU), (European Commission (a), 2011, p. 6) and aims to modernize the existing tools and instruments for procuring agencies. It does by simplifying the rules and procedures: (European Commission (a), 2011, pp. 8-12)

- By forcing procuring agencies to accept self-declarations as the first step of identification in the procurement process the administrative burden is lessened.
- Contracting authorities are forced to explain why if they decide not to split the contract into lots. This would lower the contract value of each lot, and thus make it more accessible for SMEs. 38
- The shortening of deadlines.
- A lessening or alleviation of the publication requirements.
- Introduction of life-cycle costing in procurement. 39

On the other hand, several main issues remain the same:

- The thresholds are kept at the same level because the European Commission feels that the current thresholds strike the right balance between increased administrative burden and procedural transparency. (European Commission (a), 2011, p. 12)
- The proposal retains the safeguards against conflict of interest, favoritism and corruption.

Thus only a small part of this proposal directly influences the handling of the procedure of the Competitive Dialogue. As such, only those items that are of note to this research are discussed. The conflicting issues it may have with the new Dutch procurement law are discussed in chapter 4. And the impact that these changes will have on the RWS policy are discussed in paragraph 5.2.

In chapter 2 of the Green paper (European Commission (d), 2011, p. 12)“Improve the toolbox for contracting authorities” the point is made that the EU rules are complemented by a large set of national and/or regional rules. Regulation that is repealed at the EU level may be re-implemented or replaced at other levels. It is thus important to note that not all issues dealt with in the proposal may be transplanted to the Dutch legislation. 40

38 RWS however uses a lot threshold of €60 million when implementing the competitive dialogue procedure and as such this change will not affect their policy.
39 In the competitive dialogue procedure this was already available through the use of EMVI criteria.
40 This also creates a risk of diversification between member states and possibly leads to gold-plating. See chapter Fout! Verwijzingsbron niet gevonden. for an explanation of the process of gold-plating.
### 3.4 The new Dutch procurement law

In 2008, the Senate of the Dutch Parliament halted the proposal for a new Dutch public procurement Law. It was found that both a clarification of the implementation of European procurement guidelines as well as a cultural change were necessary. Another point on the agenda was to implement proportionality through legislation in the making of the new Dutch Procurement Law. (Pijnacker Hordijk, et al., 2010, pp. 4-5)

On the 14th of February 2012 the Dutch House of Representatives accepted the new Dutch public procurement Law. This was ratified by the Senate of the Netherlands on the 30th of October 2012. The proposed implementation of this new law was rescheduled from January to April 2013 because the Council of State has yet to give its recommendation. This new Dutch procurement law will replace the ‘Raamwet EEG-voorschriften aanbestedingen’, BAO, BASS and WIRA. (Dutch Government (h), 2009-2010, Art.1.3)

This new Dutch procurement law has been tuned to Directive 2004/18/EC and as such will have to change those items with which it will no longer comply once the proposal for a new Directive comes into effect. In the new Dutch procurement law the following points are presented regarding the competitive dialogue:

- The use of EMVI criteria is now mandatory. (Dutch Government (e), 2012, Art.2.114)
  - This does not change anything for the implementation of the Competitive Dialogue as EMVI is already the standard for acquiring DBFM contracts. This will be further discussed in chapter 5.
- A procuring agency has to maximize the societal value of any contract it sets up. (Dutch Government (e), 2012, Art.1.4 Cl.3)
  - Maximizing the societal value is in line with the mandatory use of EMVI criteria as that is the basis for its use and as such this will have very little direct impact.
- A procuring agency will communicate its invitation and its award decision including relevant reasoning. (Dutch Government (e), 2012, Art.1.15, 2.103)
  - The necessity of “relevant reasoning” may entail more work and the definition of relevant remains open for discussion.
- The minimum requirements demanded of bidders must be proportional to the contract scope. (Dutch Government (e), 2012, Art.1.10, 1.13, 1.16, 2.90)
  - A short discussion on the effects of proportionality is given in chapter 4.1.1.
- The procurement documentation must be available free of charge. (Dutch Government (e), 2012, Art.1.21, 2.66)
  - This in effect changes nothing for Rijkswaterstaat, yet it determines that all interested parties will at all times be capable of acquiring the procurement documentation.

As such there are no direct issues in the Dutch procurement law relating to the competitive dialogue procedures that are in conflict with the proposal for a new directive. However, several new options of implementation have opened up. These new options will be discussed in chapter 4, and their economic viability will be assessed in chapters 0 and 0.

41 (Dutch Government (h), *memorie van toelichting aanbestedingswet*, 2009-2010, Dutch Government ’s Gravenhage)
3.5 Answer to the research questions, branch I
In this chapter we have established the answers to the research questions from branch I of the issue tree.

i. What does the Competitive Dialogue entail?
The competitive dialogue is a procedure used by procuring agencies to obtain the most economically-effective contract available for ‘particularly complex’ projects. The procedure entails a dialogue, which may be phased, with the aim of developing one or more suitable alternatives capable of meeting the project’s requirements. (European Commission (b), 2004, Art.1 Cl.11(c))

ii. When was it implemented?
The competitive dialogue procedure was first established in 2004. Of influence to the legislation of the procedure are the proposal for a new Directive and the new Dutch Procurement law. As stated in synthesis of replies to the Green paper (European Commission (e), 2012, p. 16), a large group of stakeholders are for using the competitive dialogue procedure.

iii. For what reason was it developed?
The procedure was developed as a flexible method of procuring complex projects. It has the advantage of bringing the procuring agency and the market closer together to get a more cost-efficient proposal. It is known for being a time consuming procedure but an overall improvement than the preceding options.

I. What is the competitive dialogue?
The competitive dialogue is a procurement procedure used to obtain the most economically-effective contract available for ‘particularly complex’ projects. The procedure entails a dialogue, which may be phased, with the aim of developing one or more suitable alternatives capable of meeting the project’s requirements. Especially interesting is the complementary system within procurement law, which entails both European as well as national law. Because of this, the possibility of gold-plating presents itself. Of influence is the green paper, which has resulted in a clear picture of the needs and wants of the market parties. Most notably, parties would like a reduction of administrative burdens and more negotiation between the procuring agency and the market. And to this end a proposal for a new Directive was drafted. In addition the Dutch government is striving to implement a new procurement law which is still based on the ‘Classic Directive’, Directive 2004/18/EC.
4 New EU procurement Directive and the Dutch procurement law

As both a new set of procurement guidelines from the European Commission and a new Dutch procurement law are set to be implemented in the near future, it is important to sketch the differences and overlap these two legislatures will have on the competitive dialogue procedure. By ensuring that we take both types of new legislation into account and any conflicting issues are immediately clarified, any policy adjustments for the Competitive Dialogue procedure will be able to incorporate both instead of necessitating another change when the latter will be implemented.

First of all, the Gold-Plating effect will be explained as this is where European legislation meets a member-state’s legislation. Secondly, the possible improvements that stem from both new sets of legislation are examined. Finally this chapter deals with the question of how much impact legislative change may have on projects that are already underway.

4.1 The Gold plating effect

For those projects over the threshold given in the EU procurement guidelines the Dutch procurement law will have to set the procedure within the boundaries set forth in those guidelines. However, the national governments have the freedom to put extra- or intensifying requirements set forth within the guidelines. This process is known as Gold-Plating. (CNplus, 2012)42

The process of Gold-Plating has come under fire for making it more difficult for businesses to enter the cross-border national markets. For example, architects in the United Kingdom are claiming that, due to the effect of Gold-Plating, they still have to invest in localized knowledge to participate in the European procurement market to cope with member-state level regulations. (CNplus, 2012) The effect is not limited to the construction industry, as in the UK the Health and Safety commission has complained on a regular basis that the UK government burdens self-employed doctors to the same degree as hospital employed doctors while this is beyond the scope of the EU directive. (Great Britain, Parliament, 2008, pp. 12-13)43

Additionally Gold-Plating is sometimes used by member states as a political statement to pass controversial measures into national legislation as these are under less scrutiny. The term is also sometimes used when implementing EU legislation before the date given in an EU directive. Therefore the EU governments committed themselves to a deregulation agenda at the Lisbon Summit in 2000. As a consequence the European Commission has supported more harmonization measures in recent years, which effectively prohibit Gold-Plating.

The new Dutch procurement law has not taken the changes proposed in the new EU guidelines into account. This will happen at a later date through a modification of the procurement law. The new Dutch procurement law will replace the BAO, BASS and the WIRA. (Pianoo, 2012)44

As all projects for which RWS uses the competitive dialogue procedure are of a €60 million or more financial scope, all of these projects fall above the €5 million EU guideline threshold for works. (European Commission (a), 2011, Art.4 CL.A)
4.1.1 The focus on proportionality in the new legislation

Both the proposed guidelines as well as the Dutch procurement law (Dutch Government (e), 2012) have a focus on enabling more small and medium-sized enterprises (SMEs) into partaking in the procurement process. The proposal states: “In order to foster the involvement of small and medium-sized enterprises (SMEs) in the public procurement market, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.” (European Commission (a), 2011, p. 21 Note 30) Both base part of the desire on the principle of proportionality. (European Commission (a), 2011, p. 6 Note 3)

The guidelines have set forth the following on division of contract into lots: “Public contracts may be subdivided into homogenous or heterogeneous lots”. (European Commission (a), 2011, Art 44 CL.1) This is in accordance with those set forth in the “guide proportionality” which also entails an “apply or explain” clause. (Dutch Government (d), 2012) These measures can be followed back to the wish expressed in the Green paper (European Commission (e), 2012, p. 16) for the procurement systems to be used to stimulate the European economy during the current crisis.

4.2 Design improvement space

It is a target in the new directive that contracting authorities are free to use the competitive dialogue when they deem it appropriate. (European Commission (a), 2011, p. 45) The contract value of the average project for which the competitive dialogue procedure was used has significantly increased over the last years. According to the new directive the dialogue has shown itself to be of use when contracting authorities are unable to clarify what they truly need. It may also be of use as an assessment tool to gather what the market can offer in terms of technical, financial or legal solutions. (European Commission (a), 2012, Note 16) This type of situation may arise in large scale construction projects, or projects for which the technical, financial or legal scope is hard to clarify. Smaller projects, financially speaking, generally have a lower scope and therefore lower difficulty in clarifying its technical, financial or legal needs. As was seen in the theoretical case of 3.2.4 those smaller projects are thus less likely to have the competitive dialogue procedure implemented.

The new Dutch procurement law, as well as the proposal, enables the procuring agency to allow variant solutions in the procedure. Variant solutions give the bidders a low-risk stepping stone for out of the box proposals and innovative (non-proven) technology. Article 43, clause 1 of the proposal states: “Contracting authorities may authorize tenderers to submit variants. They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest whether or not they authorize variants. Variants shall not be authorized without such indication.” (European Commission (a), 2011, Art.43 CL.1) This is however in contrast to the ARW2012 (Dutch Government (g), 2012, Art.4.21) which states that for the competitive dialogue no variants are allowed, giving us another example of gold–plating and negates any benefit that might stem from allowing variants in the Competitive Dialogue procedure. In

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45 (Dutch Government (d), Gids Proportionaliteit, 2012, Dutch Government ‘s Gravenhage)
46 This wish is not in accordance with the views expressed by Micheal Burnett. Burnett’s views where discussed in the foreword of this document on page 3. As such this method of implementing proportionality into the legislation may have further implications. The ability to implement these forms of proportionality is discussed in chapter 5.2 ‘Policy under pressure’.
chapter 6 we will discuss the possible benefits that the addition of variants may have for the Competitive Dialogue.

For the modernization of the procedures the commission states that the proposal provides a more flexible and user-friendly framework. They give the reason that time-limits for both participation and the submission of offers have been shortened. This would then in turn allow the procurement procedures to become more streamlined. In addition the argument is made that by adding flexibility to the selection of tenderers and the awarding of the contract the modernization of the procedures has enabled procuring agencies to optimize their procurement process and add additional criteria; such as the quality of staff assigned to the project. This means that more freedom is ingrained in the Directive. This will however require more work from procurement agencies, like RWS, to select the appropriate policy for each project and as such entail a higher (financial) burden unless a standardized selection policy is put in place.

The selection of candidates has also been updated: “Contracting authorities will be entitled to exclude economic operators which have shown significant or persistent deficiencies in performing prior contracts.” (European Commission (a), 2011, p. 9) However, a self-cleaning measure was implemented alongside: “contracting authorities may accept candidates or tenderers in spite of the existence of an exclusion ground if they have taken appropriate measures to remedy the consequences of any illicit behavior and effectively prevent further occurrences of the misbehavior”. (European Commission (a), 2011, p. 9) For the Competitive Dialogue procedure this means that procuring agencies may now exclude bidders from participation if they have not performed to specification in earlier contracts. This in turn pushes the market parties to perform to the best of their abilities on the EMVI criteria when a contract is awarded as it may have repercussions in later procedures.

As was stated in the foreword, Michael Burnett has argued both sides of the question whether or not the Competitive Dialogue needs to be abolished in light of the changing procurement and in the end, Burnett concludes that the Competitive Dialogue still has its place in procurement procedures. (Burnett, 2011) With this in mind, when looking at the above paragraphs we see that the applicability of the Competitive Dialogue has actually improved and been widened under the new legislation, and as such not only need not be abolished but may require further implementation. In chapter 5.2 we will discuss how these changes affect the Rijkswaterstaat policy and what new ways have opened up. But first we will look at how current projects are affected by legislative change and if affected, how great that impact may be.

4.3 Risk adversity

When talking about legal issues in the construction industry we are in part discussing the issues of risk allocation and assigning responsibility for when negative influences occur.

One of the many issues that risk managers deal with is the allocation of compensation for legislative changes. According to ‘Bing, et al’

48 Risk assessment is the principle of acquiring knowledge about the behavior of a system when a specific change occurs. This may be a negative or positive occurrence.

49 L. Bing, A. Akintoye and C. Hardcastle are Risk management researchers for the Glasgow Caledonian University, Scotland, UK. P.J. Edwards is a Project management fellow at the RMIT University, Melbourne, Australia.
and legislation change) belong to the macro level risk group. It is generally recognized that force majeure risk could be severe, but has a low probability of occurrence. The nature of this risk factor is such that public and private sectors may not be able to deal with it alone. Hence, a shared mechanism would appear to be the best option.” (Bing, et al., 2005, p. 28)\(^{50}\) Bing, et al’ define a method so that the risk of changing legislation can be allocated. This method however does not specify a way in which to deal with the risk in case it does occur. We can therefore assume that they propose to take the risk and pay the costs incurred.

Very little anticipatory research\(^{51}\) is being openly\(^{52}\) published on what effects upcoming (known) legislative change will have on existing projects. On this basis the deduction is made that the common approach is to take the low probability risk and not to try and circumvent or deal with the risk. If this is the case, than high costs may be incurred by a procuring agency if legislation changes.

4.4 Are there systems in place that minimize the impact of legislation changes?

Under Dutch law the principle of legal certainty gives those involved in a construction project a degree of protection against the risk of legislative change. The basis of this principle implies: “Legal certainty is an established legal concept both in the civil law legal systems and common law legal systems. In the civil law tradition, legal certainty is defined in terms of maximum predictability of officials’ behavior. .... legal certainty is regarded as grounding value for the legality of legislative and administrative measures taken by public authorities.” (Claes, et al., 2009, pp. 92-93)\(^{53}\)

As such, when legislative changes occur no punitive actions will be undertaken against offenders if they could not have predicted or prevented the breach of law. In the Netherlands for example procurement projects are measured against the legislation that was in place on the date of publication. According the UAV2012 (Dutch Government (f), 2012, Ch.III Cl.13)\(^{54}\) any changes to legislation after the day that a bid has been handed in are allocated to the Project Owner unless it can be assumed that the contract taker was able to anticipate on those changes.

These provisions make it clear that there are systems available and in place which deal with risk allocation when legislation changes. And this in turn makes it clear that anticipatory research is far more important for a project owner than for a contractor as he will have to deal with all the (financial) risk.


\(^{51}\) Anticipatory research is the process of analyzing the effects of an upcoming event.

\(^{52}\) Internal research by procuring agencies and market parties is not always published and as such was unavailable for this research.


\(^{54}\) (Dutch Government (f), Besluit vaststelling Uniforme administratieve voorwaarden voor de uitvoering van werken en van technische installatiewerken 2012 (UAV 2012), 2012, Dutch Government ’s Gravenhage)
4.5 Answer to the research questions, branch II
In this chapter we have established the answers to the research questions from branch II of the issue tree.

i. What is the current legislative framework?
The competitive dialogue procedure currently falls under the European procurement directive 2004/18/EC. It is implemented in the Netherlands through the use of the BAO. In the ARW2005 the methods of implementation are explained.

ii. What is the upcoming legislative framework?
In both the new Dutch procurement law as well as in the proposal for a new Directive by the European Commission the competitive dialogue procedure is covered. When the proposal is implemented the Dutch procurement law will have to comply with the proposal for those projects that exceed the financial threshold covered in the proposal.

II. What are the changes to the legislative framework?
The legislative framework that deals with the competitive dialogue procedure is dependent on the position in time when being referenced. Once the proposal for a new Directive is implemented it will be the leading factor dealing with the applicability of the competitive dialogue procedure for construction projects exceeding the financial threshold of €5 million. Those issues in the new Dutch procurement law that contradict the proposal by the European Commission will at that point need to be changed into compliance. More room for design improvement has been given in the new Directive, although the risk adversity of procuring agencies and the market can still be covered by the competitive dialogue procedure.
5 Rijkswaterstaat policy

To gain a better understanding of the influence the changing legislation will have, we must first look at the current policy of RWS. This chapter explains the process RWS uses to implement that policy and strives to clarify if and where that policy will need to be changed.

5.1 The current policy of Rijkswaterstaat

It is sometimes interesting to contract the maintenance activities in combination with the construction activities in infrastructure projects, thus taking them out of the scope of the output contracts. RWS has set as its policy that this consideration has to be made for all projects exceeding €60 Million. The complexity of the project plays a significant part in this consideration. (Rijkswaterstaat (d), 2009, p. 7)

However, there is a limited capacity in the market and RWS organization; the market and RWS have to be able to contract and carry out the DBFM-contracts. The working method has to fit with the company philosophy and the organizational development. (Rijkswaterstaat (e), 2012, p. 9)

Preferably no more than 4-8 projects are in preparation nationally at any one time, to make sure enough RWS-knowledge and experience can be deployed. This is to thoroughly prepare the project/contract, and to learn from experiences in former projects. Preferably no more than 3 projects are in procurement at the same time; this is in regard to the limited tender capacity stemming from the market and RWS.

RWS’s market policy is made up of three focus points (Rijkswaterstaat (d), 2009, p. 17):

- Caution with regards to competitive proportions/relationships in the market (market forces). This means no merging if spoiling of the market seems to lie ahead)
- Caution with regards to price-quality relation and use Economic most Valuable sign-in (EMVI) for quality assurance.
- Keep transaction costs low at both the market and government side: work efficiently.

The Rijkswaterstaat policy on implementation of the Competitive Dialogue procedure is very extensive. (Rijkswaterstaat (d)) Over the next few pages we will go through a concise version of the most important points that make up that policy. These points were picked because of their relevance to the research and because it is important for Rijkswaterstaat to have a complete overview in this report. However, due to the level of precision of the policy we shall keep the discussion of each separate item to a minimum and move through rather quickly.

Deliberation on a project level:

The financial analysis of a project is usually made using a business economics tool (PPC, Public Private Comparator). The result of this PPC, combined with strategic criteria leads to a cohesive advice on the form of contract on a project level.

A procuring agency may implement the competitive dialogue procedure in particularly complex projects. Projects are deemed particularly complex if the procuring agency is not objectively capable of setting the technical means or unable to specify the judicial or financial requirements. (European

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55 (Rijkswaterstaat (d), De concurrentiegerichte dialoog, 2009, Rijkswaterstaat Utrecht)
56 (Rijkswaterstaat (e), Afweegkader Inkoop, 2012, Rijkswaterstaat Utrecht)
Commission (b)) RWS has a large basis of experience in implementing the competitive dialogue procedure for integrated DBFM(O) projects and as such is capable of handling large scale construction projects.

**Critical Success Factors:**
RWS will try to set a project’s critical success factors (CSFs) in such a way that they are a derivative from the project’s policy and goal. If it is not possible to trace the project’s critical success factors back to these, it could be stated that tax money is being spent incorrectly. It is deemed worth the time spent on this as this is generally won back further on in the project.

The following examples of CSFs are in line with the chosen markers as explained in chapter 2.3; (Rijkswaterstaat (d), 2009, pp. 9-10, 20-22)

- The build speed of the project
  - If a project has a mandatory due date, then the build speed may be seen as a critical factor for the project’s success.

- The transaction costs inherent in the chosen procurement procedure
  - If the transaction costs of a project are above what the procuring agency wishes or is capable of covering, then a project can be construed as unsuccessful.

- The nuisance during and/or after construction.
  - As the image of a project greatly depends on public opinion, a limitation of the nuisance during and/or after construction may increase support of the project and as such contribute to project success.

- The innovation of the bids.
  - If a project allows for innovative bids this increases the overall value of a project as it stimulates (technical) progress and allows for spin offs of these ideas to be used in other projects.

- The efficiency of the project team
  - This CSF allows for measuring the overall effectiveness of resources spent. As such it strongly signifies how close to “optimal” the project has been.

- The cooperation between the stakeholders may be regarded as a CSF.
  - When the cooperation between the stakeholders is deemed bad or below preferable this may lead to further repercussions in following projects. As such a project may fail on other points but still teach the involved stakeholders enough that it contributes to the success of other projects.
Stakeholder analysis:
The environment analysis done by RWS states which internal and external parties influence the project results. These parties are also called the project’s stakeholders. There is a distinction between parties whose interests are touched by the project and the project’s proponents and opponents. Essential is whether the impact of the project has advantages or disadvantages for the parties in question. Also important is whether compensating action is necessary or whether the project can be implemented in a way to make sure it creates solely advantages. An environmental analysis is a tool to visualize the project’s opportunities and threats. This way, an impression can be created of the potential success rate, which might be improved by taking fitting measures. (Rijkswaterstaat (d), 2009, p. 10)

![Power / Interest Matrix](image)

According to Gardner, stakeholders can be assessed based upon two variables; their level of interest in the project and their power to influence the project outcome. In Figure 5.1.1 the general advice is given in how to deal with each of the four variant stakeholders. (Meredith & Mantel, 2008, p. 132)

Appropriate Mandate:
The RWS project team needs to be able to react effectively and decisively to suggestions. If they do not carry sufficient mandate this will cause time-delays and could also cause mixed information going out to the bidders.

Conflict of Interests:
To avoid a conflict of interests it is possible, following the European court of Justice Judgment in the case C-213/07 Michaniki-ESR, to exclude parties from participation in the procurement if the principle of equality would be at risk.

Cherry picking:
Measures are taken to avoid cherry picking, as this is damaging to the relationship that RWS has with the market. (Rijkswaterstaat (f), 2008, p. 13)

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Risk Analysis:
Attention is paid by RWS to the possibility that the project’s risk, regarding its composition, scale and success rate might change during the preparation and execution phases. Management measures can be adapted as necessary. For a proper analysis, a distinction should be made between projects risks and contract risks. Project risks are risks that might influence the course and progress of the project. They are important with regard to the preparation phase and the procurement, as well as the contract management by the commissioner/commissioning party during the execution and exploitation phase.

<table>
<thead>
<tr>
<th>Likelihood</th>
<th>Insignificant</th>
<th>Minor</th>
<th>Moderate</th>
<th>Major</th>
<th>Severe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Almost certain</td>
<td>Medium</td>
<td>High</td>
<td>High</td>
<td>Extreme</td>
<td>Extreme</td>
</tr>
<tr>
<td>Likely</td>
<td>Medium</td>
<td>Medium</td>
<td>High</td>
<td>High</td>
<td>Extreme</td>
</tr>
<tr>
<td>Possible</td>
<td>Low</td>
<td>Medium</td>
<td>Medium</td>
<td>High</td>
<td>Extreme</td>
</tr>
<tr>
<td>Unlikely</td>
<td>Low</td>
<td>Medium</td>
<td>Medium</td>
<td>Medium</td>
<td>High</td>
</tr>
<tr>
<td>Rare</td>
<td>Low</td>
<td>Low</td>
<td>Medium</td>
<td>Medium</td>
<td>High</td>
</tr>
</tbody>
</table>

Figure 5.1.2 Risk Impact chart.

Figure 5.1.2 shows the impact distribution of risks. For example a risk occurrence that has been assessed as possible with major consequences should be given High priority in the risk management of the project. (Meredith & Mantel, 2008, p. 168)

Budget/PPC/PSC:
The decision to start procurement of a DBFM(O)-agreement is, as stated earlier in this chapter, generally based on a PPC. This compares the execution through a DMFB-agreement with a private sector approach. If the PPC makes it clear that it would be advantageous to let the project be executed through the market, a PPP approach will be chosen, such as for example through a DBFM contract. Afterwards, benchmarking is possible by using a PSC (Public Sector Comparator) to make a comparison with the definitive applicants. After the PSC has been created, it will need to be refined and edited throughout the procurement process if the dialogue provides information that might lead to a change in the risk allocation and/or the output specification. (Rijkswaterstaat (d), 2009, p. 11)

The PSC can be seen as the framework of the procuring party. (Dutch Government (a), 2005, p. 99)

58 Cherry Picking is the picking and choosing of advantageous solutions and contractors without proper (financial) restitution.
59 (Rijkswaterstaat (f), Rijkswaterstaat is een toonaangevend opdrachtgever, 2008, Rijkswaterstaat Utrecht)
Planning:
According to RWS (Rijkswaterstaat (d), 2009, p. 15) an extensive DBFM(O) contract under the competitive dialogue requires anywhere between 26 and 48 months (approximately 2 to 4 years):

- 7-12 months of preparation
- +/- 3 months selection
- 9-24 months Dialogue
- 3 months of registration
- 3 months contract close
- 1-3 months Financial close
- Realization
- Exploitation and maintenance operations

The dialogue is first and foremost a process to achieve an optimal coordination of supply and demand. It is not a (price) negotiation in the classic sense because there is no ‘starting bid’. The process starts with a question which requires a solution. It is however allowed to discuss all aspects of the project, including pricing. The procurement procedure may also be divided in phases and the amount of solutions to be discussed can be limited. This limitation, also known as ‘trechtering’, has to be based on pre-published award criteria. (European Commission (b), 2004, p. 134) (Dutch Government (c), 2005)

Measuring Performance:
For the creation of the output specification it is important to use an objective criterion to measure the performance of the contractor. Therefore, measurable units have to be used, as otherwise measuring can be very difficult or even impossible. The quantification of EMVI criteria, especially environmental (Braat & ten Brink, 2008)\(^{60}\), contains extra difficulties and requires adequate time.

Market Consultation:
When a market consultation takes place, care is taken by RWS to avoid giving the participators an unacceptably large advantage.

A possible consideration as to whether or not to hold a market consultation can be the extent to which the procuring agency can oversee the possibilities and limits. And if RWS can judge if the scope of a project, ideas and/or solutions for plan initiatives can be seen as feasible by market parties.

Proportionality:
The minimum criteria and the selection criteria that RWS sets need to be proportional with regards to the nature and scale of the project, and have sufficient distinctive properties. With regards to reference projects, it is important that the nature and scope of the minimum requirements of the reference projects are related to the project to be procured. The size and content of the reference project should be comparable. Comparable yet (slightly) smaller projects can also serve as a reference.

\(^{60}\) (Braat, L.C. & ten Brink, P., The Cost of Policy Inaction, Wageningen, 2008, Alterra Wageningen)
Award Criteria:
The Award criteria are derived from the project objectives and critical success factors. Award criteria are relevant to the application and not to the applicant. RWS will assess the application based on these criteria. It is important for RWS to formulate the award criteria in a way that the application which provides the best price-quality relation will be assessed the highest. (Rijkswaterstaat (d), 2009, p. 20)

Award criteria that could be used are for example the quality of the materials to be used, the qualification of assigned staff or the implementation planning. In addition, Rijkswaterstaat sometimes chooses to award projects based on additional non-qualitative criteria, such as the status of social security of the workforce or the methods implemented for acquiring and conclusion of complaints.

A proper consideration on which demands might function as minimum demands and which as gradable award criterion is crucial in this process are made. Minimum demands are also known as knock-out criteria, in which non-compliance results in the disqualification of the application, as it does not meet the demands. Discussions on the composition and formulation of the award criteria cost a lot of time. They are the base for a successful procurement process and granting of the contract by RWS.

Number of parties invited to the dialogue:
It is possible to allow more than 3 parties in the dialogue, and reduce to 3 after the first round. This is possible based on the assessment of for example a project visions and/or action plan. Assessment by RWS is done based on the award criteria. Company suitability however, is not a factor in this phase of the dialogue.

RWS has as its policy that they will invite five bidders to start with the dialogue. Choice is then narrowed down in such a manner, that the three selected parties should built on their original action plan and/or project vision, to make sure previously rejected parties have no reason to complain. Follow-up plans need to be of at least equal or better quality than the earlier presented plans. (Rijkswaterstaat (d), 2009, p. 23) (Rijkswaterstaat (e), 2012, p. 7)

Planning:
Planning is not underestimated by RWS. A proper assessment, with written motivation, costs time. A rushed and inadequate motivation may lead to misunderstanding. The result could be conflicts, which could costs much more money and time, especially when battled out in court. Applicants are to be given sufficient time to compose their tender teams. Even such things as (construction) holidays need to be taken into account because the private sector will be less inclined to assign resources during those periods.

For example, if a project team of RWS has spent a year on preparation of the procurement, it is unrealistic to expect an applicant to process all important information within a very short timeframe. In addition the use of a digital standardized format for the format applications are handed-in in is useful for comparison of the applications.
**Period of appeal:**
After the award decision, a stop period of 15 days is generally applied. It is considered as a method to create concrete moments for judicial appeal in between the procurement periods. (Dutch Government (a), 2005, p. 100)
For example, implementing this term after selection and after limitation of the amount of solution/participants on account of the action plan or the mass study gives an appropriate stop period. The advantage is that rejected applicants get clear possibilities for appeal. If an applicant does not use this opportunity, this will reduce the chance of a judge acknowledging the appeal at a later stage. (Grossman Air Service vs Republic of Austria, 12 February 2004)\(^6\)

**Cost Reduction:**
RWS uses the available standard procurement guidelines and standard contracts. A standard DBFM(O) contract is available. RWS strives to consider the amount of information they request from the market. How much work should applicants do and how many costs should be made to get to an application? How much work is the assessment of certain documents for the procuring service? Care is taken with regards to making the planning, such that the applicants have not in fact have to completely finish their design to cope with the next phase of the procuring process.

**Design costs Reimbursement:**
Despite measures to reduce transaction costs in the competitive dialogue, the transaction costs in the procurement process are high for market parties. The procuring service can decide to give a reimbursement for design costs. (European Commission (b), 2004, Art.29 Cl.8) For RWS this has been set on 50% of the design costs, which in turn has been set on 3-4% of the project financial scope. (Rijkswaterstaat (d), 2009, p. 26)

**Application:**
Application for RWS projects is done in the same way with the competitive dialogue as with non-public procurement. Based on the project goals and scope parties can see if they consider the project attractive to apply for. The in the procurement documentation noted minimum requirements can give the parties a notion on whether or not they might be considered for an invitation.

**Dialogue as optimization process:**
Before the start of the dialogue, it is important for RWS to establish which products are expected to be received from applicants, and the timeframe necessary for doing so. The procedure is aimed on optimization. Experience has shown that in many cases it is desirable to first enter into the dialogue with applicants, before such applicants deliver a dialogue product. This way of proceeding offers parties the opportunity to explore the question and potential solutions. (Rijkswaterstaat (d), 2009, pp. 31-35)

**Bid acceptance period:**
Sometimes RWS implements a Bid acceptance period. One of the main reasons to do this is to keep a secondary applicant on hand in case the winner is not able to fulfill the necessary financial obligations for the project. On the other hand, the issue arises that many of the project-team members of the secondary applicant may have been reassigned. To counter this issue it is important to have a clear and concise period between awarding the contract and the final contract-financial close of the project. (Rijkswaterstaat (d), 2009, p. 44)

5.2 Policy under pressure

Having now established what policy RWS uses to implement the competitive dialogue procedure we will look at how this policy is influenced by the new Dutch procurement law and the Proposal for a Directive of the European Parliament and the Council on public procurement.

5.2.1 What needs to change?

Proportionality:

The new Dutch Procurement Law has set forth new rules on proportionality of the demands for financial turnover of the bidders in relation to the procuring project. What it boils down to is that the maximum demanded turnover can be no greater than three times the financial scope. (Dutch Government (e), 2012, Art.2.90) This is in congruence with the “guide proportionality” and the proportionality principle. In addition, to suppress the administrative burden to both the market and the procuring agency the demands for proof of capability are changed to the system of a “personal declaration”. (Dutch Government (g), 2012, Art. 4.13.2) In case the procuring agency has misgivings about statements in the “personal declaration” of a bidder they may request further explanatory documents. (Dutch Government (g), 2012, Art. 4.13.5)

Abolishment of awarding of contract based on lowest price:

Although RWS already has as its policy to award contracts in the dialogue based on the Economic most valuable bid (EMVI) the new Dutch procurement law has now abolished the option for awarding of contract based on lowest price, and demands the use of EMVI. (Dutch Government (e), 2012, Art.2.110) This is in accordance with Article 28 Clause 1 of the Proposal.

Minimum term of sign-in:

The first date on which a deadline might be placed for sign-in of bidders has been set on a minimum of thirty days after the contract notice been sent. (European Commission (a), 2011, p. 58) According to the new Dutch procurement law; in founded critical situations this period may be shortened to ten days for the competitive dialogue procedure. (Dutch Government (e), 2012, Art.2.74) However, the Proposal doesn’t support this. As such when the proposed guidelines come into effect this clause will have to be scrapped as it is in direct violation.

Continuation of the dialogue:

In the proposal the following statement is made: “The contracting authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.”. (European Commission (a), 2011, pp. 58-59) During the research no provisions have been found that would allow the procuring agency to stop the procedure if satisfactory solutions cannot be found other than to decide to not award the contract at all. This could lead to difficult situations if the definition of “meeting its needs” is not clear.

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62 In Dutch known as an “Eigen verklaring”
5.2.2  What extra options open up?

Explanation of bid:
The new Dutch procurement law allows a procuring agency to ask a bidding party to clarify or explain their bid more completely. This may not lead to a negotiation of the bid, nor to any changes in the bid but may lead to a better understanding of the fit with the award criteria. This is especially the case when dealing with hard to quantify EMVI criteria. (Dutch Government (e), 2012, Art.2.111. Cl.8 & 9)

Demand for membership:
Previously it was not possible to demand membership of a trade register or equivalent for non-Dutch bidders. (Dutch Government (g), 2012, p. 77) This change will allow easier benchmarking of bidders for cross-border projects and enable a better measurable competence of foreign bidders.

Special demands:
A procuring agency may specify special demands on the execution of the projects, if these demands are not in contrast to the treaty on the workings of the European Union and mentioned in the published procurement documentation. These special demands may entail environmental or social demands, such as the Dutch national policy of having 5% of employees come from disability or low-chance inhabitants. (Dutch Government (e), 2012, Art.2.80)

Variants:
In contrast to the current ARW 2005 and the ARW 2012 it is now possible to allow bidders to come with variants on the solution requested. (Dutch Government (e), 2012, Art2.83) These variant solutions must still comply with the demands as specified in the award criteria. This system will allow more innovation from the market to be presented in the dialogue without bidders having to “put all their eggs in one basket”.

5.2.3  Experience versus difficulty

The basis for using the competitive dialogue procedure is that it is implemented for particularly complex projects. The complexity may stem from the technical, financial or contractual aspects of the project. However, given the fact that several years of experience have given multiple examples of projects that can now be used to mirror new projects on, we can question the fact if all projects where the procedure is implemented are indeed still ‘particularly complex’. If the project is deemed complex in a technical sense, the procuring agency could search for more reference projects to find proven technology and so bypass this difficulty.

When dealing with projects over a certain financial threshold, for RWS this is set at €60 million, the complexity stems from the scope of the project. In this case experience may simplify the procedure, but will not totally negate a need for the dialogue.

Complexity in this case is used as legal terminology and is not based in quantifiable models. Nor is each project above the financial threshold of €60 million weighed on its complexity in contrast to other project. Rijkswaterstaat has had the government lawyer draw up an explanation on why DBFM contracts always fall under this ‘particularly complex’ terminology.
5.2.4 The use of the competitive dialogue in conjunction to DBFM

As was explained, the Competitive Dialogue is used for procuring DBFM contracts and its awarding is based on the use of EMVI criteria. These three elements all work in conjunction with each other to achieve the optimal solution for the project.

If for example the specifications for the DBFM contract appear unclear, the Competitive Dialogue can be used to explain and clarify those specifications. RWS has the option to then set the specifications at a higher abstract level, any other form of change would be in violation of procurement principles, to allow for a broader set of solutions. (Rijkswaterstaat (d), pg.14) This also works the other way around: if the dialogue phase seems to lead to no added benefit then the specifications of the DBFM contract will be a hold-on point for the market parties to base their solutions on.

The EMVI criteria play a similar role in the process, as the awarding of the contract is based solely on the score that the bidder’s solutions obtain on these EMVI criteria. It is this tripod setup that makes the Competitive Dialogue procedure such a stable method for procuring complex projects. Within any of the three pillars an answer to a question may be found which then in turn will strengthen the project as a whole. If both the DBFM specifications and the EMVI criteria are totally clear and obtainable then the dialogue will play a very minor role. If either one of those is unclear the dialogue, with support from the other pillar, will be able to clarify and push the project on.

It is therefore necessary that bidders are allowed to question the specifications and criteria during the dialogue. It is also necessary for the procuring agency to have a flexible outlook on the final product. Without this flexibility, we run the risk of obtaining sub-optimal solutions due to overconfidence by the procuring agency in their ability to clarify the DBFM specifications and EMVI criteria.
5.3 Answer to the research questions, branch III

In this chapter we have established the answers to the research questions from branch III of the issue tree.

i. How is the competitive dialogue implemented by Rijkswaterstaat?
RWS has a clear procedure that they follow when implementing the competitive dialogue. This procedure is aimed at cost-effectiveness and maximizing the amount of competition between bidders. By focusing on acquiring clear award criteria RWS strives to minimize legislative repercussions.

ii. What legislative freedom arises from the new directive?
Under the new directive RWS will have several options to expand or improve their policy with. Especially the use of variants on the bids could lead to more innovation in the procurement process. In addition, by allowing the placement of special demands the European Commission has enabled procuring agencies to implement social and/or environmental policy into its procuring strategy.

III. How is the competitive dialogue implemented?
In the case of RWS, the competitive dialogue procedure is implemented on the basis of the accumulated experience, as described in “De concurrentiegerichte dialoog” (Rijkswaterstaat (d), 2009) This policy is founded on the focus for cost-effectiveness and the wish of RWS to have a close relationship with the Dutch construction industry. RWS is already implementing large parts of the upcoming legislation considering proportionality in its current policy. However, by expending the amount of parties invited to the dialogue to 5 in comparison to the required 3 RWS is adding unnecessary costs. They implementation of variants to the bid could offset this if implemented into legislation.
6 Prognosis
In this chapter several scenarios are described through which the economic viability of the competitive dialogue procedure will be measured. The five scenarios are described first, and then each scenario is weighed on the critical success factors as described for RWS in chapter 5.1.

6.1 Viable scenarios
Scenarios expose the numerous possibilities of the future. They are hypotheses, not predictions. Scenarios are the stories about how the future might unfold. (Global Business Network, 2004, pp. 7-9) 

64 Herman Kahn refers to the scenario’s hypothetical character, defining this as: “A Hypothetical sequence of events constructed for the purpose of focusing attention on causal processes and decision points”. (Kahn & Wiener, 1967) Each of the following scenarios entails a policy adjustment for RWS based on the findings from chapters 4.2 & 5.2.

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Policy adjustment</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>In this scenario no policy adjustments are made. The project is run as was done in the real life situation. (0 hypothesis)</td>
</tr>
<tr>
<td>B</td>
<td>As explained in chapter 0, RWS usually invites 5 parties to the dialogue. In this scenario we diminish the amount of tenders in the dialogue to 3. (no gold-plating)</td>
</tr>
<tr>
<td>C</td>
<td>This scenario looks at the effect of taking the finances out of the award criteria. This is done by only using non-financial EMVI criteria and setting a max budget.</td>
</tr>
<tr>
<td>D</td>
<td>As the awarding of a design restitution is not mandatory we shall look at the effect of removing this restitution in this scenario.</td>
</tr>
<tr>
<td>E</td>
<td>In accordance with paragraph 0, RWS could in future possibly allow variant design and solutions from bidders. In this scenario we will sketch what sort of effect RWS could expect.</td>
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</tbody>
</table>

Scenario A is chosen to contrast the other scenarios to reality. This gives us the option to later analyze if the cost of a policy adjustment is worth the benefit in contrast to the current policy. 

As explained in chapter 4.1, Gold-Plating may lead to an increased complexity of the procurement process. In addition, in chapter 5 we discovered that RWS has implemented a form of Gold-Plating by always striving to invite 5 parties to the dialogue. By negating this effect we can analyze what effect a minimization of Gold-Plating may have on overall project success. 

If a procuring agency has a fixed budget and is striving to maximize public value gain, they may opt to not include the financial bid into the EMVI criteria. Scenario C takes this option into account and allows us to analyze the effect on the overall cost-effectiveness of the project.

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The giving of a design restitution to bidders is not a mandatory practice and as such can be construed as being another form of Gold-Plating, although in this capacity with a mindset to alleviate a burden. As implementation of a design restitution increases project cost it is important to see what effect this has on overall project success. As such, scenario D deals with the current situation minus the design restitution.

In the final scenario, scenario E, we look at the options of allowing variant designs and solutions of the bidders in a Competitive Dialogue procedure. By analyzing the effects this may have on the overall project success the RWS policy may be adjusted and/or implementing political pressure for further legislative change may become necessary.

6.2 Criteria matrix per scenario

In this paragraph we will discuss the balance of the above described scenarios as viable solutions between the project scale, the price of the project and the time frame in which the project was completed. Each of these three project parameters will be set against the six chosen critical success factors. In each scenario the impact of the parameter versus the CSF (row to column) is given as either:

+ (increasing in effect)
0 (is uncorrelated to each other or linear related)
– (decreasing in effect)

For example:
The current method of calculating the transaction costs is based on a percentage of the total price of a project. Therefore if the price of a project grows the transaction costs grow with it proportionally and are thus linearly related. In the matrix this relation is represented by a 0.

However, if the transaction costs are not based on a percentage of the price, the effect would be that an increase in price is represented by a proportional decrease in effect of the transaction costs on the total project. This would be represented by a –.

In these matrixes scale is defined as the amount of work the project entails. Price is the total cost, from the beginning of conceptualization through to completion of the project. Time is the minimum amount of weeks/months/years necessary to complete the project (also known as the critical path).
To further explain this principle graph 6.1 shows us how two variables may relate to one another. An in/decrease in one equals a similar in/decrease in the other, this effect is known as a linear relationship, or there is an in/decreasing return to scale. This last effect can either be increasing in effect, where +α on the X-axis equals +α on the Y-axis, or a decreasing effect, where +α on the X-axis equals -α on the Y-axis.

6.1 Explanatory graph

Each of the scenarios is scored on how the critical success markers, explained in chapter 2.1, are influenced by different project Scale, Price or Time. With this information in hand we can start to analyze how each of the case studies relates to the scenarios depending on the Scale, Price or Time of the case. This last step will be performed in chapter 7.

6.2.1 Scenario A

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Build speed</th>
<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
<th>Efficiency</th>
<th>Cooperation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scale</td>
<td>0</td>
<td>+</td>
<td>+</td>
<td>0</td>
<td>-</td>
<td>0</td>
</tr>
<tr>
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<td>0</td>
<td>+</td>
</tr>
</tbody>
</table>

Under the current policy, increases in scale or price are generally inefficient. Having more time allotted for the project will increase the cooperation between the market and the procuring agency because a proportionally smaller amount is spent on getting to know one another. Increasing the budget available will enable the build speed to increase due to more resources being allocated to production. More time being spent on the project has a decreasing effect on innovation due to the effect of knowledge creep.\(^{65}\)

---

\(^{65}\) Knowledge creep is the effect where the global amount of knowledge is slowly expending over time, thus making new ideas no longer innovative when implemented if more time is spend on development. (Weiss, C. H., Knowledge Creep and Decision Accretion, *Knowledge: Creation, Diffusion, Utilization*, 1980, Vol 1.(3), pp 381-404)
6.2.2 Scenario B

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Build speed</th>
<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
<th>Efficiency</th>
<th>Cooperation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scale</td>
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<td>0</td>
<td>+</td>
<td>0</td>
<td>-</td>
<td>0</td>
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<td>0</td>
<td>+</td>
<td>0</td>
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<td>+</td>
</tr>
</tbody>
</table>

In contrast to scenario A, in this scenario the transaction costs are less proportionate to scale due to there being less transaction costs overall. This is also represented in the effect the total price has on the transaction costs. And finally due to having fewer parties at the dialogue table RWS will be more easily able to assess the innovation of the ideas and suppress some of the effects of knowledge creep.

6.2.3 Scenario C

<table>
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<tr>
<th>Criteria</th>
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<tbody>
<tr>
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</tr>
</tbody>
</table>

When we remove the direct correlation between the quality of a bid and the amount of financial compensation, the transaction costs become insensitive to changes in price. In addition, nuisance can be minimized by awarding those bidders that focus on this CSF while the price remains the same. At the same time nuisance becomes unrelated to the time spent on the project. More efficient bids will have a higher chance of awarding of this type of contract and so this CSF also becomes unrelated to price. A higher price will stimulate the market to cooperate more with the procuring agency in order to clarify the harder to quantify EMVI criteria.

6.2.4 Scenario D

<table>
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<th>Criteria</th>
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<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
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</tr>
</tbody>
</table>

When taking away the design restitution we can expect the effect of the price to decrease in relation to the transaction costs as the transaction costs are now solely based on the workload and no percentage of the price is paid out. However, the market will be less inclined to come with innovative ideas if the scale of the project increases, as this also entails an inherent risk which puts pressure on the efficiency of the project.
6.2.5 Scenario E

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Build speed</th>
<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
<th>Efficiency</th>
<th>Cooperation</th>
</tr>
</thead>
<tbody>
<tr>
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<td>+</td>
<td>+</td>
<td>+</td>
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<td>0</td>
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<tr>
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<tr>
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<td>+</td>
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<td>0</td>
<td>0</td>
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</tr>
</tbody>
</table>

In this final scenario RWS would have allowed the bidder to come with variant bids in the dialogue. The effect, in contrast to the current policy, would be that more innovation through multiple variants is available if the scale of the project increases. In addition the same effect as in scenario C for the relation between price and cooperation is valid, but in this case the clarification is done through the use of variants. However, each of the variants will have to be planned for the entire project life cycle and as such the transaction costs will proportionally increase in effect due to time.

6.3 Analysis of the scenarios

Each of the scenarios has their advantages and disadvantages. When we put all scenarios next to each other we can create the following matrix:

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Build speed</th>
<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
<th>Efficiency</th>
<th>Cooperation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scenario</td>
<td>A B C D E</td>
<td>A B C D E</td>
<td>A B C D E</td>
<td>A B C D E</td>
<td>A B C D E</td>
<td>A B C D E</td>
</tr>
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<td>0 0 0 0 0</td>
</tr>
<tr>
<td>Price</td>
<td>- - - - -</td>
<td>0 - 0 - 0</td>
<td>0 + - 0 0</td>
<td>+ + + + +</td>
<td>- - 0 - -</td>
<td>0 0 + 0 +</td>
</tr>
<tr>
<td>Time</td>
<td>0 0 0 0 0</td>
<td>0 0 0 + +</td>
<td>+ + 0 + +</td>
<td>- 0 0 -</td>
<td>0 0 0 0 0</td>
<td>+ + + + +</td>
</tr>
</tbody>
</table>

As we can see, the build speed of a project is not affected by any of the scenarios. Neither are the balances between scale and nuisance, price and innovation or the balance between time and efficiency affected. The original argument of the relation between the effects of time on cooperation from scenario A seems to hold steady as well.

When we combine the effects of scenario B and E we see that the overall transaction costs will be lowered. We could increase this effect by also adding in scenario D, but these costs will have to be paid for in a decrease in innovation and will impede the development of the construction sector.

Scenario C seems to be a more efficient method of implementation of the competitive dialogue than scenario A. Both seem similar on most of the CSFs except for efficiency and nuisance, yet the overall financial costs of scenario C will probably be higher because competition on price is taken out of the equation.
7 Economic viability
Having established the scenarios in the previous chapter, this chapter will look into how each of these scenarios would have influenced one of the cases as described in chapter 2.

7.1 Economic viability
An important step in this process is to clarify which definition of “economic viability” is used.

According to ‘Meredith and Mantel’ the definition for an economically viable project is: “(the project is) Able to sustain operation on the basis of current and projected revenues equal to or in excess of current and planned expenditures. In other words, an activity that can support itself financially. It can be applied to any economic unit, from a single project to a business to a country.” (Meredith & Mantel, 2008, p. 48)

In the case of the competitive dialogue procedure this would lead to the following definition: Implementation of the competitive dialogue procedure is economically viable if the cost of implementation is equal to, or less than the added benefits to the project. To find out if this happens in a case we must perform a Cost-Benefit analysis (CBA). (Brealey, et al., 2010, pp. 220-232) This process is often applied to find the financial optimum of an investment, or to enable a decision on whether a project will provide a return on the investment (profit) or not (loss). The same principle can be applied to the application of the Competitive Dialogue procedure to see if the costs of choosing this procedure are recouped in the benefits for the project.

However, as we are not dealing with only a financial situation, we must also take into account non-financial costs and benefits. The sum of the costs can be weighed in a multiple criteria analysis (MCA) and balanced against the benefits based on the critical success factors for the project. Through this method the CBA becomes a societal Cost-Benefit analysis (in Dutch known as a “Maatschappelijke kosten-baten analyse MKBA).

7.2 Scenario impact analysis
The following paragraphs contain the MCA’s of the case studies in accordance with the scenarios from chapter 6. The information stems from the research performed on each case, as was explained in chapter 2. By assessing how a case relates to project Scale, Price and Time we can use the finding of chapter 6 in congruence to the case studies themselves to score how a scenario would have influenced the overall project outcome. Remembering that scenario A is the approximation of how the case was run originally we can then contrast the other scenarios to scenario A.

In these analyses the build speed is based on the actual time from start of the project to completion. The transaction costs are based on percentage of project scale (Feitz, 2012). The nuisance is measured in delay and social objection. Innovation is given in the form of (potential) spin –off projects. Efficiency is measured in the balance between use of resources versus the project scope. And lastly, the cooperation between the procuring agency and its partners is given.

66 (Brealey, Myers, Allen, Principles of Corporate Finance, 2010)
67 Paul Feitz is a Rijkswaterstaat financial assessment manager (Costs group). (Feitz, P., RWS financial assessment manager, e-mail 17-10-2012)
Each of the scenarios will be measured on the impact to these critical success factors. Whether they would lead to a project:

- failure --
- below expectation -
- expected results 0
- above expectations +
- innovative results ++

In chapter 6 scenario A was explained as being the scenario where the current policy is implemented. In these case studies this leads to scenario A being the representation of the actual project. So scenarios B-E are given in contrast to scenario A and will sketch how the policy adjustments would have impacted the CSFs of that project.

The effects of each scenario on the case’s CSFs are based on the findings from chapter 6.3 and the author’s interpretation of the available materials in the case studies as was explained in chapter 2.1.

### 7.2.1 Case Haringvliet- and Volkeraksluizen

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Build speed</th>
<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
<th>Efficiency</th>
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<tbody>
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<td>A</td>
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<td>0</td>
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<td>+</td>
</tr>
</tbody>
</table>

Contrasting to scenario A: Too much innovative ideas led to problematic efficiency. (Rijkswaterstaat (a), 2008, p. 10) By implementing a combination of scenarios B and E this project would have had a smaller amount of bidders, while each bidder could have given more innovative ideas. By implementing scenario C, the case of Haringvliet- and Volkeraksluizen would have been run more efficiently and better cooperation would have been achieved. However, implementing scenario C would have a direct effect on the nuisance. A high nuisance was deemed unacceptable for this case. (Rijkswaterstaat (a), 2008, p. 27)
### 7.2.2 Case KOSMOS projects

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Build speed</th>
<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
<th>Efficiency</th>
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<tbody>
<tr>
<td>A</td>
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</tbody>
</table>

**Contrasting to scenario A:** In the case study Nuisance was generally kept to a minimum due to financial incentives. (Hoezen, M. (a), 2012, p. 86) If in this case no financial criteria had been placed in the award criteria (scenario C), then an increase in nuisance would be traded for an increase in overall efficiency and cooperation in the procurement process. By minimizing the amount of parties involved (scenario B) the overall efficiency and cooperation of the procurement process could have been increased.

### 7.2.3 Case Maasvlakte – Vaanplein

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Build speed</th>
<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
<th>Efficiency</th>
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<tbody>
<tr>
<td>A</td>
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</tr>
</tbody>
</table>

**Contrasting to scenario A:** The case of Maasvlakte – Vaanplein is considered to have proceeded as was planned. However, the cooperation between the market parties and RWS leaves something to be improved upon. All of the scenarios would have been an improvement on the cooperation, yet each would have had its drawbacks as well. The best option for improvement would be implementing variant designs (Scenario E).
### 7.2.4 Case Utrecht Lunetten – Veenendaal

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Build speed</th>
<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
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</tr>
</tbody>
</table>

**Contrasting to scenario A:** The case of Utrecht Lunetten – Veenendaal was procured parallel to the case of Maasvlakte – Vaanplein. They are therefore similar in how each of the scenarios would influence its overall viability. However, in the Utrecht Lunetten case, the build speed was above expected. This also led to a lowering of the nuisance to the surrounding inhabited areas. Although this project could be improved without direct drawback by implementing variant solutions, this would however make it harder to reach the increased build speed.

### 7.2.5 Case Coentunnel 2

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Build speed</th>
<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
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</tbody>
</table>

**Contrasting to scenario A:** The Coentunnel 2 project has had quite a few setbacks when considering the efficiency of the procedure. This has directly influenced the expected build speed. In addition, as was explained in chapter 2.2.5 the transaction costs, as reported by the market parties, have been around 200% of those as calculated by RWS. Once again we see that an implementation of scenario E would have an overall improvement on each of the CSFs. However, the already stressed transaction costs would increase even further. This increase in transaction cost could usually be offset by also implementing scenario B, but in the case of the Coentunnel 2 project this is no longer an option as only 3 bidding parties took part in the procedure.
7.2.6 Case A1/A6 Diemen- Almere Havendreef SAA

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Build speed</th>
<th>Transaction costs</th>
<th>Nuisance</th>
<th>Innovation</th>
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</table>

Contrasting to scenario A: Implementing the policy from scenario B would have an increasing effect on the positive CSFs that this case already encompasses. The case of A1/A6 Diemen- Almere Havendreef SAA uses several non-financial goals to measure project success. In this case this is reflected in the nuisance score and in the innovation score. These project goals could have been further stimulated by implementing scenario C.

7.3 Analysis

When cross-examining the MCA’s, as were set out in paragraph 7.2, we can see the following issues come up:

- The extra transaction costs incurred by implementing scenario C will be recouped by those projects where a suppression of nuisance is ranked higher than the financial burden. As is seen in the case of A1/A6 Diemen- Almere Havendreef SAA.

- Implementing variants is only considered viable for projects which are not so great in scope that they only attract a very limited amount of market parties as was the case in the Coentunnel 2 project. In addition the added time necessary for evaluating the variants is very costly if no measures are taken to limit the amount of parties involved in the process.

- None of the cases would have benefitted from removing the design restitution. It is therefore unadvisable to implement scenario D. Only for those cases where the budget of the project is deemed as a stronger constraint than the overall created value may this scenario be of use.

- When cross-examining the findings for scenario A between the cases, we see that overall the procedure has led to an ‘as expected’ performance. However, in nearly all cases the cooperation between the market parties and RWS has been below expectation. This could either be from setting too high a demand for cooperation or this may stem from the fact that the procedure is still a business transaction with both sides holding their own agenda.
• Cooperation can be stimulated above the current norm by reducing the number of parties partaking in the dialogue procedure. As seen in the KOSMOS projects, this is more beneficial if a standardized process is used.

• Limiting the amount of gold-plating by RWS, as was proposed in scenario B, seems to have very little direct drawbacks and does limit the transaction costs.

If the competitive dialogue procedure can be deemed economically viable under the new legislation is therefore mostly dependent on the implementation freedom that RWS receives. In addition, to be able to implement scenario E several legislative changes to the ARW2005/ARW2012 will have to be made in the future. By putting a heavier focus on non-financial award criteria the procedure itself becomes more economically viable. This however can lead to an overall higher project financial cost.

### 7.4 Answer to the research questions, branch IV

In this chapter we have established the answers to the research questions from branch IV of the issue tree.

i. **What is the definition of economically viable?**
   The implementation of the competitive dialogue is considered economically viable when the costs of implementation (the transaction costs) are compensated for in an equal or greater increase in the success rate of the critical success factors. Thus making the determination of economic viability dependent on a societal cost-benefit analysis (MKBA in Dutch).

ii. **When is an implementation of the competitive dialogue economically viable?**
    In the case of the Coentunnel 2 project we can see that the implementation of the competitive dialogue procedure was not fully viable. The project scope was directly influencing the innovation and cooperation stemming from the procedure. However, in the other cases studied it becomes clear that under the new legislation there are options, as discussed in chapter 7.3, for the current scope of projects to increase value through the procedure and thus making it economically viable.

IV. **What is considered economically viable with regards to the competitive dialogue?**
   The definition of an economically viable implementation is being able to recoup the costs of that implementation through an increase in value. This can either be a higher value on non-financial EMVI criteria or through a lower overall cost of the project. In the case of A1/A6 Diemen- Almere Havendreef SAA we see that the implementation of the policy adjustment from scenario B would have led to an overall increase in value. However, in the Coentunnel 2 project any viable policy adjustments where negated due to the project scope. The economic viability of the competitive dialogue procedure under the upcoming legislation is therefore dependent on the scope of the project not eclipsing the available solutions and that a clear choice is made between overall value gains or for financial impact.
8 Conclusion
In this chapter you will find the conclusion in answer to the research question posed in chapter 1.3. The answer is based on the outcome of the research from chapters 3 – 7.

The main research question posed was:
To what extent is the competitive dialogue implementable in an economically viable manner?

This was then subdivided in an issue tree to four sub-sections.

I. What is the Competitive Dialogue?
The competitive dialogue is a procurement procedure used to obtain the most economically-effective contract available for ‘particularly complex’ projects. The procedure entails a dialogue, which may be phased, with the aim of developing one or more suitable alternatives capable of meeting the project’s requirements. Especially interesting is the complementary system within procurement law, which entails both European as well as national law. Because of this, the possibility of gold-plating presents itself. Of influence is the green paper, which has resulted in a clear picture of the needs and wants of the market parties. Most notably, parties would like a reduction of administrative burdens and more negotiation between the procuring agency and the market. And to this end a proposal for a new Directive was drafted. In addition the Dutch government is striving to implement a new procurement law which is still based on the ‘Classic Directive’, Directive 2004/18/EC.

II. What are the changes to the legislative framework?
The legislative framework that deals with the competitive dialogue procedure is dependent on the position in time when being referenced. Once the proposal for a new Directive is implemented it will be the leading factor dealing with the applicability of the competitive dialogue procedure for construction projects exceeding the financial threshold of €5 million. Those issues in the new Dutch procurement law that contradict the proposal by the European Commission will at that point need to be changed into compliance. More room for design improvement has been given in the new Directive, although the risk adversity of procuring agencies and the market can still be covered by the competitive dialogue procedure.
III. How is the competitive dialogue implemented?
In the case of RWS, the competitive dialogue procedure is implemented on the basis of the accumulated experience, as described in “De concurrentiegerichte dialoog”. (Rijkswaterstaat (d), 2009) This policy is founded on the focus for cost-effectiveness and the wish of RWS to have a close relationship with the Dutch construction industry. RWS is already implementing large parts of the upcoming legislation considering proportionality in its current policy. However, by expending the amount of parties invited to the dialogue to 5 in comparison to the required 3 RWS is adding unnecessary costs. They implementation of variants to the bid could offset this if implemented into legislation.

IV. What is considered economically viable with regards to the competitive dialogue?
The definition of an economically viable implementation is being able to recoup the costs of that implementation through an increase in value. This can either be a higher value on non-financial EMVI criteria or through a lower overall cost of the project. In the case of A1/A6 Diemen- Almere Havendreef SAA we see that the implementation of the policy adjustment from scenario B would have led to an overall increase in value. However, in the Coentunnel 2 project any viable policy adjustments where negated due to the project scope. The economic viability of the competitive dialogue procedure under the upcoming legislation is therefore dependent on the scope of the project not eclipsing the available solutions and that a clear choice is made between overall value gains or for financial impact.

Considering these findings we can conclude that the extent to which the competitive dialogue is implementable in an economically viable manner is dependent on the following factors:

- **Transaction costs.**
  - The transaction costs are of great importance when determining the viability of the procedure, as they directly reflect the costs of its implementation.

- **EMVI criteria.**
  - Through the use of the EMVI criteria the costs of the implementation can be recuperated.
  - A higher focus on non-financial criteria may lead to an overall higher value of the project but will generally incur a higher project cost.

- **The Policy by RWS.**
  - The current policy for the competitive dialogue procedure as implemented by RWS is economically viable because the overall project performance is deemed ‘as expected’. However, due to the gold-plating effect of requesting 5 parties partake in the early phases of the dialogue RWS is incurring higher costs than strictly necessary.

- **Cooperation.**
  - Nearly all of the cases studied for this research say that the cooperation between the market parties involved in the competitive dialogue procedure and RWS is sub-standard.
  - In the cases of the A15 Maaslakute- Vaanplein and A12 Utrecht Lunetten – Veenendaal the market parties clearly state that they see RWS as a professional procuring agency yet would appreciate a better understanding of their internal workings and a better fit with the planning of the procedures.
So to what extent is the competitive dialogue implementable in an economically viable manner?

The competitive dialogue procedure is economically viable under the current form of implementation by RWS because it leads to the expected value on a project’s CSFs. This was clarified in the MCAs of chapter 7.

When the new Dutch procurement law comes into effect the current form of implementation of the competitive dialogue procedure remains economically viable because very little policy adjustments are necessary. However, in both the current and upcoming legislation there is room for improving the cost-effectiveness of the procedure by limiting the gold-plating effect through the policy adjustment as were described in scenarios B & E. The recommendations for improvement are discussed in chapter 9.

So the extent to which the competitive dialogue procedure is implementable in an economically viable manner depends on internal choices in the procedure, the setting of the EMVI criteria and limiting the transaction costs, which stem from the policy of the procuring agency (in this case RWS) and may be influenced by how well the stakeholders are able to cooperate.

As such we have a procedure that on the one hand is economically viable if implemented in a cost reducing manner. But on the other hand it is also a procedure with an ingrained risk of hard to specify cost recuperation. There is thus great potential for the Competitive Dialogue procedure in the future of procuring construction projects, but we must be wary of placing to large an emphasis on bureaucratic clarification and remember that at its foundation the Competitive Dialogue is meant as a solution optimization tool.
9 Recommendations

The basis for this research document is not purely academic as RWS also wishes to know what issues could be improved in their implementation of the competitive dialogue procedure to make it more cost effective. As such the following recommendations are made to RWS. These recommendations are derived from the conclusion drawn in chapter 8.

It is advisable that Rijkswaterstaat strives to:

- Limit gold-plating.
  RWS has implemented the policy of inviting 5 parties to the initial phases of the dialogue. This is more than the 3 required by the new Dutch procurement law or the European procurement Directive. No research was found that proves that inviting the 5 parties provides better contracts than the 3. The European Commission has deemed that 3 parties provide sufficient competition in the procurement process. It is therefore advisable to re-evaluate this policy.

- Push for implementation of variants in the dialogue.
  As has been clarified in chapter 7 the implementation of variants into the dialogue procedure could be beneficial to the innovation CSF. It is therefore advisable that RWS pushes for a change in the ARW2005/ARW2012 that enables the use of variants for the competitive dialogue procedure as proposed in the proposal for a new Directive. (European Commission (a), 2011)

- Assess for each project if value creation is more important than lower financial cost.
  When the value creation is deemed to be of higher importance than the financial cost of the project, it is prudent to implement a maximum budget and take the financial impact of a bid out of the award criteria. In this way the market parties interested in the contract are stimulated to focus on increasing the value of their bid through a reduction of nuisance and/or increasing efficiency.

- For projects where only a limited number of market parties are capable of fulfilling the contract the planning of the procedure needs to be tuned to those market parties. As RWS is seen as a professional procurement agency by the market parties it has worked with, RWS’s overall competence with the competitive dialogue procedure seems to be adequate. However, when procuring projects that can only be fulfilled by a limited number of market parties, it is important to take their scheduling into account to optimize the cooperation.

All the recommendations mentioned can be viewed in a broader perspective, specifically with regards to other procurement procedures. In particular the recommendation regarding the limiting of gold-plating is also interesting outside of the scope of the Competitive Dialogue, as the same or similar effects will most likely be seen for other procedures.

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68 This could happen if no types of nuisance, such as traffic delays, are allowed in the project.
The same applies to the recommendation for the assessment of value creation versus financial cost. This issue is of the highest importance for every procurement procedure in existence. 69

69 This is an issue that is in my opinion at the core of the (problems of the) procurement industry and will be discussed in depth in my author’s note in chapter 13.
10 Discussion and evaluation

In addition to the research performed for this report several other interesting points have been raised over the course of preparing this documentation.

10.1 Points of interest for further study:

- To better assess the economic impact of a procurement strategy each individual project that is procured through the use of a procurement procedure should perform an economic impact assessment after the project is completed. Each of these assessments will however require the full cooperation of the project team and bidding parties. This was not the case in this research, as some parties were reluctant to voice their opinion in fear of being marked in disfavor for a next procedure.

- An evaluation of the RWS policy of using DBFM contracts for all projects over €60 million would enable a re-calibration of that threshold. Currently all these projects are deemed particularly complex, but as has been stated in chapter 5.2.3 this need no longer be the case based on the gained experience.

- Being similar in its type of work to this economic viability study, a risk assessment for the upcoming procurement legislation would give those stakeholders affected by the changes a better means of understanding and implementation.

- The competitive dialogue procedure is not the only procedure affected by the difference between the new Dutch procurement law and the proposal for a new procurement Directive by the European Commission. As such it would be interesting to place this research next to the economic viability assessments of these other procurement procedures.

10.2 Evaluation of methodology

In addition to finding new research options, the chosen methodology of this report needs to be evaluated.

- Originally a set of interviews were planned in addition to the case studies. These were taken out of the research when it became clear that they would add unnecessary burden without a clear benefit to the research. In addition enough study material was available on the chosen cases. Some of the material that would have been found through the interviews would be deemed confidential to the projects and could not have been directly used for the research.

- It was very challenging to find a correct balance between the economic and legal side of the research. It was especially difficult to correctly analyze the different forms of legislation as the author had no previous experience with performing a legal analysis. To counteract this difficulty, this research could have been done in cooperation with a law student. The scope of the assignment would have been great enough for a cooperative project.

- By using a multi-criteria analysis on the basis of scenarios the research took a step away from the current situation. This made it very difficult to correctly assess the effects of the policy adjustments on the current situation. To negate this effect it would be advisable for future
studies to do an economic viability assessment on a project to project basis instead of across several projects, as this tends to keep the reality of the situation closer to the findings of the research.

10.3 Authors view on the Competitive Dialogue

After extensively studying both sides of the legislative – economic balance it is my personal opinion that the Competitive Dialogue procedure is capable of meeting the demands it was designed for.

However, the amount of bureaucratic nitpicking that is needed to clarify many of the important issues for a unbiased awarding of contract seem redundant if we were to operate not out of personal gain, in this case market party profit or procuring agency budget, but out of communal value. Scenario C, as was explained in chapter 6, strives to come close to this form of thinking by valuating non-financial criteria instead of the financial bid. However, this also requires extensive quantification to be able to award the contract in an unbiased way and thus again costs us all a lot of time, money and effort. The idea that cherry-picking needs to be avoided is in direct contrast to communal value creation, yet understandable from a micro-economic point of view.

Until we either standardize the quantification of non-financial criteria or we remove the profit incentive the Competitive Dialogue procedure will incorporate an amount of wasteful bureaucracy. However, I do not see a better option for protecting both market interest and creating valuable construction projects then through the use of the Competitive Dialogue.

Further discussion on the authors view on the Competitive Dialogue can be found in the affixed Author’s Note to this report.
11 Literature.
The following literary sources and research documents have been used in coming to the conclusions drawn in this research. The references are sorted alphabetically by author or authoring organization.

11.1 Bibliography


Rijkswaterstaat (d), 2009. *De concurrentiegerichte dialoog*, Utrecht: Rijkswaterstaat.

Rijkswaterstaat (e), 2012. *Afweegkader Inkoop*, Utrecht: Rijkswaterstaat.


# 12 List of common terms and abbreviations

<table>
<thead>
<tr>
<th>Abbreviations</th>
<th>Meaning</th>
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<tbody>
<tr>
<td>DBFM(O)</td>
<td>Design, Build, Finance, Maintain, (Operate)</td>
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<tr>
<td>RWS</td>
<td>Rijkswaterstaat</td>
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<tr>
<td>CSF</td>
<td>Critical Success Factor</td>
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<tr>
<td>EMVI</td>
<td>Economic Most Valuable Application</td>
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<tr>
<td>PPP</td>
<td>Public Private Partnership</td>
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<td>EC</td>
<td>European Commission</td>
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13 Author’s note

The European Union has put down guidelines on how Member States should conduct the procurement of public contracts. There has been a lot of support for changing these guidelines because the system was deemed to be not very cost effective. The European Committee has agreed to such changes and has written a proposal for a new Directive.

One of the methods described in the Classic and in the new Directive is the Competitive Dialogue Procedure, and this procedure is used by RWS to procure large infrastructure projects (60 million +). My thesis researches what changes to the policy for implementing the CD procedure RWS will have to make and/or should make, on one hand to conform with the new legislation and on the other hand to be as cost effective as possible.

The Competitive Dialogue procedure is used for procuring complex projects because it enables both the procuring agency as well as the interested market parties to distill the best possible solution. In this it is quite effective but, due to its very nature of being a discussion, also very time consuming. The fact that it is very time consuming also means that it is very costly in comparison to other types of procurement procedures.

It is my strongest belief that, although current procedures might be economically sound, a lot of potential is wasted and the only way to remedy this is by an overall mentality change by all involved actors.

The problems of the Competitive Dialogue

The Competitive Dialogue is a very expensive procedure, mostly because it is very time consuming. Time equals personnel costs, because these are opportunity costs, as these project teams cannot at the same time work at multiple projects. By the very nature of the procedure, there is only one winner and several economic operators who lose out.

Secondly, the Competitive Dialogue does not always have a very transparent end result. It is a procedure with an open nature and a goal of solving complex problems/projects for which the end project might not always be decided beforehand. Due to the complexity of the system, it is not yet clear what the final product will be when entering the procedure. For example, if the procuring agency would like to connect city A to city B, and has the option of using a tunnel, bridge or ferry service, but leaves these options open for the market to come up with the best possible solution, the end result might then go in either of these three directions or be something completely different still, as long as it conforms to the EMVI criteria.

A result of this intransparency is that when the EMVI criteria are set, some of these criteria may be very hard to measure. This makes it very difficult to assess whether a project can or cannot be deemed successful. And in the interest of the correct spending of public funds, it is necessary to know the exact and correct spending. The procuring agency has to uphold its public responsibility.

The advantages of the Competitive Dialogue

The great thing about the Competitive Dialogue is that it enables for a negotiation with the procuring agency to assess if the initial question raised by the procuring agency is actually what they need and not what they want. This subtle difference can become a huge issue when determining if a project is economically viable.
It therefore gives a broader perspective on what the problem actually is. The Competitive Dialogue strives to be the optimum between pushing for competition and allowing negotiations between opposite interests.

**Most valuable chance**

RWS (but this is probably the case for most procuring agencies) should thoroughly assess the policy choices they have made on how they go about public procurement that diverge from the minimum requirements as stated in the legislation. These diverging policies can only be seen as gold-plating (the adding of burden to a European Union minimum standard) and thus add costs above the probable minimum cost. Several of the policy choices made, may in fact stimulate a better competition and thereby a higher quality end result, but if this is the case then those policy changes should in my opinion— if they are properly researched— be implemented as the new minimum in the legislation. For example, I found that RWS invites 5 instead of 3 operators to the Competitive Dialogue procedure. This is a form of gold-plating, although RWS states that this also increases competition. As seen in my recommendations, I advise RWS to perform further research on this. The policy makers should not only be learning from the legislation but in addition the legislators should take note from proven policy.

**How should RWS director (Cees Brandsen) continue?**

He should first of all research his own policy and ensure a foundation for the policy choices made. He should make sure that the market is not constantly presented with minor changes to existing procedures, but in cooperation with the market research an optimal policy and implementation, and implement it directly and not step by step. This way there is only one interface moment. Otherwise the market is constantly guessing on the differences between the current, previous and future procedures. For example, the proposal for a new Dutch procurement law took a long time, many parties were guessing to its content and this created a lot of uncertainty and restlessness. In addition, Mr. Brandsen should leverage the experience RWS has with procuring complex projects on a political scale towards changing the mentality in the construction industry on from now on focusing on the quality of the end result instead of on the cost of the total project.

We should think in terms of benefits instead of in costs, in chances instead of in problems. *This might seem like a philosophical viewpoint, and in fact it is. However, currently the emphasis is so much on the administrative side of procedures that the core of the industry might sometimes get lost in the process.*

*For example, if I give you 75 euros and get 80 euros back, that is a good deal for me. If I give you 15 euros and get 20 euros back that is also a good deal. Both are solid investments for me, but in the end, I have 80 Euro value, or 20 euros value. The second project has a higher percentage of value to cost ratio, but your total value is less. You need 4 of those 20 Euro projects to get to the value of the first, but the market might not have four projects, it might only have two. So you lose out on probable value. So instead of focusing on lowest costs, we should focus on highest societal value for the entire community.*

It is therefore advisable for RWS to entice the procurement industry into setting up a common goal for the next five to thirty years. By doing so, he would stimulate the growth of a co-operational market instead of a confrontational market as we see today.
What should the procurement industry do?

In my opinion, the procurement industry really needs a mentality change. By stopping to focus on personal gain and minimizing the effect that either lawyers or economists have on the procedure, we can strive to come to a combined effort in creating the biggest communal value possible.

The current confrontational market is based on the principle that the project owner wants the highest value for the lowest cost and the contractor in comparison wants the lowest value (cost for contractor) for the highest cost, as that will give him the highest profit. As these ideals are in direct opposition of each other, when a consensus (contract) is formed, neither party will have reached their optimum.

A co-operational market paints a different picture. It should be a market wherein the combined effort of value creation is both profitable for the contractor as well as creating the highest value for the project owner. This creates the highest value for society in general. This ‘helicopter view’ of value for the entire society is a factor that I think should be the top priority of the procurement industry, because if the communal value of a project is higher than its communal costs it is a viable project. This is especially the case when considering this balance on a much higher macro-economic scale than just for RWS.

So in my opinion, the procurement industry needs to not put the process ahead of the market capability or the possible result. It should focus on what end result will be gotten, instead of what would be easier in the procedure.

The balancing of fairness with transparency within an effective procedure is the difficulty ingrained in the procurement procedures. This is of course the central issue of public procurement in general. And it is also the ‘problem’ that I see at the heart of this combination of a legal and an economic issue.

Ultimately I believe that we, as a construction industry, should change our way of thinking. We should stop using public procurement funds as is being done right now. It is time consuming, administrative-heavy and not focused on optimizing the end result, but on limiting freedom in the procedure towards a result. Although I understand the need for an open, competitive market, we as a community should focus on providing the highest quality (communal value) in the end product instead of the individual stakeholders’ share of the profit. In this instance, profit may also be seen as lowest cost. The construction industry is one of the largest economic pillars in our civilization. It not only supports but also carries a certain communal responsibility that should be taken more literally than is being done right now.

My personal view leans to the ‘means to an end’, therefore the societal value that will be gained in the end. However, I recognize that with current legislation we are bound in many ways towards ‘keeping things fair and transparent’. It is the mixed directives of the legal and the economic sides of the procuring procedure that pull the project value away from the cost-value optimum.
What should we as a society do?

We need to move away from a system wherein either the project owner says ‘I am the expert, build it my way’ or says to the market ‘you are the expert, tell me how to build this’. In both cases, expertise is unused and thereby value is lost. Instead the project owner should say ‘we have expertise, and we would like to cooperate with your experts’.

In addition, we have made it legally impossible to take certain actions that would economically speaking be very beneficial. It is a bit like trying to fit a square into a circle. Instead of just squeezing harder, we should look at this from a larger viewpoint. The Competitive Dialogue is by principle a competition. In a fully free market, competition would in essence lead to the highest value per cost. This free market is the circle. However, by overthinking what we deem are principles of equality and fairness, we have through legislation made the solution space into a very tight square. We are now trying to force this circle into the square and either lose economic value, or force a solution that is not freely competitive.

If we see the circle as the free market and the square as the legislation governing it the following picture presents itself. Now, if we look at the circle as the biggest solution space, there are areas that are not covered by the legislative framework and thus are economic options that require ‘illegal’ actions. On the other hand, if we make the circle smaller and state that the legislative framework has the largest solution space, there are the corners of the square that thus allow for solutions that do not fit within the free market and so do not benefit from cost effectiveness driven by competition.

The procurement process is a method for translating a technical idea or problem through an economic evaluation into a legal language. The combination of these two steps, as is seen in my thesis report, is both the difficulty as well as the driving factor behind a successful procurement.

So despite the fact that the construction industry is producing a turnover, and our general ideals are in the right frame of mind, we should re-evaluate our priorities. We should stop thinking in terms of ‘lawyers’, ‘economists’ and ‘engineers’ while dividing the pieces. Instead we should gather around the table and set one single joint course. A ship can have but one direction to sail.