# Procurement Procedures under the Private Finance Initiative†

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**Abstract**

The EU regulates public procurement in order to open Member States' markets in public contracts to EU-wide competition. Since the 1970s, it has done this through a series of harmonising directives; these essentially require Member States to implement rules providing for certain public contracts to be awarded in accordance with transparent and non-discriminatory procedures. In 2004 a new procedure was introduced: competitive dialogue. The new procedure is designed specifically with the procurement of complex contracts, such as contracts procured under the UK's Private Finance Initiative, in mind. Prior to 2004, in the UK these contracts had been procured in a way that the European Commission perceived to lack transparency and competitive tension. The introduction of competitive dialogue seeks to remedy these problems. However, some writers have identified areas of legal uncertainty and areas in which the legal rules may potentially conflict with value for money procurement goals. The paper provides an overview of the new legal rules on competitive dialogue and the regulation of complex procurement in the UK.

## 1. Introduction

The competitive dialogue procedure was introduced into UK law in 2006 under the Public Contracts Regulations 2006 and Public Contracts (Scotland) Regulations 2006,[1] which transpose the European Union (EU) Public Sector Directive 2004/18/EC (the "Directive").[2] The new competitive dialogue supplements the existing EU framework of contract

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1 S.I. 2006, No. 5 and S.S.I. 2006, No. 1.

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

award procedures in order to provide a new process specifically designed with modern procurements methods, such as the UK's Private Finance Initiative (PFI), in mind.

The paper will begin with an outline introduction to EU procurement regulation. The paper will then move on, in section III, to set out a general picture of Public Private Partnerships (PPPs) in the UK, with particular focus on the most important type of PPP in practice in the UK, PFI. This section of the paper will also consider the background to competitive dialogue, explaining why its introduction was perceived as necessary. In section IV, we will turn to the legal rules on competitive dialogue. The legal rules essentially attempt to strike a suitable balance between transparency and competition on the one hand, and the commercial necessities of complex PPP procurement (*e.g.* the need for flexibility) on the other. It will be seen that in many key areas the legal rules on competitive dialogue lack certainty, for example in relation to the extent of negotiations that can take place with the preferred bidder (the provisional winner). The UK legislature has left the precise law to be determined by procurement practitioners, as influenced by soft-law (non-binding advice and guidance issued by central government), and ultimately the UK courts and the Court of Justice of the European Union (CJEU). In section V, certain aspects of the legal rules will be evaluated to see whether an adequate balance has been struck, before some brief concluding remarks in section VI of the paper.

## II. The Regulation of Public Procurement in the EU

There are presently 27 member states of the EU. The UK has been a member since 1973. The free movement of goods, capital, services and people between EU member states is a primary policy objective of the EU, and is the reason behind the EU regulation of member states' public procurement.

All public procurements of sufficient cross border interest must adhere to the general rules set forth in the constitutional treaty, the Treaty on the Functioning of the EU (TFEU). For example, Arts.34 and 56 TFEU prohibit discriminatory (and some non-discriminatory) restrictions

on the free movement of goods and services, respectively. In addition, there are judge made principles, which apply to public procurements in the EU. For example, the CJEU has found there to be a principle of transparency (imposing positive obligations on contracting authorities) implicit within the TFEU principle of non-discrimination.[3]

Member states' public procurement markets are of great economic importance: in 2002 public procurement was estimated as accounting for 16% of the EU's GDP (or €1.5 trillion).[4] The existence of discriminatory procurement practices in member states therefore poses a real barrier to market integration, and a successful European single market. For this reason, it was recognised relatively early on in the integration process that public procurement needed specific regulatory attention. Since the 1970s, public procurement has been regulated by a series of harmonising directives.[5]

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[3] Case C-324/98, *Telaustria v. Telekom Autria* [2000] ECR I-10745.

[4] "A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future" (3 February 2004), available at http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf (accessed August 2011).

[5] The following are a list of EU procurement directives that have regulated public procurement in the EU (not including the most recent directive, note 2): Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ 1971 L185/5); Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L210/1); Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L13/1); Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts (OJ 1980 L215/1); Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC (OJ 1988 L127/1); Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L199/1); Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L199/54); Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L209/1); European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC,

Over the years, the procurement directives have grown in their level of detail and become increasingly prescriptive.[6] Currently, there are only two main sets of rules: one for utilities,[7] and one for other public sector authorities.[8] For the purposes of this paper, we are concerned with the latter set of rules.

The public sector rules require that contracts above specified financial thresholds are to be procured in accordance with competitive contract award procedures, which are based upon principles of transparency, equal treatment, non-discrimination and competition. These procedures are known as the open and restricted procedures, the Directive's standard procedures (article 28 of the Directive). The open procedure is a one stage process, corresponding to "tendering" in article 18(1) UNCITRAL Model Law.[9] Here, firms tender for a contract in response to a contract advert. Any interested firm may submit a tender. The restricted procedure is a two stage process, not to be confused with the restricted tendering procedure in article 20 UNCITRAL Model Law. Here, having received responses to the contract advertisement, a procuring authority may select a limited number of qualifying firms to invite to tender for the contract (at least five tenderers, provided this ensures genuine competition (article 44 of the Directive)). In both procedures, technical specifications must be drawn up at the outset of the procedure,

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93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (OJ 1997 L328/1); Commission Directive 2001/78/EC of 13 September 2001 amending Annex IV to Council Directive 93/36/EEC, Annexes IV, V and VI to Council Directive 93/37/EEC, Annexes III and IV to Council Directive 92/50/EEC, as amended by Directive 97/52/EC, and Annexes XII to XV, XVII and XVIII to Council Directive 93/38/EEC, as amended by Directive 98/4/EC (Directive on the use of standard forms in the publication of public contract notices) (Text with EEA relevance) (OJ 2001 L285/1).

[6] See S. Arrowsmith, "The Past and Future Evolution of EC Procurement Law: from Framework to Common Code?" (2006) 35 *Public Contracts Law Journal* 337.

[7] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*Official Journal L 134 , 30/04/2004*).

[8] Public Sector Directive, note 2.

[9] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW *Model Law on Procurement of Goods, Construction and Services*.

specifying with some precision what the authority intends to procure. The final tenders must be compliant with these technical specifications. There is very little room in the open and restricted procedures for negotiation between the procuring authority and bidders, as this is viewed to lack transparency.

The open and restricted procedures are not suitable for all procurements, and so the Directive does provide alternative processes; however, these can only be used in certain situations. The most relevant for the purposes of this paper is the competitive negotiated procedure, which is a relatively unstructured two stage process. Like the restricted procedure, the process is started with a contract advert and the procuring authority may select from qualifying firms, firms to negotiate with; however, other than that, the legal rules say very little (*e.g.* there is no express requirement for a final tender stage to identify a winner).

Prior to 2004, the above mentioned procedures were all that was available to public sector authorities in the EU wishing to procure complex PPPs. The Directive introduced a new procedure, the competitive dialogue procedure (article 29) in order to provide a process tailor made to the needs of complex PPP procurement.

## III. Public Private Partnerships

PPP is a broad concept, for which there is no universal definition. The term means different things to different people. A broad definition is provided by the UK Institute of Public Policy Research's Commission on Public Private Partnerships:

> "PPPs are a risk-sharing relationship based upon an agreed aspiration between the public and private (including voluntary) sectors to bring about a desired public policy outcome."[10]

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[10] Institute for Public Policy Research , "Building better partnerships: the final report of the Commission on Public Private Partnerships" (2001) Commission on Public Private Partnerships, Institute for Public Policy Research (London, England), p.2.

In the UK, PPP is commonly used to refer to three main categories of relationship:

- the contracting-out (outsourcing) of public services;
- projects procured under the Private Finance Initiative; and
- joint venture arrangements (*i.e.* institutionalised PPPs).

In the UK probably the most important forms of PPP in practice are PFI arrangements. The PFI is an alternative to traditional methods of procurement for major capital assets. Essentially, under a PFI arrangement the procuring authority procures, rather than the asset itself, a flow of services over a long contractual duration. A private sector consortium (made up typically of a construction company, a bank and a support services firm) will contract to finance, design, and build the capital asset and will recover its costs and make a profit by providing services (*e.g.* cleaning and maintenance) over the life of the contract (typically 20 years plus). It is reported that, as of June 2010, 920 PFI projects have achieved financial close.[11] The PFI has been used in the UK to procure a diverse range of infrastructure and services, including, but by no means limited to, schools, hospitals, roads, bridges, ICT infrastructure, libraries, courts, prisons, and leisure centres.

The process to be followed for the award of a PFI contract, which are invariably highly complex deals, is critical if public authorities are to obtain value for money. Prior to the introduction of competitive dialogue, many argued that the set of award procedures in place, which had existed relatively unchanged since their introduction in the 1970s, had become dated and did not take account of modern procurement methods, like PFI.[12]

For numerous reasons, the competitive and transparent open and restricted procedures are not suitable for PFI procurement. A key reason are the high bid costs (potentially running into the €millions) and

[11] See www.partnershipsuk.org.uk/ (accessed August 2011).

[12] S. Arrowsmith, "Public Private Partnerships and European Procurement Rules: EU Policies in conflict?" (2000) 37 *Common Market Law Review* 709.

administration costs associated with PFI procurement. The benefits of holding a competitive process are well known, however inviting bids from all (as required under an open procedure) or only five interested firms (as required under a restricted procedure) is not commercially sensible or practicable. In fact, the use of these procedures for an expensive PFI procurement may run the risk of deterring competition. Due to the time and expenses needed to draw up a tender, bidders may be reluctant to invest in their bids and may even drop out of a process if they are still only one of five at the invitation to tender stage.

It is also the case that the open and restricted procedures are most suited to non-complex procurements where an authority is able to specify at the outset precisely what it wants. Tenders must be submitted in line with a technical specification drawn up at the outset of the procedure, and there is very little scope for negotiations between procuring authorities and suppliers. For complex procurement, these rules are too inflexible, and stand in the way of procurers running efficient procurements that achieve value for public money. PFI arrangements are invariably complex, with many variables and uncertainties, and there are very obvious information asymmetries, *i.e.* private sector suppliers have information advantages over the procuring authority (*e.g.* they know what risks the private sector will be willing to accept). In complex PFI deals a procuring authority is unlikely to know how best to meet its needs, and therefore a rigid technical specification can stand in the way of value for money. In these complex procurements authorities need to be able to state their desired overall outcomes in outline, leaving it to private sector bidders to develop innovative and efficient ways of meeting the output requirements. The only way the information imbalances can be redressed is if the procuring authority is permitted to negotiate with private sector firms in competition with each other. By harnessing the skills and expertise of the private sector, a procuring authority can determine the best available way of meeting its needs and maximise value for money.[13]

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[13] S. Arrowsmith, "The problem of discussions with tenderers under the EC Procurement Directives: the current law and the case for reform", (1998) 3 *Public Procurement Law Review* 65.

The competitive negotiated procedure is sufficiently flexible to allow for value for money PFI procurements; however, it can only be used in a limited set of circumstances. Research suggests that, prior to the introduction of competitive dialogue, the negotiated procedure was the standard procedure for UK PFI procurement, even in cases where its use could not be said to be strictly in line with the rules. UK PFI procurement practice, despite being encouraged by UK central government through non-binding guidance,[14] was not in line with the Commission's interpretation of law, resulting in a challenge to the use of the competitive negotiated procedure in the Pimlico schools PFI.[15]

The flexibility of the negotiated procedure meant that authorities could tailor the procurement process to the needs of complex contracts. It is noted that usual practice was for the procedure to be conducted in successive stages in order gradually to reduce the number of bidders involved, and hence reduce costs. For example, typically a small number of qualifying firms would be invited to submit outline solutions, based on these solutions two or three firms would be invited to submit more detailed bids, this would be followed by some negotiation before a best and final offers stage.[16] This method of reducing bidders by stages, which is not possible in an open or restricted procedure, is desirable in complex procurement because, as the process progresses and bidders are deselected, remaining bidders are more able to justify concentrating their resources into developing their proposal and attuning it to the authorities' requirements. In order to keep the bid costs and administration costs low, which can run into the €millions on complex procurements, there was considerable pressure upon authorities to get down to one preferred

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[14] Treasury Taskforce, "Step by Step Guide to the PFI Procurement Process" (Revised November 1999); Treasury Taskforce, "How to Follow EC Procurement Procedure and Advertise in the OJEC" (June 1998).

[15] Commission of the European Communities, Reasoned Opinion addressed to the United Kingdom, pursuant to Article 226 of the EC Treaty, concerning failure to fulfil its obligations under Directive 93/37/EEC, and in particular Article 7(2)(c) thereof, (C(2000) 1972 final) (Pimlico School).

[16] S. Arrowsmith, "An Assessment of the New Legislative Package on Public Procurement", (2004) 41 *CMLR* 1277, p.1286.

bidder as quickly as possible in order to ensure that extraneous bid costs were not imposed on all participants. Although on the face of it commercially sensible, the approach attracted criticism, as substantial contractual negotiations would often take place after a preferred bidder had been appointed when there was little or no competitive tension. This lack of competition could impact negatively on the result of negotiations and also the speed in which they were conducted.

The introduction of competitive dialogue seeks to remedy the problems associated with the overuse of the competitive negotiated procedure for PFI procurement by combining the transparency and structure of the restricted procedure, *e.g.* there is a requirement for a formal tendering stage involving relatively complete final tenders, with some of the flexibility of the competitive negotiated procedure, *e.g.* specific provision is made permitting a procuring authority to engage in dialogue with bidders.

## IV. The Competitive Dialogue Procedure

The competitive dialogue procedure is similar to "two stage tendering" or "requests for proposals" found in articles 46 and 48 of the UNCITRAL Model Law. According to the recital 31 of the Directive, competitive dialogue is "a flexible procedure ... which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate".

The competitive dialogue is not freely available, it is only to be used where there is a "particularly complex contract", and where the procuring authority considers that the open or restricted procedure will not allow for the award of the contract (article 29(1)). The Directive explains that a "complex contract" is where a procuring authority is not objectively able to define the technical means capable of satisfying its needs or objectives, and/or not objectively able to specify the legal and/or financial make-up of a project (article 1(11)(c)). The European Commission in its Explanatory Note on Competitive Dialogue notes that legal/financial complexity occurs "very, very often in the case of Public

Private Partnerships".[17] Thus, the availability of competitive dialogue for PFI contracts is not currently a controversial issue. Following a drive from UK central government,[18] the competitive dialogue procedure has now replaced the competitive negotiated procedure for the vast majority of PFI procurements, with only the very exceptional projects being procured under the competitive negotiated procedure. Indeed, the competitive dialogue has become the standard procedure for many PFI schemes, such as Building Schools for the Future.[19]

The procedure, like all the Directive's competitive procedures, is started when the procuring authority has the Commission publish a contract advert in the Official Journal of the EU. The procuring authority must define its needs and requirements in this document, and/or in the "descriptive document" (article 29(2)). At no point in a competitive dialogue is an authority required to draw up technical specifications, as it would in an open or restricted procedure. Indeed, the technical complexity ground for using competitive dialogue is based on the idea that the contracting authority is not capable of at the outset formulating sufficiently detailed technical specifications. Thus, use of the term "specifications" is avoided in article 29. In a competitive dialogue, authorities are free to set out only their functional or output requirements, with elaboration on how these requirements will be met provided at later stages in the procedure.[20]

The procuring authority may then select from qualifying firms responding to the contract advert a minimum of three firms (provided this ensures genuine competition) to invite to take part in the next stage of the procedure, the dialogue stage (article 44(2)). During the dialogue stage the procuring authority may discuss with bidders all aspects of the

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[17] European Commission, "EXPLANATORY NOTE – COMPETITIVE DIALOGUE – CLASSIC DIRECTIVE" (CC/2005/04_rev 1 of 5.10.2005), para. 2.3.

[18] See Office of Government Commerce, "Competitive Dialogue Procedure: OGC guidance on competitive dialogue procedure in the new Procurement Regulations" (January 2006), para. 2.

[19] www.partnershipsforschools.org.uk/ (accessed August 2011).

[20] See P. Trepte, "Public Procurement in the EU: a Practitioner's Guide" (Oxford: OUP 2007), 7.192.

contract in order to identify and define the means best suited to satisfying their needs (article 29(3)). The Directive expressly stipulates that "[d]uring ... dialogue, ... authorities shall ensure equality of treatment among all [bidders]. In particular, they shall not provide information in a discriminatory manner which may give some [bidders] an advantage over others" (article 29(3)).

The Directive states that the dialogue may be structured so as to take place in successive stages in order to reduce the number of solutions (and by implication participants) to be discussed during the dialogue stage (article 29(4)). Thus, the staged approach to negotiations which took place in the UK under the negotiated procedure can continue (*i.e.* an outline solution stage through to a best and final offers stage).

When the procuring authority can identify the solution or solutions which are capable of meeting its needs, it must formally declare the dialogue stage over and invite those bidders remaining in the process to submit final tenders (article 29(3)). Once dialogue has been declared over, the procuring authority must hold a formal final tendering stage involving tenders containing *all the elements required and necessary* for the performance of the project (article 29(4)). A winner must then be chosen on the basis of most economically advantageous tender (article 29(7)). In this stage following the formal close of dialogue there remains some scope for further "dialogue", but this is significantly curtailed (article 29(6) and (7)).

The requirement for complete final tenders coupled with the limitations on the work that can be undertaken with the preferred bidder only are potentially problematic. It is commonly accepted that it is not practical in complex procurements for all contractual issues to be finalised before the appointment of a preferred bidder. The high costs of pulling together the details of the contract can be off putting for firms that have no certainty of success. Indeed, it is noted that the commercial reality of complex procurements is such that a bidder and its debt funders will only be prepared to commit the substantial resources required to bring a project to commercial and financial close when there is only one bidder

left in the running.[21] The following are issues that, depending on the particular procurement, may need to be finalised after the identification of a preferred bidder, for example, because it is not possible to do otherwise:

- Detailed design development;
- Detailed site surveys;
- Investigation of legal title;
- Lenders due diligence; and
- Detailed planning applications.

The extent to which it is possible in competitive dialogue to leave matters such as those set out above to be finalised when there is only one bidder left in the process is unclear. At present, any issues left to be dealt with with a preferred bidder attract an element of risk of legal challenge. UK guidance provides that matters can only be left to be finalised after appointment of a preferred bidder where there is good cause[22] (*e.g.* it may be disproportionately costly).

A separate but connected matter is the scope for changes to the winning tender or the call for tender. In complex, lengthy procurements a degree of change to tenders or the call for tender is almost inevitable. The Directive provides some scope for such change in article 29(7); however the provision is unclear and inconsistent. Article 29(7) states:

> "... the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects ... and does not risk distorting competition or causing discrimination".

There is clearly scope for changes that are not "substantial"; however, it is uncertain what might amount to a substantial change. There

[21] A. Brown, "The Impact of the New Directive on Large Infrastructure Projects: Competitive Dialogue or Better the Devil You Know" (2004) 13 *PPLR* 160, 166.

[22] Office of Government Commerce and HM Treasury, "Competitive Dialogue in 2008: OGC/HMT joint guidance on using the procedure" (2008), box 5.8.

are no CJEU judgments in the context of competitive dialogue on the work that can be undertaken with a preferred bidder; although, the following two cases may have some relevance to the way in which the close of dialogue rules are to be interpreted: Case C-454/06, *pressetext Nachrichtenagentur BmbH v. Austria*[23] and the European Commission's London Underground PPP State Aid Decision.[24] In *pressetext* the CJEU ruled upon the extent to which changes can be made to a concluded contract. According to the CJEU, there is a new contract where a contract is changed so that it is "materially different in character". The CJEU gave the following examples of potential "material" contractual amendments:

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

The facts of the London Underground Decision involved changes to the preferred bidder's tender and the call for tender under a competitive negotiated procedure. Here, the Commission weighed up a number of factors in accepting the lawfulness of quite significant changes. Briefly, the London Underground Decision suggests that a lawful change is potentially one in which the preferred bidder remains the bidder with the most economically advantageous tender; there may be some scope for change even where the change/s make the contract more valuable for the preferred bidder; and where changes are made to the project itself, the project must remain the same as that advertised at the outset in the OJEU

[23] Case C-454/06, *pressetext Nachrichtenagentur v Republik Osterrich (Bund)*, Judgment 19 June 2008.

[24] State aid No. N 264/2002 – United Kingdom London Underground Public Private Partnership (2 October 2002) (C(2002)3578fin).

(it would not attract different bidders). It would seem that, at its broadest, there is scope to negotiate with the preferred bidder under competitive dialogue provided it is within the scope of *pressetext* and London Underground.

UK guidance issued by central government argues that changes within the control of the contracting authority are more difficult to justify legally than changes outside the control of the contracting authority that could not reasonably have been predicted or anticipated.[25]

## V. Procurement Procedure under the Private Finance Initiative: The Operation of the New Legal Framework

The legal rules on competitive dialogue appear to require some striking changes to UK PFI procurement practice, not least surrounding the work that can be done post appointment of a preferred bidder. Although there is some scope clarifying and confirming commitment (and by implication non-substantial changes), it would seem quite clear that no longer can a preferred bidder be quickly decided upon with extensive contractual negotiations then being undertaken with that one bidder. Under competitive dialogue, most of the contractual negotiations that would have been undertaken with a preferred bidder only must now be undertaken with multiple bidders in competition with each other: final tenders must contain all elements necessary for the performance of the contract. In theory this should lead to better value offers and speedier completions.

It needs to be assessed whether or not competitive dialogue, as it seeks to do, strikes an appropriate balance between the aims of transparency and competition on the one hand, and the commercial necessities of complex PFI procurement on the other. Many argue that competitive dialogue fails to strike an adequate balance, commonly citing the excessive bid costs and administration costs associated with the procedure. Indeed, by requiring more than one bidder to prepare bids up to a point near to financial close, it inevitably means that those bidders

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[25] OGC and HM Treasury (2008), note 22, 5.5.7.

who are not subsequently successful will incur much higher bid costs than they would previously. This may risk making firms selective about the contracts they bid for, which may impact negatively on competition.[26]

In addition, procuring authorities are now required to dialogue with multiple bidders to develop their bids up to a much later point in the procurement. This probably does necessitate greater administration costs, but there is no express requirement for costly face-to-face meetings with each bidder, excessive amounts of which can really drive up costs. Nevertheless, these face-to-face meetings seem to have played an integral role in many dialogues. However, it is arguable that such costs are not always necessary. In order to keep costs manageable for all parties, procuring authorities may be well advised in the early stages of a PFI procurement when bidder numbers are still relatively high to conduct as much dialogue as is possible without face-to-face meetings, *e.g.* using modern electronic techniques.

It is still quite early to assess the success/failure of competitive dialogue, particularly as the procedure was introduced in the UK in what quickly became very extreme economic circumstances. Many of the difficult procurements reported since 2006 may not be down to legal rules (which are not themselves overly complex), but instead the 2008 banking crisis which led to recession in the UK. PFI deals are heavily reliant on raising private finance. Anecdotally, some authorities found that late on in procurements funding upon which a preferred bidder was reliant was being withdrawn (with no other private funds available elsewhere), or banks were refusing to lend on agreed terms (*e.g.* wanting to further limit their exposure to risk). Such issues posed real difficulties for procurers, particularly when the procurement had reached the seemingly inflexible stages post-dialogue.

Competitive dialogue also came at a time where there appears to be a generally perceived change to the challenge culture in the UK. In

[26] It should be noted that specific provision is made (article 29(8)) for authorities to, if they so wish, make payments to participants in a competitive dialogue procedure to cover expenses.

comparison to continental Europe, in the UK for several reasons very few procurement disputes reach the courts. There appears, however, to be a strong perception amongst many authorities (encouraged by the press) that, for many reasons, this is changing. This in turn is impacting upon the behaviour of authorities when interpreting and applying the legal rules. Economic theories of compliance explain compliance as being a calculated decision, whereby actors (typically private corporations) will comply with regulation only to the extent that it is in their rational self interest to do so.[27] The main economic theories view compliance as the result of a cost-benefit analysis, where the expected detriment to the corporation from non-compliance (*e.g.* in the case of contracting authorities this includes financial loss due to having to pay out damages, the costs involved in defending legal actions, delays to projects, and even negative publicity) exceed the expected benefits deriving from violation (*e.g.* cost savings).[28] This logically implies that if authorities perceive there to be a greater risk of procurement challenge they can be expected to be more risk averse in their approach, favouring strict interpretations of the rules to more flexible, commercially convenient readings.

PFI procurements are invariably going to be resource intensive for all involved regardless of the procedure that is used. There does not appear to be anything inherently wrong with the legal rules on competitive dialogue, provided sensible interpretations are taken in practice, particularly regarding the scope for working with a preferred bidder.

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[27] T. Amodu, "The Determinants of compliance with Laws and Regulations with Special Reference to Health and Safety: A Literature Review" (2008), Research Report (RR638) Prepared by the London School of Economics and Political Science for the Health and Safety Executive, p.6; Parker and Braithwaite, "Regulation", in Cane and Tushnet (eds.) The *Oxford Handbook of Legal Studies* (OUP, 2003), Chapter 7, p.130; Snellenberg and Peppel, "Perspectives on Compliance: Non-Compliance with Environmental Licences in the Netherlands", (2002) 12 *European Environment* 131, 133.

[28] G. Becker, "Crime and Punishment: An Economic Approach" (1968) Journal *of Political Economy* 169; R. Posner, "Economic Analysis of Law" (New York: Aspen Law & Business, 5th ed., 1998); D.J. Pyle, "The Economics of Crime and Law Enforcement" (London: Macmillan, 1983); G. Stigler, "The Optimum Enforcement of Laws" (1970) 78 *Journal of Political Economy* 526.

## VI. Concluding Remarks

The paper has considered procurement procedures for complex public contracts. It is with these complex contracts that if the procedural rules are insufficiently flexible procurers may find real conflicts between procurement objectives: the objective of minimising legal risk, the objective of running an efficient procurement, and the objective of getting the best possible value for public money. In the EU competitive, transparent procedures are favoured, which make it difficult to conceal discriminatory conduct; however, in complex procurements negotiations, which are considered to lack transparency, are vital. The competitive dialogue seeks to strike an adequate balance between transparency and competition, and the need for flexibility in complex procurements.

On the face of it, the legal rules on competitive dialogue do not appear overly prescriptive; however, many key areas of the rules (being the result of intergovernmental negotiations) lack certainty. It is important that the legal rules are interpreted flexibly in line with the high value, complex projects that competitive dialogue was designed to procure. Anecdotally, however, there are signs that many contracting authorities in the UK are adopting narrow approaches to the level of bid development required under the Directive whilst multiple bidders remain in the competition. This is may be contributing to widespread dissatisfaction with the process, which is evident from trade press.