CEDR

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Efficiency in road public procurement

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Abbreviations

ALT	abnormally low tenders
ANAC	Italy's National Anti-Corruption Authority
ANAS	The Italian NRA
CEDR	Conference of European Directors of Roads/Conférence Européenne des Directeurs des Routes
D&C	Design & Construct
ECJ	European Court of Justice
ESPD	European Single Procurement Document
EU	European Union
FIDIC	Fédération Internationale des Ingénieurs Conseils/International Federation of Consulting Engineers
GDP	gross domestic product
IPR	intellectual property rights
KPI	key performance indicators
MEAT	most economically advantageous tender
NRA	national road administration
OGP	Office for Government Procurement
OJEU	Official Journal of the European Union
PBC	performance-based contracts
PCP	pre-commercial procurement
PLN	Polish zloty
PPP	public private partnership
SEK	Swedish Kronor
SME	small and medium-sized enterprises
TG S6	CEDR's task group S6

Executive summary

Over the past decade, the topic of procurement has become increasingly important. Not only because overall government spending on procurement is estimated to be 16 per cent of the European Union's GDP, but also because of the increasing importance that is attached to government buying power as a policy instrument. This and the development of European procurement legislation mean that our traditional procuring agencies have to make a fast transition and become much more professional. NRAs face common issues/challenges. Thus far, each NRA has been finding its own way to cope with these issues/challenges, for example regarding the instruments used to award the most economically advantageous tender or for stimulating innovations. In 2012, CEDR decided to set up a task group to explore common problems in awarding contracts and find fitting solutions, build a discussion platform, and identify steps that will help CEDR become a reliable stakeholder on public procurement issues.

Procurement topics: selection and description in the report

This report is the result of a survey conducted within task group S6 (TG S6) into perceived common procurement issues and the solutions applied in participating countries. Eight survey topics were selected on the basis of:
- urgency and difficulty (qualification and selection of bidders, the most economically advantageous tender, abnormally low tenders, dispute resolution);
- political urgency (the role of small and medium-sized enterprises, social return);
- additions to the new Procurement Directive (innovation, past performance).

For each topic, this report describes the current state of European legislation, the current practice in the countries represented in TG S6, a best practice case from one of the participating countries, and the changes on the specific topic in the new Procurement Directive 2014/24/EU. This directive had to be transposed into national legislation by EU member states by 16 April 2016.

TG S6 does not seek to provide solutions to all NRA procurement challenges. However, by providing practical solutions and examples of best practice, it will give each NRA the opportunity to address these issues in a practical way and to know where to find contacts in other NRAs.

Conclusions, based on the discussions in TG S6

In general, the new Procurement Directive provides guidance for NRAs on the procurement issues they face. However, as far as the selected topics are concerned, this guidance is not always as helpful as many countries had hoped, e.g. when it comes to the positive use of past performance or the identification and handling of abnormally low tenders. The general conclusion on these topics is that sharing experience will help NRAs find best practice for implementation of the new directive. This could help NRAs work with the directive in a sound and efficient way.

Innovation
- Under the previous directive, procuring agencies faced various kinds of obstacles when it came to procuring innovation: legal and financial obstacles, risk avoidance, and problems with intellectual property rights.
- The new directive provides new opportunities for innovation by introducing the public procurement of innovation procedures. Although the new directive is expected to at least eliminate legal obstacles and facilitate risk avoidance, the new procedure is not expected to address all obstacles faced by NRAs.

- The Swedish Transport Administration shows that the combination of functional specifications and adequate investment incentives for providers helps stimulate companies to create innovations as long as the risks involved are not too great.

Small and medium-sized enterprises:
- The new directive encourages the role of small and medium-sized enterprises (SMEs). The challenge to member states is to stimulate the role of SMEs without giving up the advantages of aggregated public purchases. Efficient, SME-friendly procurement is possible.
- The Irish NRA, for example, has ample experience in combining several measures such as market analysis, the subdivision of contracts into lots, and decreased requirements for capacity and turnover.

Qualification and selection of bidders:
- The qualification and selection of bidders is challenging when it comes to formulating the best and most appropriate criteria, especially when foreign bidders are involved. NRAs expect e-Certis to be a help when it comes to fact-checking bidders' self-declarations.
- The survey shows that the majority of NRAs use selection criteria such as reference projects, experience, and/or financial criteria/cash flow. When it comes to identifying effective selection criteria, NRAs can learn from each other, which could lower transaction costs. In Estonia, for example, time is saved during the tender procedure by having tenderers deliver proof of key personnel's technical and professional abilities after winning the bid, instead of before.

Past performance:
- Past performance is essentially a selection tool. It focuses on the performance of a company instead of the bid during the tender. Past performance is only included in the new directive as an incentive against misconduct. The NRAs represented in TG S6 regret that the new directive does not provide for the option of rewarding good (past) behaviour. This is why the use of 'past performance' differs throughout Europe.
- TG S6 proposes that CEDR members share information and perform a joint evaluation in this area. Italy, for example, has developed an effective vendor rating system.

Most economically advantageous tender (MEAT):
- The new directive provides more direction regarding the inclusion of qualitative and social aspects in tenders. The effectiveness of MEAT is nevertheless determined by how countries substantiate it. NRAs could learn a number of things from each other, e.g. how to make quality a substantive part of MEAT and how to monitor MEAT in the execution phase of projects.
- Experience in the Netherlands shows that the winning bid is often both the most economically advantageous and the least expensive bid. When given the right incentives, contractors are stimulated to focus on the needs of the procuring authority and to find appropriate, efficient, and effective solutions.

Social return:
- Many member states are experimenting with how to increase social return on investment in an effective and durable way. Social return is primarily politically driven. Sharing experience might help NRAs to learn more quickly so that they can jointly develop durable methods for social return.
- The Swedish Transport Administration creates between 200 and 1,500 internships, apprenticeships, and full-time jobs per annum by including clauses for social return in their contracts.

Abnormally low tenders (ALT):
- Unfortunately, the new directive does not provide any more guidance on abnormally low tenders than the previous directive. The difficulties faced by CEDR members in proving abnormally low tenders are expected to continue.
- In 2016, TG S6 will work on a brochure outlining best practice in the way NRAs handle ALTs. It will definitely include Poland's systematic approach to assessing a bid, which provides structure and guidance.

Dispute resolution:
- Dispute resolution is not part of the procurement directive. The Remedies Directive, however, does not help overcome disputes. This is costly, time consuming, and not very practical. The sharing of experience within CEDR could help NRAs arrive at a practical common approach to dispute resolution and could help CEDR influence a revision of the Remedies Directive.

Continuation: procurement within CEDR

To develop procurement further within CEDR, several development tracks are needed. CEDR should move from sharing knowledge at an operational level (e.g. in the eight chosen topics) to more tactical and strategic topics.

The tactical level comprises issues that concern the way NRAs contract work, deliveries, or services. For example, the shift from products to services and the use of alliance contracts, concessions, and framework contracts. On the tactical level, the new Procurement Directive contains new procurement methods, such as the negotiation method and the innovation partnership.

Strategic issues concern decisions about 'make, buy, and share' and strategies on (early) market involvement. These will be part of early project decisions, where scope, environment, and cooperation issues are still open. However, this can also involve the market in new developments such as smart mobility. This broadening of scope will help professionalise the procurement function within NRAs.

Other than that, CEDR can take the lead in new procurement initiatives, for example by organising a number of shared innovation procurements. A combination of greater sharing of experience and increased cooperation on procurement will help CEDR become a more reliable partner on procurement issues for other stakeholders such as the European Commission.

1 Introduction

This is the final report from CEDR task group TG S6 (Efficiency in road public procurement). It presents the results of a survey into the operational issues national road administrations (NRAs) faced when working with the previous Procurement Directive 2004/18/EC and substantiates one of the main elements of the task group's assignment: 'A comparative survey on common problems related to awarding and management of public procurement contracts and on solutions adopted'.

This report focuses on operational issues and aims to address those issues so that all CEDR NRAs can discuss them and share knowledge of them. The aim is also to present best practice on these issues in the participating NRAs. In addition to current experience of procurement issues, the report will list new topics to be addressed while implementing the new directive, 2014/24/EU. The intention is that this report will be discussed by procurement specialists in the NRAs. Having gathered feedback and experience from national experts, TG S6 completed the report in early 2016 and submitted it to the GB for approval, which it received on 20 April 2016. The final report will support all NRAs in their handling of operational procurement issues and will set an agenda for knowledge-sharing in relation to the implementation of Directive 2014/24/EU.

1.1 Background

In its Strategic Plan 3, CEDR created a procurement task force for the first time. Procurement is a topic that concerns all NRAs and is rapidly growing in importance. It is estimated that overall government expenditure on procurement in the European Union is 16 per cent of the EU's GDP. Furthermore, procurement accounts for up to 80 per cent of NRAs' annual spend. Many NRAs face major investment challenges relating to the maintenance and renewal of infrastructures that were built after World War II. NRAs plan building projects and maintenance operations. Sometimes NRAs design and engineer projects. However, in most countries, all the actual building and maintenance is performed by the private sector. Procurement is at the heart of all these processes.

The involvement of the private sector is not only a matter of costs and efficiency. It is also a matter of finding a new balance in the distribution of responsibilities between the public and the private sectors. In many countries, political discussions—and sometimes austerity policies—have led to a reduction in the size of the public sector. However, over the last 10–15 years, there has also been a change in the appreciation of government involvement. While there is greater belief in the power and creativity of the private sector, government organisations have to return to their core business. For road authorities, these changes have often led to the use of new contractual relations: integrated contracts, public private partnerships, and alliances. Our procurers have to learn to work with these new arrangements.

At the same time, the work of NRAs is becoming more complex. There is a shift in focus from the building process to environmental, sustainability, and social issues relating to NRA projects. People expect the construction sector to perform to standard and to minimise failure costs. They also want sustainable and environmentally friendly solutions. Road maintenance projects have to be carried out without hindering traffic or at least without any major disturbances. Moreover, during the economic recession, some NRAs were asked to provide learning opportunities for the unemployed or even create new jobs as part of the procurement process. In some countries, this is called 'social return'. Policymakers like to use the purchasing power of government to increase the importance of these social wishes. This leads to a need for innovation.

In addition, there are, of course, EU procurement directives, which concern all NRAs and focus on issues such as the proportionality of demands, the position of small and medium-sized enterprises, and the awarding of contracts according to the principle of the most economically advantageous tender (MEAT). This means NRAs are no longer allowed to tender on the basis of the lowest price, but on a combination of quality aspects and price.

All NRAs in CEDR face these issues and have in recent years had to learn to cope with these new topics by implementing Directives 2004/18/EC and 2014/24/EU. While all NRAs would find ways of handling these issues without CEDR involvement, it is not always effective for each NRA to develop its own solutions. CEDR provides a platform for the pooling of knowledge and experience and the discovery of new and durable solutions. This does not necessarily mean that this report will provide solutions that will suit all NRAs. Differences in geographical circumstances, climate, economic situation, and political preferences across Europe can result in the need for specific solutions. However, even in these cases, NRAs can learn from each other's experience. This report should be seen as the start of a process of knowledge-sharing.

1.2 Approach

This report reflects the work performed by TG S6 during the first two years of its existence. Procurement issues can be addressed at different levels. Firstly, at strategic level, where decisions are made about the role of government (make, share, buy) and about the role procurement should play in achieving policy goals, for example the role of procurement in introducing innovations. Secondly, at tactical level, where decisions are made about the way to contract, which contracts to use, and what packages of projects are formed. Thirdly, at operational level, where the discussion is about the actual procurement process and the use of procurement tools.

The discussions in the task group focused mainly on the operational procurement level. TG S6 focused on a common learning process. The first step was to share information within the task group. This report is a second step: sharing TG S6 members' experience with other NRAs. Parallel to this report, TG S6 is building a discussion platform linked to the CEDR website. The group hopes that themes addressed in this document will result in discussions on the platform that will provide fellow procurement specialists in other NRAs with solutions to their challenges. Chapter 11 (Conclusions) provides initial suggestions for tactical and strategic issues that CEDR could address in its Strategic Plan 4.

During the first two-day meeting in June 2013, the task group drew up a list of topics to be discussed at subsequent meetings. Topics such as the qualification and selection of bidders, past performance, the awarding of contracts on the basis of the most economically advantageous tender, abnormally low tenders, innovation, demands for sustainability, social criteria in tenders and dispute resolution were put on a longlist and ranked according to priority by group members. The group then discussed two main topics at each of its two-day meetings. In order to ensure fruitful meetings, all members completed a questionnaire on each topic to be addressed, and two or three members prepared presentations about the current practice in their country regarding the topic. During the meeting, the group discussed the relevant topic using the introductory presentations and the results of the survey.

The surveys, the presentations, and the group discussions provided the input for this report. In short, this report contains input from the NRAs represented in the task group over (part of) the past two and a half years: Denmark, Estonia, Greece, Ireland, Italy, Malta, the Netherlands, Poland, and Sweden.

2 General framework for procurement within NRAs

2.1 General objectives of the procurement directives

The main goals of the previous directive, 2004/18/EC, were transparency, objectivity/equal treatment, and proportionality. In most countries, the directive was directly transposed into national law. Some countries (such as Italy, Malta, Ireland, the Netherlands, Sweden, and Denmark) made specific additions. These were made to help procuring authorities adopt the directive and ensure an equal procurement approach. The reasons for these additions are varied and include, for example, politics, legal regulation authorities, or a wish to also regulate small tenders, which are not regulated by the directive, since they are below its financial threshold.

2.2 The influence of politics, market situations, and legal constraints

National politics, market conditions, and legal constraints influence the procurement framework of NRAs. Different national interpretations of the EU directive also contribute to the fact that 'possibilities' and constraints in procurement differ from country to country.

Despite these differences, there are still many areas where NRAs face the same strategic considerations and challenges on how to procure road building and maintenance contracts. The constant exchange of knowledge and experience and the search for best practice between NRAs help to harmonise and develop best practice across member countries.

NRAs frequently discuss the following issues with each other:
- the use of national guidelines (2.3.1)
- the influence of procurement policies (2.3.2)
- project procurement strategies (2.3.3)
- types of contracts (2.3.4)

These issues have links to the EU directive. A common approach (or shared best practice) between NRAs makes good sense, since market players typically operate internationally. Through the dialogue in CEDR, NRAs have a good opportunity to contribute to what TG S6 sees as good practice (or interpretation of the EU directive) across member countries, thereby bringing more influence to bear at national level.

2.3 Practice under Directive 2004/18/EC in the participating countries

Procuring agencies have to act within a framework that combines the directive that has been transposed into national guidelines, national procurement policy considerations, and procurement strategies and procedures within the own organisation.

2.3.1 Use of national guidelines

Although the combination of procurement directives and additional national legislation form an important framework when procuring road works, national procuring agencies also need to take into account a wide range of national guidelines. These guidelines include, for example:
- employment, social return targets (Italy, the Netherlands, Sweden)
- enhancing market competitiveness (Malta, the Netherlands, Ireland, Sweden)
- increasing road safety (Malta, Denmark, Sweden)

- green procurement (Malta, Ireland, the Netherlands, Sweden)
- satisfaction rate impact (Malta)
- tourism impact (Malta)
- obligatory use of types of contract (Ireland, the Netherlands)
- the flow of traffic (Italy, Malta, the Netherlands, Sweden)
- requirements relating to evaluation/debriefing, insurance requirements self declaration, advertisement, publishing, SMEs, tax clearance (Ireland)
- innovation targets (the Netherlands, Sweden)

Although these laws and guidelines are meant to help define how to act, several procuring agencies face dilemmas. The most frequently mentioned dilemmas were how to combine all the rules and guidelines in one project and how to reflect experiences and lessons learned in new projects.

2.3.2 Use of procurement policies

All of the participating procuring agencies also have a procurement policy and/or procurement procedure in addition to the law and national guidelines.

The ***main goals*** of the policies/procedures of procuring agencies are:
- to ensure effective and efficient procurement processes,
- to be in line with rules and regulations to ensure openness and transparency,
- to obtain better value for money in procurement,
- to ensure that the products and goods ordered meet specifications, and
- to guide employees to make procurement choices that align organisational and political goals, as well as the rules and regulations.

Depending upon the country in question, ***some main elements*** of these procurement policies are:
- the participation of SMEs (Ireland, Sweden),
- the stimulation of innovation by procurement (the Netherlands),
- the use of internet-based IT system for tenders (Greece, Ireland, the Netherlands),
- working with procurement strategy and market dialogue (Denmark),
- the national organisation of procurement (Malta, Denmark),
- the outsourcing of decisions and market policy (Netherlands, Denmark),
- knowledge of the market (Denmark),
- how to find the right incentives to ensure the right quality (the Netherlands, Denmark),
- decisions to procure in the most effective and efficient manner (Greece, Denmark),
- policy on aggregation of works (Netherlands),
- the roles, responsibilities, and authority of key people (Malta),
- audits (Malta), and
- how to manage procurement processes, contracts, documentation, and thresholds (Malta, Ireland, the Netherlands, Denmark, Greece).

2.3.3 Procurement strategies and procedures

An important element of organisational procurement strategy is the prescribed use of certain contract forms. Many procuring agencies use modern, integrated contract forms such as Design & Construct (D&C), performance-based contracts (PBC), or public-private partnerships (PPP).

Design & construct (D&C) is used most frequently, especially for building and large renewal projects. All participating countries have experience with the use of design and construct. The most experienced countries are Poland, Ireland, Italy, the Netherlands, Denmark, and Sweden. Estonia rarely uses D&C. Greece and Denmark have a set of preconditions that regulate the use of D&C.

Performance-based contracts (PBC) are less well-known. Italy, Ireland, and Greece do not make use of PBC. Instead, they use contracts based on prescribed technical specifications. On the other hand, the procuring agencies in Sweden, Poland, Estonia, Denmark, and the Netherlands make large-scale use of PBC (all regular maintenance contracts).

Public-private partnerships (PPP) are not used in Estonia and Sweden. Denmark and Poland are now starting (and have to date completed a few projects with PPP). Italy, Ireland, and the Netherlands are more or less experienced with PPP. PPPs are often shaped as a Design, Build, Finance and Maintain contract.

The decision whether or not to use a PPP is often a political one. Since governments can borrow money at a lower interest rate than contractors, this argument is used in several countries not to start PPPs at all. On the other hand, the need for additional money or the wish to obtain added value (efficiency, accelerated delivery, enhanced delivery, wider social impact) influences the decision in favour of PPP. The use of PPPs has thus far only been evaluated in Poland (financial, legal, and organisational risks) and the Netherlands (more or less detailed, during the contract management phase, the effects resulting from the PPP are compared to the upfront expectations of PPP as formulated before the start of the project).

Most of the participating countries (Ireland, Greece, Sweden, Denmark, the Netherlands) make procurement strategies for individual projects. This may relate to exceptional projects where the overall policy does not apply, programmes containing projects in specific product groups/categories, and larger projects or mega-projects.

In general, project procurement strategies consist of a general project description, market analysis, selection and award criteria, contract form(s), tender form(s), use of incentives, partnering considerations or use of market dialogue, and a tender time schedule (Denmark, the Netherlands). In those countries where a project procurement strategy is used, this strategy is subsequently evaluated.

2.4 From Directive 2004/18/EC to Directive 2014/24/EU

On 26 February 2014, the European Parliament and the Council of the European Union adopted Directive 2014/24/EU on public procurement and repealed Directive 2004/18/EC. The new directive had to be transposed into national legislation no later than 18 April 2016.

Directive 2014/24/EU is complex, detailed, and supplemented by extensive case law from the EU court. As the directive is a compromise between member states, the directive contains formulations that are open to different interpretations.

TG S6 also has the impression that some practices that are already 'good' practice in some countries have been adopted into the new directive. These practices include:

a) increased flexibility, resulting in new procurement methods and enlarged use of existing methods (2.4.1);

b) a focus on quality (balanced to low price), which results in a focus on MEAT (quality + best value) and past performance (2.4.2);
c) a focus on transparency and establishing a level playing field (2.4.3);
d) a greater focus on the societal impact of procurement, for example on opportunities for small and medium-sized enterprises (SMEs), social responsibility, and sustainability (2.4.4).

2.4.1 Increased flexibility

New procedures

The new directive, 2014/24/EU, enables member states to create new possibilities for their procuring authorities. New procedures have been introduced, such as the innovation partnership (see Chapter 3 for more information) and the electronic catalogue. The options to use the existing competitive dialogue and the negotiated procedure have been extended to include, for example, contracts involving design and innovation. From being procedures that could only be used under exceptional conditions, the procedures of negotiation and competitive dialogue can now be used more widely. Most of the participating agencies feel that this will produce completely different technical and commercial opportunities to those to which they are accustomed. They take the Netherlands as an example, since the Dutch NRA (Rijkswaterstaat) already has quite a lot of experience with the competitive dialogue.

Use of contracts

The new directive presents a broad choice of procurement regulations. The agencies' own interest in having adequate competition will probably become the most decisive factor when choosing a procedure. For example: in stimulating innovations, the agencies will focus on commercialising the innovation without creating a monopolist. This will determine the procedure that is used to develop the innovation. The directive will no longer prescribe a specific procedure. To ensure uniform application of the new procurement legislation within its own organisation, the Danish NRA (Vejdirektoratet) is developing guidelines on how to use the new procurement directive, including guidelines for applying the possibilities of negotiation, development of concepts and subsequent rollout for all of Vejdirektoratet.

Modification of contract

The option to modify the contract is explicitly included. The limitations arise from current EU jurisprudence. Substantial modifications to on-going contracts (for example the addition of a different kind of assignment to the contract) are not allowed. The directive outlines the circumstances in which on-going contracts can be modified.

2.4.2 Focus on quality

MEAT: terminology and definition

The definition of what the most economically advantageous tender (MEAT) is has changed considerably in the new directive. This will probably create considerable confusion when the new directive is implemented. The term MEAT, as previously used, will be replaced by 'price-quality-ratio'. Moreover, the new directive defines 'MEAT' in a different way. Even awarding a contract on the basis of the lowest price (with or without a focus on life cycle cost) will count as 'MEAT'. This dissolves the contrast between awarding on the basis of lowest price and awarding on the basis of

MEAT. The procuring authority's evaluation methodology must be described in the tender documents.

Under the new directive, all projects will be awarded on the basis of MEAT. The new directive empowers the member states to forbid the awarding of contracts on the basis of lowest price. TG S6 wonders if any member state will actually use this option. For a more detailed description of MEAT, see Chapter 6.

Past performance

The new directive explicitly mentions the concept of 'past performance'. Past performance is added as a (facultative) ground for exclusion. Most countries are positive about this, since it gives procuring agencies a measure to take when contractors drastically fail to live up to their contracts. In the Netherlands, a group of large public clients has already invested in a past performance instrument to be used during the selection of bidders. Specialists expect this instrument to fit into the new directive. For a more detailed description of past performance, see Chapter 5.

2.4.3 Focus transparency and level playing field

Modifications in on-going contracts

The regulations on modifications during the term of the contract will also be hard to get a grip on. For example, modifications and additions during the term of the contract may have to be procured once again and cannot just be performed by the contracted supplier/constructor. The new directive will give procuring agencies more guidance than the previous directive. This will make it easier for agencies to decide to modify an on-going contract.

Embargo on asking for documents that are publicly available (pre-selection)

Under the previous directive, several CEDR members faced problems regarding the verification of self-declarations (see Chapter 4 of this report for more details about the qualification and selection of bidders). These problems have been acknowledged, and under Directive 2014/24/EU, the European Commission will create a format for a 'single procurement document' in all languages. The format will be made available via e-Certis, an information system that provides access to all obligatory certificates and other documents in all member states.

To help procuring agencies, the new directive indicates that e-Certis can also be used to access the databases of other member states. Member states are obliged to update the data in e-Certis. This is of assistance to agencies, which are obliged not to ask their suppliers and contractors for documents that are freely available or that have previously been given to the agency.

Tender documents to be published earlier

Regardless of the tender form, tender documents must be published at the same time as the contract notice. Today, virtually all tenders with prequalification use the period between contract notice and start tender, during which potential bidders prepare application for prequalification, to complete the tender documents.

This change will result in substantial resource pressure before publication of the contract notice. This should be taken into account when planning procurement. However, this change is not seen

as a significant change for major construction works, where preparations often take several months. It will, however, have a more adverse effect on a project that is triggered by sudden needs or is otherwise subject to greater time pressure.

E-tendering from 2018

From 2018 on, new regulations will require all tendering to be done electronically. This means that data in procurement, such as contracts and bids, will be exchanged electronically. The main challenges lie in authentication and the confidentiality of data in the period between bidding and the awarding of the contract. Participating countries are agonising about how to electronically block projects from anyone not working on the project in order to avoid confidential project information being retrieved by someone within the organisation. Furthermore, agencies need qualified electronic signatures. These needs are a challenge for IT companies and may be something that European countries could develop together as a common task. There has been a suggestion to develop one common basic template with the possibility of national adjustments. The European Commission has abolished the obligatory 'four-eyes principle' for the confidential treatment of bids before the awarding of a contract. This principle was part of the previous directive, but will no longer be part of the new directive. This makes the implementation of e-tendering less complex.

2.4.4 Societal impact

The new directive underlines the importance of including broader political, social, and economic responsibilities in the procurement process. Selecting a partner and awarding a contract is not only about finding the right partner to do the job, it is also about doing this in a socially responsible way and keeping in mind the importance of durable, healthy markets. This means that in the evaluation, selection, and awarding processes, consideration must be given to small and medium-sized enterprises (economic policy goal), environmental, social, and labour standards (policy), and to life-cycle costing (efficient spending of public resources).

The participation of SMEs

Under the new directive, procuring agencies are obliged to observe strict rules regarding the size of contracts. To give SMEs a fair chance, contracts must not be larger than necessary. This means that procuring agencies will have to explain (to the tenderers or sometimes in court) why specific contracts are not split into separate contracts per construction stage or per lot.

Some participating countries, such as Sweden, have mixed feelings about this demand. They fear that it will result in small contracts not for geographical reasons or for different content in different parts of the object to be procured, but simply because of the prescriptions in the new directive. This fear might become reality. In other countries, such as the Netherlands, the requirements regarding contract size in national legislation are even tougher than in the new directive. This national legislation is not expected to change with the implementation of the new directive, because so far, the Dutch NRA has little difficulty explaining why specific contracts are not split up into parts. For more details on opportunities for SMEs, see Chapter 9.

Social standards

In the new Procurement Directive, more attention is paid to social criteria as an award criteria. Quality criteria form an essential part of the awarding of a contract within the most economically advantageous tender method. Sometimes technical criteria play a role, but quality is more often

expressed by means of broader social criteria and criteria relating to user quality. In the Netherlands, for instance, almost all road projects place considerable emphasis on reducing traffic disruption during the maintenance periods or during the building process. This aspect is translated into the award criteria by asking for a traffic plan and the need to show that the work will be done within the planned time period.

Other criteria that are often used relate to environmental issues, including the sustainability of the given solution, the reduction of carbon dioxide emissions in the project, or the impact of a project on the people living in the surrounding areas.

Another category covers purely social criteria, which concern public responsibility for employment, education, social standards, child labour, etc. When faced with an economic downturn in particular, policymakers will ask procurers to use their power to help those with a weak position on the labour market. The directive notes that it is important to use objective or measurable criteria to keep the scoring and awarding of the project transparent.

Life cycle costs – total cost of ownership

The new directive stresses the importance of a life-cycle approach.

The award criteria have changed, but the rules are more or less the same.

Tender material must include data on how to make calculations and the method of calculation. Requirements concerning the project or the project organisation must be proportional. The costs in this context include acquisition costs, costs of use, maintenance costs, end-of-life costs, and costs imputed to environmental externalities related to the product during its life cycle, provided their monetary value can be determined and verified.

The authorities will indicate in the tender documents the date to be provided and the methods used for determining the life-cycle costs.

2.4.5 Additional topics

Although many of the items above are reinforced in the new procurement directive, it is important to note that in many cases, they are already developed or implemented by many NRAs and part of their current procurement practice.

In addition to these topics, TG S6 has identified some topics that are not specifically addressed in the new directive, even though more work needs to be done on these topics by NRAs so that they can use them effectively in procurement processes. Such topics include the use of self-declaration in pre-selection, the handling of abnormally low tenders, and finding a leaner method for dispute resolution. These issues were discussed in the task group and the results are described in Chapters 4, 8, and 10 respectively.

2.5 Procurement topics of interest to NRAs

During TG S6's meetings, the task group discussed both the procurement process in general and the individual steps within this process. The details of the discussions are reflected in the chapters that follow. The discussions within TG S6 covered the use of procurement instruments across the whole procurement process. The most interesting subjects were

- innovation through procurement (Chapter 3)
- opportunities for small and medium sized enterprises (SMEs) (Chapter 4)
- the qualification and selection of bidders (Chapter 5)
- past performance (Chapter 6)
- the most economically advantageous tender (MEAT) (Chapter 7)
- social return on investment (Chapter 8)
- abnormally low tenders (Chapter 9)
- dispute resolution (Chapter 10)

In order to show how these subjects relate to the steps in the procurement process, the table below describes the procurement and contracting process, the associated subjects, and the chapters in which they are discussed.

Step in the procurement process	**Subject discussed by TG S6 / Chapter**
Step 1: Preparation - Identification of needs - Consideration of policy boundaries - Development of outline requirements - Affordability test - Choice of tender procedure, selection- and award criteria	Innovation through procurement (Chap. 3) Qualification and selection of bidders (Chap. 5) Past performance (Chap. 6) MEAT(Chap. 7)
Step 2: Prequalification - OJEU notices - Descriptive document and bidder conference - Pre-qualification assessment	Qualification and selection of bidders (Chap. 4) Chances for SMEs (Chap. 4) Past performance (Chap. 6)
Step 3: Information process - Issuing of invitation to participate - Information notices, dialogue, etc.	Dispute resolution (Chap. 10)
Step 4: Tender submission - (Shortlisting) - Tender submissions - Tender assessment - Appointment of preferred bidder	MEAT(Chap. 7) Social return on investment (Chap. 8) Abnormally low tenders (Chap. 9)
Step 4: Award - Notice of award issued - Feedback provision to tenders - Standstill period ahead of the confirmation of the award	MEAT (Chap. 7) Abnormally low tenders (Chap. 9) Dispute resolution (Chap. 10)
Step 5: Contract execution - Project start-up - Contractor performance and contract management	Past performance (Chap. 6) MEAT (Chap. 7) Abnormally low tenders (Chap. 9) Dispute resolution (Chap. 10)

3 Innovation through procurement

3.1 Challenges for innovation

National road administrations are increasingly confronted with the need for innovations in order to meet political demands for efficiency, sustainability, and safety. However, innovations are also needed to improve technical solutions and to meet growing road user expectations for route and congestion information. Innovations are usually developed by the private sector or with financial support from private sector parties. This means that innovation will increasingly find a place in public procurement processes. As innovation is a rather new issue in procurement, there are hardly any proven procurement methods. Members of TG S6 shared the different ambitions and methods used in the respective countries. The procurement of innovation process introduced by the new directive is expected to reduce legal obstacles and avoid risk. However, other obstacles to innovation under the previous directive (concerning finance, intellectual property, or country-specific obstacles) are not expected to be solved by the new directive.

3.2 Previous practice to encourage innovation through procurement

The previous directive had no rules for the procurement of innovation. This meant that all countries adhered to their own policy, interpreting the previous directive as they saw fit. Of the nine participating countries, four agencies (the Netherlands, Ireland, Italy, and Sweden) have a policy concerning innovation. The agencies that have formulated innovation policies focus mainly on incremental innovations (the Netherlands, Ireland, and Sweden). Nevertheless, radical innovations are also mentioned in the innovation policies of the Netherlands and Sweden. Driving forces to implement policies on innovation are:

- environmental impact/climate change (the Netherlands, Denmark, and Italy)
- other social goals (the Netherlands, Sweden)
- increased productivity/reduced costs (the Netherlands, Denmark, Italy, and Sweden)
- a request from the market (Malta)

3.2.1 Influence of innovation policies on the procurement process

In the Netherlands, Ireland, Denmark, and Sweden, innovation policies have led to changes in procurement, for example to an increased use of Design & Build contracts, functional specifications, and more dialogue with contractors. These instruments are used because they allow for innovative solutions. Functional specifications are being adopted in Poland as well. In Italy, the innovation policy still has to be implemented in procurement policy, so it has not yet led to alterations in the procurement process.

3.2.2 Use of procurement instruments

Several procurement instruments are expected to have a positive influence on innovation. Some of these instruments are already used by the procuring agencies. The most frequently used are:

- pre-commercial procurement (used in the Netherlands, Ireland, Italy, Denmark, and Sweden),
- provision of pilot projects/test beds (the Netherlands, Ireland, Italy, Denmark, and Sweden),
- announcing contests (the Netherlands (although the outcome has not always been positive), Ireland, Poland, and Sweden), and
- alliances (the Netherlands, Ireland (as an outcome of tenders), Denmark, Sweden, and Poland (especially with technical institutions and universities)).

Market initiative schemes (unsolicited proposals) are less frequently used. Only the Netherlands, Ireland, and Denmark are familiar with such schemes and only rarely act upon them.

All countries include elements in their contracts to stimulate innovation. For example:
- integrated contracts (design included) with MEAT (the Netherlands, Ireland, Italy, Denmark, and Poland),
- bonus/options packages (the Netherlands, Ireland, Denmark, and Sweden),
- early market involvement (the Netherlands, Ireland, Denmark, and Sweden),
- flexibility to optimise solutions after the contract is signed (the Netherlands, Ireland, Denmark, and Sweden), and
- smart exits/modernisation clauses in (long-term) contracts (the Netherlands, Ireland, Italy, and Poland).

3.3 Changes under the new directive and expected challenges

Under the previous directive, 2004/18/EC, procuring agencies faced five kinds of obstacles to innovations. Agencies worked on solutions to the obstacles they faced. Of assistance to all of these countries is the fact that under the new directive, innovation is being brought in as a goal to strive for in procurement (as opposed to the situation under the previous directive, which merely acknowledged innovation as a possible effect of the way in which procurement was executed). The participating agencies in TG S6 agree that the altered mindset in the new directive might help stimulate the manner of thinking about innovation.

The five obstacles under the previous directive, current solutions, and the expected solution as addressed in the new directive (2014/24/EU) are:

1 **Legal obstacles** (all agencies): concerns about openness and transparency; little freedom to negotiate; both developing with and contracting a single contractor was barely possible. The *innovation partnership* in Article 31 of the new directive could solve these issues. In general, however, although the innovation partnership might look expeditious at first, it may slow down because of a lack of competition. Specialists expect the innovation competition ('Pre-commercial Procurement' (PCP)), to be of greater value than the innovation partnership. The competitive elements of the innovation competition, as described in the Commission Communication of 14 December 2007 entitled 'Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe', might speed up this procedure, which will probably start slowly.

2 **Financial obstacles** (the Netherlands, Sweden, Malta). The Netherlands: some innovations are not implemented due to separate budgets for construction and maintenance. Sweden: the obstacles posed by state aid rules and the principle of equality are not expected to be solved by the new directive.

3 **Intellectual property rights** (IPR) (Italy, Ireland, Sweden, the Netherlands, and Poland, but all agencies are working on it in various ways):
   - The Netherlands is used to buying out the IPR (making ideas public). From now on: the procuring agency will buy the entitlement to exploit the IPR in its own projects.
   - Ireland: either buys the entitlement to either share or completely buys out IPR. In general, Ireland has provisions in its contracts to transfer the IPR to the client.
   - Italy: assesses on a case-by-case basis, depending upon the situation.
   - Sweden: usually leaves IPR to companies. In each case of joint development, Sweden assesses whether or not to buy out IPR or make other arrangements. When procured: the

contractor has to either lower the product price, or (if the contractor will not commercialise the innovation) the IPR becomes public.

The new directive is not expected to be of any help, since it does not deal with the handling of property rights. All it handles is how to use electronic auctions to procure specific intellectual property rights; and the ability to exclude operators who have violated intellectual property rights.

4 **Country-specific obstacles** such as:
- obstacles from the commissioning party (Ireland, sometimes); and
- few chances for experiments (Denmark and Sweden).

These are internal agencies' issues that neither stem from nor will be solved by aspects of the directive.

5 **Risk avoidance** (the Netherlands, Italy, Denmark, Sweden, and Malta) and **the state of mind of employees**. If we are not innovation-minded, we are not open to innovations, no matter what policies are implemented. This is an aspect all agencies should be aware of. The main challenge for the innovation parts of the new directive will be to understand the opportunities the new regulations and standards offer and make sure everyone within the agency is aware of them.

3.4 Best practice: Sweden

The basis for successful innovation through procurement is to focus on needs. By setting functional requirements that work in a business relationship and considering equivalent solutions, opportunities may be generated to create innovative solutions where materials, design, or execution is concerned.

This should be handled within the framework of accurate regulations. Another important prerequisite is that the contracts contain adequate incentives for the providers to invest, while at the same time ensuring that the risks are not too great.

The Swedish Transport Administration has for some time been working to increase the number of turnkey contracts and fixed-fee consulting contracts. This, however, is not primarily to provide the opportunity for new technical solutions in already existing facilities, but to give freedom to the providers to increase internal productivity within the project by means of new solutions, methods, and ways of working. In order to increase the benefits for the client and the end user, the contract form and compensation form have to be combined with incentive and cooperation forms that create transparency and knowledge sharing.

Innovation is a decisive factor in meeting the new challenges that society faces, as well as for the development of the transport system and more specifically for the development of the construction market. Two examples of innovation through procurement in Sweden are presented below.

3.4.1 Procurement of innovation: new technology with satellite measurements (Sweden)

For the first time, the Swedish Transport Administration is buying a technique in a construction project that uses satellites to measure changes in the level of the land surface. The goal is to obtain even more reliable measurements at a lower price, since larger areas can be covered.

Västlänken (the West Link project) will use this technology to see how the environment changes when a tunnel is being built. Movements in the soil surface occur slowly, but may have a significant

impact on buildings and infrastructure in the long run. Property damage may be caused by a shift of just a few millimetres.

'This is an inexpensive way of monitoring land movements over large areas. The other methods we have used so far on the ground require a lot more human resources. Without satellites, we would not have been able to have proper control over the areas a little further from the tunnel,' said Roger Smedberg.

Västlänken is buying existing technology from a foreign satellite provider during the first three years. The goal is for the supplier to develop the technology during the project and hopefully find an even better solution for Västlänken. If the supplier manages to develop the method, there will be an innovation bonus of SEK100,000.

For more information about the satellite procurement see:
http://www.trafikverket.se/en/startpage/projects/Railway-construction-projects/The-West-Link-ProjectVastlanken/News-archive/2015/2015-05/satellite-keeps-track-on-movements-in-the-ground/

3.4.2 First innovation procurement for environmentally friendly sleepers (Sweden)

The Swedish Transport Administration is now conducting the first innovation procurement to replace toxic sleepers containing creosote with a new eco-friendly type of sleeper. The goal will be achieved by providing market freedom to develop a new solution.

'The Swedish Transport Administration has long wanted to replace all the sleepers containing creosote. Now we believe that the market can find solutions that are both environmentally friendly and are of high quality at a reasonable cost,' says Bertil Westerström, procurement manager for the new sleepers.

Strategies for an eco-friendly solution
The subject of the contract is to find a non-toxic alternative to sleepers containing creosote. The old sleepers may gradually be replaced by new ones when maintenance is required.

Within the EU, the use of creosote for the impregnation of sleepers is permitted until 2018. After 2018, the EU is expected to take a new decision whether creosote will be allowed or not.

In order to create room for innovation, the focus is on functional requirements and as few additional requirements as possible in order to give providers the freedom to find new solutions. Furthermore, the procurement enables multiple vendors to test their solutions and makes it possible for a few suppliers to share the contract.

Two test periods will be implemented where a number of sleepers are laid out on a track on some test routes. The sleepers that meet the criteria in the first trial will proceed to the second test period. The second test period lasts at least one year from the time the sleepers are laid on the track.

For more information about the procurement of environmentally friendly sleepers contact:
bertil.westerstrom@trafikverket.se

3.5 Conclusion

While the previous directive did not produce any innovations at all, the new directive introduces the concept of the 'Innovation Partnership', which places more emphasis on the procurement of innovation. This does not mean that all issues concerning the procurement of innovation are solved. The combination of innovation in the new directive and the sharing of best practice examples concerning the subject will most likely contribute to an increased use of innovation, perhaps with respect not only to incremental innovations but also to radical innovations.

Of the five stated obstacles faced by NRAs today, at least the legal obstacle and risk avoidance can be partly solved by the new directive. However, most obstacles are still country specific and have to be solved by the country itself and its own legislation. From the point of view of an NRA, knowledge-sharing and, if possible, experiments with joint procurement initiatives would help NRAs most and would help resolve issues that are not addressed in the previous or the new directive.

The implementation of innovation in the new directive can be a driving force for all participating countries to implement rules for procurement of innovation and also work as a mind-changer.

4 Opportunities for small and medium-sized enterprises (SMEs)

4.1 Challenges concerning SMEs

In order to obtain economies of scale, including lower prices and transaction costs, public purchasers tend to aggregate and centralise purchases. However, the excessive concentration of purchasing power should be avoided in order to preserve competition. This brings opportunities of market access for small and medium-sized enterprises (SMEs). The previous directive included no specific measures for the participation of SMEs. Therefore, the measures taken to actively facilitate SME participation, and with that, actual SME participation, varies from country to country. While some countries have explicit measures to encourage the SME participation, others do not.

In the new directive (2014/24/EU), facilitation of the participation of SMEs is an explicit goal. Measures in the new directive include requirements concerning the size of contracts. The challenge to member states is to take into account these new measures without compromising on the advantages of the aggregation of public purchases.

4.2 Current practice in participating countries

There is an emerging trend across the European Union towards the aggregation of contracts by public purchasers. The aim is to obtain economies of scale, including lower prices and transaction costs and to improve and professionalise procurement management. This can be achieved by concentrating purchases either by the number of procuring authorities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency, competition, and market access opportunities for SMEs. The use of functional/performance specifications is encouraged so that SMEs may tender alternatives where possible (Ireland).

4.2.1 Participation of SMEs in tenders

All agencies involved in TG S6 are familiar with the negative sentiment expressed by SMEs that their share of works contracts is decreasing. Figures show, however, that SMEs still have a fair share of the European public works contracts[1]. NRAs notice that the maintenance of local roads in particular is carried out by SMEs. Smaller projects (smaller works (Sweden); projects up to the value of €3 million (Denmark); tenders up to €10 million (Ireland and the Netherlands)) usually go to SMEs as well.

4.2.2 Procurement regulations

There are, however, participants in TG S6 who attach importance to and try to facilitate SME participation. The Irish and Swedish NRAs specifically attempt to facilitate SME participation. The other procuring agencies state that SME participation is of concern in some projects (Denmark); that the general policy considers competition in a broad sense (Netherlands); or that the government stresses the importance of not making contracts too large (Sweden). The Netherlands, Denmark, and Ireland create fair thresholds (for example by ensuring that technical and financial minimum requirements are fair). In Denmark, some large contracts are split and tendered in

[1] PWC, ICF GHK, and Ecorys (2014), SMEs' access to public procurement markets and aggregation of demand in the EU; A study commissioned by the European Commission, DG Internal Market and Services, page 6.

parallel lots to give both SMEs and large enterprises the possibility to bid (best total offer wins). In addition to the matters raised above, Ireland does have a policy that looks carefully at ways of dividing contracts into lots and the use of consortia/joint ventures is also encouraged and facilitated.

4.2.3 Communication outside procurement

Generally speaking, procuring agencies do not communicate specifically with SMEs except during procurement processes. Ireland ('meet the buyer meetings') and Denmark have a regular dialogue with the contracting sector but not with SMEs in particular. Only Italy, Sweden, and the Netherlands organise specific meetings for or with SMEs. Market surveys are also conducted by individual procuring authorities to assess the capacity of SMEs to participate in the tender process and to assist in the setting of prequalification thresholds in the tender so that SMEs are not unintentionally excluded from participation in the tender process.

4.3 Changes under the new directive and expected challenges

In the recitals of the new directive, the legislator identified how economies of scale decrease opportunities for SME participation in European tenders. It is stated that SMEs are considered important for competition reasons in general and for reasons of their potential for job creation, growth, and innovation in particular. Therefore, the provisions in the new directive are meant to encourage SME participation in public procurement. To give SMEs a fair chance, the directive says that contracts must not become larger than necessary. This means that procuring agencies will have to explain why specific contracts are not split into separate contracts per construction stage or per lot. To this end and to enhance competition, procuring authorities should in particular be encouraged to divide large contracts into lots. Such division could be done on a quantitative basis, making the size of the individual contracts correspond better to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specialisations involved, to adapt the content of the individual contracts more closely to the specialised sectors of SMEs, or in accordance with different subsequent project phases.

Some participating countries, such as Sweden, have mixed feelings about this requirement. They fear ending up with small contracts not for geographical reasons or different contents within different parts of the project to be procured, but simply because of the prescriptions in the new directive. This fear might become reality. In other countries, such as the Netherlands, requirements regarding contract size are even tougher in national legislation than they are in the new proposed directive. The national legislation is not expected to be changed and in general, the Dutch NRA has little difficulty in explaining why specific contracts are not split up into parts.

Except for Italy, none of the procuring agencies expects the new directive to influence SME participation in their countries. The Italians expect that the regulations in the new directive will create new opportunities for SMEs and that their national regulations will be adapted to it. However, Italy also states that it already has too many procurement regulations. The Netherlands, Denmark, and Ireland do not think the current situation will change (the Netherlands already adapted its national regulations in 2013). In all countries, SMEs are able to take part in larger works as a subcontractor to the large main contractor or as part of a consortium.

4.4 Best practice: Ireland

The Irish government has mandated through government circulars that SMEs should be encouraged to participate in the procurement process and has introduced guidance as to how this can be facilitated. A high-level group has been set up through the Office for Government Procurement (OGP) to ensure that SMEs are fully engaged with public procurement. Some of the measures suggested by the OGP are described below.

Market analysis

Buyers should undertake market analysis prior to tendering in order to better understand the range of goods and services on offer, market developments and innovation, and what commercial models are available, the competitive landscape, and the specific capabilities of SMEs.

Subdividing contracts into lots

The subdivision of contracts into lots facilitates access by SMEs, both quantitatively (the size of the lots may correspond more closely to the productive capacity of the SME) and qualitatively (the content of the lots may correspond more closely with specialised sector of the SME).

Consortium bids

SMEs are encouraged to consider using consortia where they are not of sufficient scale for tendering in their own right. Standard template tender and contract documents for works contracts allow consortia to tender for public procurement opportunities.

Less use of restricted tendering and greater use of open tendering

Buyers are encouraged to use 'open tendering' for contracts where it is appropriate to do so.

Capacity requirements

Buyers should ensure that any capacity levels set for candidates/tenderers are relevant and proportionate to the circumstances of the particular contract. In addition, documentary evidence of financial capacity to undertake a project should not be sought by buyers early on in the procurement process and for many contracts, particularly in the works field, a set of standard prequalification questionnaires and standard declarations and instructions are available to tenderers.

Turnover requirements

Buyers frequently use the 'ratio of companies turnover to the contract value' as a measure when deciding whether a business has the financial capacity and strength to perform a contract.
In assessing the financial capacity of a supplier to do a job, buyers should not, as a matter of general policy for routine competitions, set company turnover requirements of more than twice the estimated contract value. For framework agreements, the likely size of individual contract drawdowns in the framework should be the turnover limit.

Framework agreements

Depending upon requirements, framework agreements can be divided into lots on the basis of geography, specialism, and/or value. This can encourage a range of SMEs to bid for business appropriate to their capacity, specialism, and location.

Financial measures: insurance, charging tendering opportunities

Buyers should only require such types and level of insurance as are proportionate and reasonable in the context of a particular contract. Furthermore, buyers must not use arrangements which involve candidates having to pay so as to access competitions for public contracts.

Feedback

For contracts above European Union thresholds for which the advertising of contracts in the Official Journal of the EU is obligatory, buyers are required to give appropriate feedback to companies who have participated in a public procurement competition. For all other contracts, buyers are strongly encouraged to provide written feedback. As a matter of good practice, in order to prepare for future bids, it will be very helpful to an unsuccessful tenderer to see which aspects of its bid were considered strong by the buyer and which aspects were considered weak.

4.5 Conclusion

The challenge to member states is to take into account these new measures without giving up the advantages of aggregated public purchases.

5 Qualification and selection of bidders

5.1 Challenges relating to qualification and selection

Qualification and selection is very important in order to guarantee that a number of good, qualified companies are included in the tender. Qualification focuses on the qualitative and quantitative requirements to ensure a company is suitable for the job. Selection is used to limit the number of companies that will submit a bid. For public clients, it is a challenge to formulate the best criteria in order to ensure that interested companies will actually be able to deliver the project. Equally challenging, however, is the checking of information submitted by the tenderer. Background checks are especially complicated if the tenderer is a foreign company. During the selection process, the challenge is to find an effective method of selecting a small number of tenderers from a large group of interested companies and to find an optimum balance between competition and costs.

5.2 Purpose and limitations

In European Directive 2004/18/EC, the conditions and the qualification criteria were defined for the selection of companies that have the ability to perform the contract in a correct manner. By means of the assessment of the contractor, its past portfolio, and available resources potential, procuring authorities were able to estimate whether tenderers were capable of delivering the work they were bidding for. If economic operators did not meet the standards, procuring authorities were either obliged or allowed to exclude them from the procedure. Thus, contracting agencies reduced the risk of the contract not being executed in a proper manner when awarded, and reduced the transaction costs since fewer bids were made and had to be evaluated.

The rules and regulations for these pre-selective grounds can be found in Articles 45 to 48 of Directive 2004/18/EC.

Grounds for exclusion

According to these articles, it was obligatory to exclude economic operators that had broken the law in the past (for example: participation in a criminal organisation, corruption, fraud, or money laundering (see Article 45.1)). Procuring agencies could also decide to exclude bidders who had acted irresponsibly in the past (examples include bankruptcy, grave professional misconduct, non-payment of social security contributions and/or taxes (see Article 45.2)).

Qualitative selection criteria

Furthermore, procuring agencies could reduce the number of tenderers to the tender by stipulating qualitative selection criteria. Unlike the grounds for exclusion, these criteria did concern the economic operators interested in taking part to the tender.

Qualitative selection criteria could be used to exclude tenderers who lacked the ability to perform the task. For example if they were not qualified to pursue the professional activity (Article 46), had a poor economic/financial standing (Article 47), or lacked the technical and/or professional ability (Article 48). The articles gave examples of how economic operators could prove their suitability, standing, and ability (and thus what kind of proof procuring authorities might ask for when they make use of qualitative selection criteria).

5.3 Current practice in the participating countries

All participating countries transposed Directive 2004/18/EC into national law. After the obligatory exclusion of tenderers based on negative criteria, selection is mainly used as a means of reducing the number of tenderers and thus lowering transaction costs in cases where the procuring agency expected many economic operators to be interested. Greece only makes use of qualitative selection in the case of high-importance/significant specialisation.

The most frequently used criteria to evaluate the capabilities of tenderers are reference projects (seven out of eight countries), experience (six out of eight countries), and financial criteria/cash flow (six out of eight countries). Other criteria include past performance (Greece, Poland, Estonia, and Ireland), technical/economic capacity (Italy), and the experience of key personnel (Poland and Ireland).

Pre-selection

Only a few agencies make use of pre-selection (tenderers are selected once for a series of forthcoming tenders. When selected, only the award criteria are used in each tender). In Italy and Ireland, pre-selection is used in all/the majority of tenders. Poland, Estonia, the Netherlands, and Sweden make use of pre-selection in specific cases (framework agreements and engineering services in the Netherlands; rail projects in Sweden). When used, the most popular criteria are experience, financial potential, and reference projects.

Self-declaration

Although all countries accept the self-declaration of tenderers, these declarations are not verified in all countries. In Denmark, the agency knows most of the tenderers, so verification is not necessary. In Sweden and Estonia, declarations are only verified if the agency believes it is necessary to do so. In Italy, Ireland, Poland, Greece, and the Netherlands, self-declarations are verified by:

- asking for standardised and original documents,
- verifying with other (mentioned) procuring agencies,
- contacting the contractor/checking on the web (Estonia), and
- checking against the trade register (Netherlands)/statutory declarations (Ireland).

Issues

The issue most frequently encountered by participating countries is the question as to whether the evidence supplied for selection criteria is true or false. For example, the submitted documents are sometimes very old. Moreover, information supplied by foreign companies (e.g. obligations relating to taxes, social security contributions, bank warranty letters) is especially difficult to verify. Another problem is worth mentioning: both the financial and personal means of third parties that a tenderer will be able to use. For example, when a tenderer is a consortium with partners from the same capital group, they will all be funded from the same main funder and their personnel will also come from the same organisation. This could become a risk, if the funder/organisation collapses or accepts too many projects. This is, however, difficult to verify at the tender stage. Finally, agencies generally find it difficult to describe the conditions to be met/the selection criteria.

5.4 Changes under the new directive and expected challenges

In the new directive, although the use of the European Single Procurement Document (ESPD) is not obligatory, procuring agencies will have to accept this self-declaration form. Self-declaration is used to exclude and select. The problems with verification of self-declaration have been acknowledged, so under Directive 2014/24/EU, the European Commission will draw up a format for a single procurement document in all languages. The format will be made available via e-Certis, an information system that provides access to all obligatory certificates and other documents in all member states.

Procuring agencies may ask for evidence of what has been declared at any time during the procedure. One obstacle is that the agencies might not be allowed to ask for documents to prove the fulfilment of requirements of suppliers and constructors if these documents can be obtained free of charge by the client on, for example, an Internet website or if these documents have previously been given to the agency. It will be difficult for NRAs to make sure they have an overview of all documents previously sent to the organisation.

Another issue relating to the ESPD relates to the submission of offers by consortia. It is doubtful that a consortium will be able to submit one ESPD section IV because a consortium consists of more than one organisation. Furthermore, the requested information concerning subcontractors is currently limited to the participation of subcontractors by indicating the extent of the scope. In the ESPD, the award entity is obliged to show the percentage of participation, which could well be unknown. This raises the question as to whether or not a change of subcontractor forces submission of an ESPD for the new subcontractor.

To help procuring agencies, the new directive indicates that e-Certis can also be used to access the databases of other member states. Member states are obliged to update the data in e-Certis.

5.5 Best practice: Poland and Estonia

Best practice 1: Successfully completed reference projects (Poland)

The contractor must demonstrate that in the five years preceding the initiation of this process, and, if the activity period is shorter, during this period, it has at least completed as a contractor or subcontractor:

- two tasks involving the construction or reconstruction of roads in category A or S or GP, length of the road minimum …km, or with the value of ... million PLN gross
- two tasks involving the construction or reconstruction of any bridge structure with min. bay spanning of … metres and load for category A, length of the bridge minimum…metres

Usually the requirements do not exceed 80 per cent of the scope and value of the contract in question and are limited to two or three contracts performed in the correct manner.

Best practice 2: Insufficiently completed projects or terminated contracts (Poland)

The contractor must not have committed grave professional misconduct (defined as intentional misconduct by the contractor or relatively significant misconduct) in the three years preceding the initiation of this process, and if the activity period is shorter, during this period, in any of the tasks involving construction or reconstruction the roads of category A or S or GP, length of the road minimum …km, or with the value of ... million PLN gross

Inadequately completed projects shall be related to and proportional to the scope of the contract in question.

Best practice 3: Proof of the technical and professional ability of key personnel (Estonia)

Whereas in the past, the technical and professional ability of key personnel had to be proven in advance (criteria were part of the advance tender notice), today, evidence must be supplied after the signing of the contract. This saves time and gives tenderers the opportunity to hire personnel once they are certain of gaining the contract.

5.6 Conclusion

In conclusion, selecting bidders before actual bids are assigned is widely used as a means of reducing the number of tenderers and thus lowering transaction costs. Countries could learn from each other by looking at ways to (pre-)select tenderers. A solution for the verification of foreign information and self-declarations could be of assistance to all agencies.

NRAs expect that e-Certis will help them look at matters more objectively and will give more certainty to procuring authorities that have to deal with foreign companies.

In this matter, procuring authorities will be supported in the selection of contractors capable of making a bid. As will be shown in the next chapter, procuring authorities feel the need to make a selection based on positive experiences. These experiences need to be looked at more objectively. The first step in this respect is the possibility to verify self-declarations.

6 Past performance

6.1 Challenges relating to past performance

The previous Directive, 2004/18/EC, contains grounds for excluding tenderers who are not expected to be able to perform the task. Jurisprudence under the previous directive made a distinction between the selection phase and the awarding of the contract. Selection is about the quality of the company (potential bidder) and the process of awarding the contract is about the actual bid. This means that past performance (which considers the bidder and not the bid) can only be used in the selection phase. Grounds for not selecting a tenderer on the basis of past performance include misconduct. However, public procurement procedures offer little assistance for the selection of companies with a satisfactory track record on projects performed in the recent past, although several procuring authorities would welcome such assistance. The challenge is to find an objective, transparent system that gives both new and foreign companies the opportunity to enter the system and that can be used within the scope of the strict selection rules in the directive. A measuring system for past performance (both satisfactory and unsatisfactory) could help to build a database with performance data for companies working for a certain public client or with performance in a market segment.

6.2 Current practice regarding the use of past performance

The previous directive, 2004/18/EC, outlined the cases where a procuring authority could exclude a tenderer from a procurement process (e.g. corruption, insolvency). This was designed to ensure that only tenderers who were able to perform the task were included.

Nevertheless, there are times when public clients are not satisfied with the performance of contractors. Procuring authorities may then want to exclude these contractors from a tender procedure or to benefit contractors who perform better. Current public procurement procedures offer little help in selecting companies with a satisfactory track record on projects completed in the recent past.

This is the reason why the use of past performance as a criterion for participating in tenders differs throughout Europe:

- Malta, Sweden, and Denmark do not currently make use of any form of past performance measures to benefit or disadvantage tenderers.
- In Estonia, Poland, and Greece, past performance is part of the pre-qualification system. Reference projects from the past may show that a contractor is qualified for a contract.
- In Ireland and the Netherlands, past performance is used as part of MEAT; past performance measures are used to indicate an aspect of quality, in addition to the bid itself.

Most of the agencies in these countries include contact evaluations in their past performance measurement. Greece, Italy, Ireland, and the Netherlands are trying to extend this to a reputation measurement, including more general aspects of performance, such as quality assurance, effective communication, etc. This has long been a point of discussion, however, as legislators are keen not to risk the introduction of subjectivity into procurement processes in order to prevent reinforcing the danger of corruption in public tenders.

In Italy, some procuring authorities are implementing their own vendor rating systems. However, these are not recognised by national legislation. Likewise, the Netherlands, Sweden, and Poland

have developed systems with only their own performance measurements. Meanwhile, Estonia, Ireland, and Greece combined their systems with other procuring agencies. The agencies in these countries not only use their own experience with contractors, but combine them with the experience of other procuring agencies.

6.3 Changes under the new directive and expected challenges

The new directive, 2014/24/EU, has introduced a third way of taking past performance into account. Whereas the past performance measures that are currently used are based on rewarding positive performance in the past, the new directive introduces the concept of the penalising of negative past performance. Besides creating a new option, this could also lead to discussions about definitions.

6.3.1 Poor past performance as grounds for exclusion

It can be said that the new directive broadly maintains the rules in Article 45.1 of the previous directive (2004/18/EC) as to when a procuring authority may exclude a tenderer from a procurement process (e.g. corruption, insolvency). However, Article 57 of the new directive extends the list of discretionary grounds for the exclusion of economic operators that a public purchaser may decide to use to exclude any economic operator from participation in a procurement procedure. More specifically, in accordance with Article 57.4.g, procuring authorities are explicitly given the possibility of excluding a bidder that has in the past exhibited *significant or persistent deficiencies in the performance of a substantive requirement* during the execution of a public contract. The provision states that this previous poor performance must have resulted in *an early termination of the contract, damages, or other comparable sanctions*.

It is also worth noting that the directive provides for defence against exclusions. If a tenderer can show that adequate measures have been taken to resolve the issues underlying their exclusion, then they cannot be excluded. However, this is not the case when the exclusion results from a 'final court judgement'.

6.3.2 Difficulties

As we have seen from the practice in accordance with the previous directive, 2004/18/EC, it is difficult for procuring authorities to take past performance into account. This is mostly because monitoring the contractor's performance introduces an element of subjectivity into public procurement. This is probably the reason why the practice of rewarding positive past performance has not found its way into the new directive. Instead, the new directive introduces past performance as a type of insurance, assuming a proper functioning of the qualification system. For this reason, TG S6 foresees that the new directive will, once transposed into national law, undoubtedly involve a review of the current qualification system of economic operators on the basis of homogeneity and transparency. It also anticipates the introduction of measures relating to the rewarding of past performance based on objective and measurable parameters and on the definitive findings concerning compliance with the time and cost of execution of completed contracts.

Even though poor performance seems to be adequately defined in Article 57 of the new directive, TG S6 expects there to be discussions about definitions. Firstly, what amounts to 'significant or persistent deficiencies'? What is a 'substantive requirement' of a contract, and what evidence will be sufficient to satisfy a procuring authority that a bidder is 'reliable' for these purposes?

Secondly, what constitutes a 'sanction'? It is common practice in procurement to take some sort of corrective action when even a minor breach is committed. This might, for example, include agreeing to small discounts or offering additional products or services free of charge in order to repair the relationship. As a result, a number of safeguards have been introduced by the new directive to ensure that suppliers are not unreasonably penalised. The penalties, for example, must relate to 'significant or persistent deficiencies' in performing a 'substantive requirement'.

Bidders should be able to take 'self-cleansing' steps in order to avoid exclusion from public tenders, provided their exclusion does not stem from a final judicial or administrative decision. This will provide extra impetus for firms to stay on top of their compliance in order to be able to take steps in advance of tender processes to ensure continued inclusion. This could possibly include payment of compensation to harmed parties, organisational changes, and the implementation of new control systems. At the same time, this may support the case for performance certificates which performers of public contracts would keep carefully in order to be able to demonstrate jobs well done.

6.4 Best practice: Italy

Since 2008, The Italian NRA (ANAS) has used past performance to consolidate the monitoring of the entire procurement cycle through the evaluation and monitoring of supplier performance.

In particular, this vendor rating system is mainly used to:
- contribute to the pursuit of strategic business objectives through the quality of services provided by suppliers;
- permit the evaluation and proper management of the supply channels;
- allow the logic of the criteria for choosing suppliers to be set;
- create clear reporting clarity in the supplier/product/customer report.

This *ex post* evaluation of benefits stemming form vendors' actions is carried out by ANAS, where the KPIs are:
- price obtained in the negotiation
- timeliness
- delivery reliability
- quality of goods and services
- innovative capacity
- flexibility
- compliance with legislation on security and human rights

Unfortunately, this system was not recognised by the legislator and is, therefore, only used by ANAS to indirectly stimulate quality in performance.

ANAS believes that the transposition of EU directives presents an important opportunity to conduct a full review of the qualification system of enterprises, more inspired by profiles of substance than purely by formal aspects.

This is an opportunity that, if properly grasped, can play a useful role not only in terms of the efficiency of procurement but also, and above all, for the prevention of corruption and administrative lawlessness. This is a response to a principle that, if illegality must be sanctioned,

there must conversely be a reward for those who have behaved according to the highest standards of fairness and respect for the rules.

The reward will obviously not only be recognised according to the moral parameters of the company and the people who are part of it (such as absence of convictions, of preventive measures, etc.), but also according to parameters linked to entrepreneurial ability in the broad sense of the term (such as punctual completion of the project within the budget).

The objective of the reward was, moreover, already pursued by the National Anti-Corruption Authority (ANAC), in the current regulatory system, through the enhancement of the institution's rating of legality, provided by Law No.1 of 2012 that currently applies only to companies with a certain level of sales, for the granting of loans by the public administration or access to bank credit; extending its field of operation to further measures of rewards related to moral and entrepreneurial parameters.

6.5 Conclusion

Past performance is basically a selection tool. It assesses a company's past performance and therefore serves as a means of finding parties that are suitable to submit a tender. Past performance is not intended to play a role during the award process, when the focus is on the tender. Past performance receives a very narrow interpretation in both the previous directive, 2004/18/EC, and in the new directive, 2014/24/EU. On the one hand, the role of past performance is designed to exclude companies that have been convicted in the past. On the other hand, companies are given the opportunity to use past performance to demonstrate that they are capable of carrying out certain work by providing reference projects .

TG S6 regrets that past performance is not substantiated in more detail in the new directive. In addition to penalties (exclusion) for poorly performing companies, it is also desirable to give companies that perform well a better chance during the selection process. Past performance scores can, for example, be used when ranking tenderers during the selection process. Use of this kind of subjective past performance score has not been permitted up until now. Fear of the unequal treatment of companies (new entrants and foreign companies) seems to play a role in this regard. The use of reference projects is not a solution as companies will always present their best projects and omit the weaker ones.

With respect to past performance, TG S6 is considering making a proposal to give procuring authorities more space to include companies' performance data in the selection phase and thus to broaden the scope of past performance in the directive.

7 MEAT

7.1 Challenges relating to the use of MEAT

Traditionally, many projects in the building sector are tendered on the basis of the lowest price. Given that public organisations spend taxpayers' money, it seems reasonable to use price as the decisive criterion when choosing a bidder. However, the responsibility of public organisations is broader than this. Factors such as the quality of the works, working conditions, and the environment also have to be taken into account. The most economically advantageous tender (MEAT) criterion enables the procuring authority to take account of criteria that reflect qualitative, technical, and sustainable aspects of the tender submission as well as price when reaching an award decision.

Many road infrastructure projects are still awarded on a lowest price criterion. One solution is to award contracts on the basis of the best quality–price ratio instead of on the basis of lowest price. However, this means a shift in thinking for public clients and contractors. The challenge is to find qualitative criteria that can be quantified and are distinctive, a system of weighing the qualitative criteria, and a scoring method.

7.2 Purpose and limitations

The previous directive stated that contracts should be awarded on the basis of objective criteria, which ensure compliance with the principles of transparency, non-discrimination, and equal treatment and which guarantee that tenders are assessed in conditions of effective competition (number 46 of the explanation of Directive 2004/18/EC). The previous directive translated this point into two awarding methods in Article 53.

The two methods are the 'most economically advantageous tender' (MEAT) from the point of view of the procuring authority and 'the lowest price'. To determine the most economically advantageous tender, the procuring authority can use various criteria linked to the subject matter, for example quality, price, technical merit, functional or environmental characteristics, cost-effectiveness, delivery date, etc.

The MEAT method provides procuring authorities with the opportunity to use objective non-financial criteria as award criteria. In this way, procuring authorities can pursue a good price–quality combination.

7.3 Current practice in participating countries

Use of MEAT

MEAT is used in all participating countries. However, in Sweden it is only common in rail projects (and rarely in road projects). Poland and Estonia only make use of MEAT in a few building contracts (Poland uses criteria other than price—duration of the warranty period and of the contract—but limits the term MEAT to qualitative technical criteria). In Malta, MEAT is not used for road projects, but for services. In the other five countries (Ireland, the Netherlands, Denmark, Greece, and Italy) MEAT is the standard procedure.

All countries combine price and quality in many of their road contracts, where price is given a weight of 20–70 per cent and quality 30–80 per cent.

There is only limited standardisation in MEAT. The standardised aspects of MEAT are:
- weighting method (Sweden, Denmark, Estonia, Ireland, and Greece (by law))
- percentage quality: price (Sweden, Denmark, Italy, Estonia, and Ireland)
- criteria (Denmark, Estonia, Ireland, Poland, and Greece)
- number of criteria (the Netherlands and Denmark)

Criteria

The most frequently used criteria in the participating countries are:
- delivery time (five countries)
- experience of key personnel (four countries)
- project organisation (three countries)
- durability (three countries)
- past performance/experience (three countries)

Other criteria used are extra guaranty (Italy and Poland), technical solution (Denmark), limitation of traffic nuisance during construction (the Netherlands), partnership/cooperation (the Netherlands), risk management (the Netherlands), and quality system and construction methods (Ireland).

Evaluation of MEAT is not very common. Of all participating agencies, ex ante evaluation of MEAT (exploration of expected effect of MEAT design before the tender is started) only takes place in Sweden, Italy, Ireland, the Netherlands, and Denmark. Ex post evaluation of MEAT (evaluation of MEAT effect after tender) is only carried out in Ireland, the Netherlands, and Denmark.

Contractors are not often penalised/rewarded with a bonus when they (do not) live up to their MEAT promises:
- Ireland only imposes penalties/grants bonuses in the case of late/early completion.
- Poland, the Netherlands, and Denmark penalise when execution is not in line with the bid.
- Other countries do not give bonuses or impose penalties at all.

7.4 Changes under the new directive and expected challenges

One of the goals of the new Procurement Directive, 2014/24/EU, is to help public authorities obtain a better balance between price and quality when awarding contracts. The aim here is that price should no longer be the only or the dominant criterion. The directive provides a number of assumptions to help public authorities formulate award criteria.

a) Procuring authorities shall base the awarding of public contracts on the most economically advantageous tender (MEAT).
b) The MEAT shall be identified on the basis of the price or cost, using a cost effectiveness approach such as life-cycle costing. It may also include the best price/quality ratio assessed on the basis of criteria such as environment, social aspects, etc., linked to the subject matter of the public contract in question. Such criteria may comprise:
   - quality, including technical merit, functional and aesthetic characteristics, accessibility, social, environmental and innovative characteristics, and trade and its conditions;
   - organisation, qualification, and experience of the staff assigned to perform the contract;
   - after sales services, delivery conditions such as date, process, and period of completion.

c) Award criteria shall be considered to be linked to the subject matter of the public contract.
d) Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the procuring authority.
e) The procuring authority will specify the relative weighting of the chosen MEAT criteria.

The fact that the criteria have to be linked to the subject is an important feature. The division between the selection criteria and the award criteria is related to the point of engagement. Selection criteria must relate to the company that is willing to make a bid during the tender; the award criteria must focus on the subject matter.

7.5 Best practice: the Netherlands

The Dutch Procurement Law (April 2013) requires public clients to use MEAT.
The Dutch NRA uses MEAT in almost 80 per cent of its tenders. The most frequently used MEAT criteria in the Netherlands are execution time (of the project), planning, sustainability, risk management, and social return. The Dutch NRA uses the criteria 'flow of traffic', 'sustainability', and 'project and risk management' most frequently.

The use of MEAT by the Dutch NRA is based on three main assumptions:
The principle of MEAT applies unless..., which means all contracts are awarded on the basis of MEAT, unless there is a specific reason not to use MEAT.

Maximum of three MEAT criteria, which guarantees a focused use of quality criteria.
Corporate criteria (at least one should be chosen):
1 Level of impact on public (flow of traffic)
   - traffic jams at execution (highways)
   - obstructions (waterways)
2 Sustainability
   - CO_2 ladder (sustainable management)
   - life cycle costs
   - material choices of design (DuboCalc software)
3 Project specific
   - project risks/opportunities

To award a tender on the basis of the MEAT, decisions have to be made about:
- how to score quality criteria
- when to use standard methods for certain criteria, such as the CO_2 ladder
- the relative weighting of different criteria
- the percentage quality compared to price in the final calculation
- a bonus and penalty system during execution

The weight of each MEAT criterion is decided on individually by project teams. Based on the needs of the public client, the project team estimates what it is willing to pay for quality, when the maximum quality level is offered. Within the range of potential criteria, the project team should look for criteria that will allow contractors to differ from other tenderers. Criteria that make this difference AND mean a lot to the client will be given greater weight. If criteria neither make a difference nor are meaningful to the client, they should not be included in the tender at all.

For some social or environmental criteria, a so-called 'ladder' is used to score a company on different social aspects, such as sustainability or social return. A ladder usually has five steps.

Each step defines actions taken by a company to achieve a certain level of realisation of a social goal (for example: the reduction of CO_2 emission levels or the employment of people with a disability). Companies that comply with a certain level will receive a financial reduction on their bid when the bid is scored. The higher the level, the larger the bonus.

In the Netherlands, a ladder is used for the reduction of CO_2 emissions; there are two ladders in development for construction safety and for social return.

In general, the qualitative elements are scored as a financial deduction from the bid. The final score is the difference of the bid and the reduction on the basis of the quality criteria.

Quantitative example:

Tenderer	Bid price (X)	€ rank	Value of bid quality (Y)	Q-Rank	Sum X minus Y	MEAT rank
Company C	€ 3,016,000	1	€ 375,000	2	€ 2,641,000	2
Company D	€ 3,291,000	2	€ 312,500	3	€ 2,978,000	3
Company A	€ 3,418,000	3	€ 0	4	€ 3,418,000	5
Company E	€ 3,600,000	4	€ 1,125,000	1	€ 2,475,000	1
Company B	€ 3,651,000	5	€ 0	4	€ 3,651,000	6
Company F	€ 3,737,000	6	€ 375,000	2	€ 3,362,000	4

Findings:
The MEAT is often also the lowest price tender, despite the fact that the contractor has added extra quality on account of the MEAT criteria. More quality has a relatively minor impact on price. MEAT is a cost-effective investment. Most tenders (73 per cent) are won by the lowest price bidder. The additional costs of the tender are, on average, only 3 per cent, while the gains (in terms of bonus for the client) are 7 per cent, which is 2.4 times higher.
The penalty for not delivering during the execution phase is 1.5 times the bonus received during the tender.

7.6 Conclusion

The new directive will help make procuring agencies more aware of the possibility of including qualitative and social aspects in their tenders.

The regulations provide more direction for this. The effectiveness of MEAT is nevertheless determined by how countries substantiate the instrument.

- The right incentives and distinguishing criteria are required, otherwise MEAT will not provide any added value. Ensure that quality forms a major part of the score and ensure that these criteria really demand creativity from the tenderers so it is worth paying a higher price for better quality.
- To make it effective, MEAT must also be monitored and, where necessary, sanctioned during implementation. If this is not done, it becomes attractive to make empty promises, thereby undermining the effectiveness of the instrument. Monitoring the application of MEAT commitments in the execution phase is difficult. Sanction policy is not yet applied.

If these two points are substantiated, MEAT can be a helpful procurement tool: companies are given an incentive to think about more efficient and smarter solutions. They often find process innovations that help to substantially reduce costs.

8 Social return on investment

8.1 Challenges concerning social return on investment

Procurement is not just seen as a way of purchasing goods and services. Public purchasers are expected to create more returns on public investment than that. Besides environmental, sustainability, and social issues related to public projects, other public goals are expected to be reached through procurement. During the economic recession, some NRAs were asked to provide learning opportunities for the unemployed or even create new jobs as part of the procurement process. In some countries, this is called 'social return' or 'social return on investment'. Policymakers like to use the purchasing power of government to increase the importance of these social and political wishes.

Inspired by the report '@BERTJAN', the new directive expresses the increased importance of bringing broader political, social, and economic responsibilities into the procurement process. In the information, the selection, and the awarding process, attention must be paid to environmental, social, and labour standards to increase the social return on investment. The challenge for the member states is to increase this social return on investment in a durable way. This means the focus should be on programmes that last longer than just the procured project and respect existing jobs.

8.2 Current practice in participating countries

Under the previous directive, a few members of TG S6 experimented with social return on investment in some of their projects. Sweden and Denmark started to include social return in their MEAT criteria. In the Netherlands, the government is working on a policy to use employment of underprivileged people as a selection criterion. However, it is not being used on a large scale. This is not because the previous directive limits opportunities, but because it is difficult to find durable solutions without supplanting existing jobs. If social return is used in selection and if a company has a good reputation in social programmes, it should be possible to use this fact as a bonus in the tender stage, for instance the number of unemployed people trained or in work experience programmes at the company during the previous year. In the Netherlands, procuring authorities are working on a social return performance scale to grade companies. If used for awarding the project, the plan should explicitly involve training or employing a number of unemployed people. One difficulty with social return in tenders is that all participants in the tender will have to come up with a plan (which means agreements with unemployment agencies), while only one of these plans will be executed. This means relatively high tender costs and an inefficient use of the unemployment agencies.

8.3 Changes under the new directive and expected challenges

The new directive expresses the importance of bringing broader political, social, and economic responsibilities into the procurement process. However, other than stating in the information, the selection and the awarding process that attention has to be paid to social and labour standards, the new directive will not provide either help or burdens for social return. The success of social return will depend on the political pressure exerted in this area. NRAs will have to use best practice to develop workable systems.

8.4 Best practice: Sweden

In Sweden, there are examples of a few municipalities using public procurement as a way of reducing unemployment in their towns. These municipalities normally struggle with high unemployment. The social requirements have been applied primarily in real estate maintenance and property service contracts. The suppliers have been required to employ people from the target groups (young people, foreign-born people, or people with disabilities). These examples were all small and local, and have consequently had mainly a small and local impact.

In June 2015, the Swedish Transport Administration received a commission from the Swedish government. The main objective of this commission was to increase employment of people who have difficulties entering the labour market. The transport administration was instructed to investigate how social requirements could be formulated in the supplier contracts to ensure that suppliers would be obliged to offer apprenticeships, internships, and/or full-time employment to unemployed people. The administration was thus the first authority in Sweden to investigate both how these types of requirements could be applied nationally and the impacts and consequences of introducing them in contracts worth SEK40 million (approx. €4 million) yearly.

Up until now, the Swedish Transport Administration has adopted few social requirements. This is in line with the administration's strategy of purchasing only to meet functional needs. In the few cases that exist, the Swedish Transport Administration has required suppliers to offer apprenticeships in the contracts with the goal of managing the risk of long-term skills shortages in the construction industry. This criterion has been found in contracts with high contract values and long contract periods.

Since early 2016, the Swedish Transport Administration has been implementing employment requirements in all its contracts as a consequence of the results and conclusions of the government commission, which was presented and handed over to the government in November 2015.

In all contracts lasting more than 6 months that require at least five full-time workers, the minimum requirement is to meet with the Swedish Public Employment Service to investigate possibilities to employ unemployed people in the specific contract. The supplier is, however, not obliged to employ anyone, it just needs to assess the supply of unemployed people. A bonus applies to all contracts where the supplier gets a subsidy from the transport administration for every person the supplier employs from the target group. According to the requirements, the following people are eligible for a job (target group):

- unemployed people who are registered at an employment office (not necessarily the Swedish employment office);
- people who must undertake a traineeship or apprenticeship as part of on-going education;
- people who have jobs that do not meet their training and/or experience/skills, but that can be matched to a position that will be offered in the contract.

For construction contracts above SEK50 million (€5 million), the supplier must employ a predetermined minimum number of people (an average of one person per SEK50 million). For consultancy/service contracts, the guideline is one person per SEK25 million (€2.5 million). In contracts where the supplier is procured early in the planning or design stage (ECI), the requirements still have to be developed jointly between the parties.

The requirements will initially be introduced in construction and consultancy/service contracts. Periodic penalty payments shall be applied if the minimum level is not reached. Bonus and penalty

levels are the same and are approximately 75 per cent of the cost of employing a person.

The Swedish Transport Administration estimates that this approach can create between 200 and 1,500 internships, apprenticeships, and full-time jobs per annum (including jobs subsidised by the Swedish Public Employment Service). The number will vary depending on the type of contract (e.g. work intensity, skills demand) and the availability of unemployed people with the appropriate profiles.

8.5 Conclusion

So far NRAs have limited experience with systems of social return. Social return has primarily a political background. Implementing social return in procurement requires a considerable effort on the part of procuring agencies and employment agencies. The risk for procuring agencies is that the effort needed to support a number of unemployed people is disproportionate to the impact of these efforts. This calls for efficient solutions where procuring agencies and unemployment agencies work closely. CEDR can be an effective forum for NRAs to share experience.

9 Abnormally low tenders

9.1 Challenges concerning abnormally low tenders (ALTs)

Since the start of the economic recession, most public agencies have been faced with abnormally low tenders. These tenders often lead to a lot of discussions and disputes during the contract execution stage. One of the central issues discussed in TG S6 was how to cope with abnormally low tenders, how to prevent them, and how to address them when they occur. Public clients have some experience of rejecting abnormally low tenders, but are also confronted with court rulings, pointing at the lack of evidence of ALTs presented by the procuring authority. The challenge for NRAs is to find methods of tendering where price is not a dominant factor and instruments that assess the quality of an abnormally low tender.

9.2 Disadvantages of low prices

Awarding a contract to the contractor who submitted a bid containing an abnormally low price may entail a series of problems. In addition to representing a serious threat to the correct execution of the contract, it may have a very significant adverse economic impact and entail additional (higher) costs of execution of public tasks. European and national legislation give procuring authorities the option to reject bids that are considered abnormally low. From a legal perspective, the issue of abnormally low tenders (ALTs) is complex since the concept is regulated (Article 55 in 2004/18/EC and Article 69 in the new directive 2014/24/EU) but ill-defined because EU directives do not provide any definition of an ALT.

The most common reason for contractors submitting abnormally low tenders is the desire to keep the company functioning on the market by obtaining the maximum number of contracts. A new contract may facilitate the survival of the company on the market, preserving the previous structure and number of employees, and sometimes opening up a new market sector for the entrepreneur. The desire to eliminate the competition certainly also plays an important role. However, low bids can also arise from other factors, such as errors in the tender documentation as provided by the procuring authority, incorrect estimations of risks or neglect of inflation costs by the tenderers, insufficient attention to contractual provisions such as penalties or obligations either within the contract or in other relevant documents, poor estimates by the client (not taking into account the current market reality). In addition, contractors all pursue different strategies in conducting operations and use different criteria for calculating profits.

9.3 Provisions for ALTs in (new) directives

Procedure to follow

Given the risks associated with the acceptance of abnormally low tenders, it is important for procuring authorities not just to examine the contractor's capacity to duly execute the contract, but also to check whether the object of the bid is consistent with the requirements of the procuring authority. Furthermore, the authority should examine whether it is certain or likely that the contractor will duly execute the object of the contract for the offered price on the terms specified in the contract. It thus prevents the procuring authority from awarding a contract to a contractor that does not ensure its due execution.

Nevertheless, the automatic rejection of bids that are lower than the level adopted by the procuring authority is not accepted. The procuring authority is obliged to identify suspicious bids (bids with an abnormally low price) and should then allow the contractors who submitted these bids to demonstrate the authenticity of their bids by requesting them to submit details that they deem relevant. The essence of the submitted explanations should subsequently be assessed and only then can a decision be taken to reject the bid (or not).

Feasibility of examination tools in directives and regulations

With reference to the regulations and guidelines contained in judicial literature, the examination of the feasibility of the bid price should be based on the mechanisms developed by law and on the related tools:

1 The right of the procuring authority to request explanations from the contractor, along with supporting evidence
The contractor called upon to submit explanations, including evidence, has to bear in mind that its bid will be rejected unless it provides explanations. The bid will also be rejected if the explanations provided and the evidence to support it do not confirm that the tender is not abnormally low. The explanations and evidence provided must be convincing in order to fulfil their function.
However, rulings in the member countries differ in terms of obligations with regard to evidence. These differences mean that procuring authorities in Europe find it more or less difficult to reject an abnormally low bid, depending on how the burden of proof is regulated in national law.

2 Sample aspects of the bid subject to this examination, contained in the directive
Evaluations depend on the specific case and always have to be conducted individually. The procuring authority conducts this examination by comparing, in general, the prices of particular elements of the bid with the prices of the corresponding items, accordingly, in the investor's cost estimates or in the planned costs of the construction works, as well as with the corresponding prices of cost estimate items in the bids of other contractors. Given that there is no uniform system for the breakdown of construction works, participating countries find it difficult to examine abnormally low bids, since calculations are often based on different designs (not just differences between the contractor's design and the design forming the basis for the agency's estimates, but also differences between the designs and technical solutions of the various bidders).

3 Evaluation of the explanations and evidence of the offered price of the bid, provided by the contractor
The request for explanations should always be specific, precise, and detailed, and should contain the legal basis for the request. The new directive, 2014/24/EU, explains that the requested explanations may relate in particular to the economics of the suggested method, the technical solutions chosen, and/or any exceptionally favourable conditions available to the tenderer, the originality of the work proposed by the tenderer, compliance with the provisions relating to employment protection and working conditions in force at the place where the work is to be performed, and the possibility of the tenderer obtaining state aid.
However, the directive lacks specific guidelines on the method of examination. Contracting agencies are especially concerned with the question as to how to examine whether the contractor has taken into account in the bid price the regulations relating to labour law, social and legal regulations, and environmental protection regulations (Article 18(2)).

4 Consultations
At present there are no practices for holding consultations in the form of meetings with contractors in order to discuss information contained in the explanations.

Automatic formulae and investigation duty

The European Court of Justice (ECJ) has ruled that it is a matter for member states to decide whether applying automatic formulae to identify ALTs is permissible or not. Jurisprudence indicates that the ECJ considers it acceptable to operate a system under which there is an 'anomaly threshold' of a certain percentage of the mean discount offered by tenderers from a pre-determined base price. For reasons of transparency, bidders should know beforehand what system is applied. The formulae can therefore be established either in national law or in the tender documents. Again, the exclusion of bids should not be automatic. Consequently, an automatic formula can only be used to identify tenders that are suspected of being abnormally low, and for which further investigation is needed.

In recital 103 of the new directive, 2014/24/EU, the description of ALTs remains the same as in recital 42 of the 2011 proposal apart from one phrase that is now missing, which suggested that 'in order to prevent possible disadvantages during contract performance, procuring authorities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices of other tenderers'.

It appears that in the process of discussing the proposal, the obligation of procuring authorities to investigate ALTs was rejected together with the mathematical standards that were originally a part of the proposal. Instead, the European Commission decided that it should be a matter for the member states to decide whether there is a duty for procuring authorities to investigate ALTs.

It remains undetermined at what level procuring authorities should be obliged to initiate an explanatory procedure. An obligation to investigate would not allow the procuring authority to refrain from examining the bid prices in justified situations, for instance when the procuring authority observes that it overestimated the value of the order compared to market prices, or when calculations with abnormally overestimated prices are submitted in the proceedings. Applying an obligatory examination based on automatic formulae without any consideration may be considered inefficient. In some cases, bids that are lower than the indicated thresholds should not be recognised as abnormally low when specific actual conditions are taken into account (such as when the procuring authorities conclude that their estimations were poor). An obligatory examination would then entail unnecessary time, money, and frustration, in particular since there is a lack of good practice with regard to the provision of explanations by the contractors.

What is considered abnormally low?

A critical point in the pursuit of addressing the problem of identifying ALTs is to determine which concepts among those trying to describe the term 'abnormally low' stand up best in court. It is important to emphasise that although the term 'abnormally low' seems to refer only to the price of the tender, this is not true, especially in the context of the most economically advantageous tender (MEAT) award mechanism. There have, for instance, been court cases where the number of hours of work necessary to provide the service were considered abnormally low, even though the bottom line price was not.

The European Commission's efforts to establish a framework to detect ALTs was unsuccessful. The proposed mathematical standard (which was part of the last negotiated proposal for a new directive in 2011) was not included in the final directive, 2014/24/EU. Interestingly, the article on ALTs (Article 69) is complemented by Paragraph 5 according to which '[u]pon request, Member States shall make available to other Member States by means of administrative cooperation any information at its disposal, such as laws, regulations, universally applicable collective agreements or national technical standards, relating to the evidence and documents produced in relation to details listed in paragraph 2.' Thus, it appears that the European Commission recognises the need to enhance the understanding of what constitutes an ALT and is trying to stimulate cooperation on the basis of exploiting knowledge and procedures for the detection of ALTs.

9.4 Current practice in participating countries

Implementation

In most countries, the conditions for the tender contain stipulations concerning ALTs. The text of these conditions is roughly the same as in the EU directive. In addition to the directive, the Dutch NRA has regulations for contractors who discover that their bid might be too low to be real. These regulations (called 'withdrawal regulations') give those contractors the option to withdraw their bid. To prevent contractors from withdrawing too often, contractors have to pay half of the difference between their bid and the second bid to the procuring authority. Consequently, not one single bidder has made use of the withdrawal regulation thus far.

Italy only audits contracts of cross-border interests for ALTs (works exceeding €1 million, services and supplies exceeding €100,000).

Identifying an ALT

The question then, is how agencies identify a bid that is considered abnormally low. All agencies state that ALTs are identified by means of a comparison of bids with the estimated value of the contract and with other bidders. In addition to this, the procuring authority in Denmark compares the bid with its own monitoring data on price level, competition, and market conditions. This is done before, during, and after the tender.

Proving an ALT

Several methods are used to prove an ALT. All agencies use mathematical criteria followed by a discussion with the bidder when the bid is considered abnormally low. The bidder then needs to explain to the procuring authority:

- actual cost, conformity, efficiency, innovations, technical solutions, commercial freedom of tenderer (competitive considerations), etc. (the Netherlands),
- costs of workforce, materials, work vehicles and equipment, transportation, productivity, profit enterprise (Italy and Ireland),
- other explanations (Malta, the Netherlands, and Italy)

However, all countries agree that it is difficult to prove that a bid is abnormally low.

Frequency of ALTs

In reply to the question as to how often procuring agencies identify bids as possible ALTs, only one agency answered 'Never'. This was Greece, where the bidder has to submit Letters of Guarantee

for larger amounts (inversely proportional to how low it bids) when a bid is considered to be too low. In the other countries, ALTs are rare (Malta and Denmark), happen in about 20–40 per cent of the bids (Netherlands and Ireland), or more frequently (Poland).

In the Netherlands, contractors tend to fight the procuring agency's assessment that their bid is abnormally low (there were four ALTs in four years, and all of them went to court). In Italy, contractors almost always manage to convince the procuring agency that their bid is realistic. In Malta, contractors sometimes go to the public contract review board, and in Ireland some ALT indications end up in negotiations. Court cases concerning abnormally low tenders are therefore rare.

Since Ireland, Denmark, and Greece did not have (m)any court cases concerning ALTs, these participating countries could not tell how difficult it is to convince a judge that a bid is abnormally low. Malta and the Netherlands experience difficulties convincing judges. In Malta, it is hard to prove an ALT within the context of the current national legislation. In the Netherlands, the courts do not have insight into actual costs. They also value commercial freedom highly. ALTs are sometimes caused by a lack of information, and then the court rules that it is the procuring agencies 'own fault' that bids are abnormally low.

Execution stage of projects awarded to an ALT

All participating countries indicate that they usually experience problems during the execution of projects that were awarded to a bidder who submitted an ALT. Several problems arise:
- changes in key personnel, working method, and specifications (Malta and Greece)
- the contractor is difficult to manage/difficult relationship on site (Ireland)
- the contractor seeks opportunities for claims (Malta, the Netherlands, and Ireland)
- the contractor minimises performance (the Netherlands, Greece, and Ireland)
- sometimes: non-conformity (the Netherlands and Greece)
- delays: time pressure makes the NRA pay more to get the project done (Greece)

Solving problems caused by ALTs

Given that the costs to society resulting from ALTs are high, procuring agencies are eager to find a solution. During TG S6's meetings, several ideas were discussed, some of which each procuring agency will be able to perform on its own, while others require joint action or a question to the European Commission:
- the introduction of a clear mechanism in the directive to quantify a tender as ALT (Malta and Ireland)
- more guidance on how to deal with ALTs (the Netherlands)
- award/selection criteria that reward quality instead of price (Denmark)
- market knowledge (Denmark)
- good relations with suppliers (Denmark)
- only procuring complete and mature projects (Greece)
- powerful supervising authorities (Greece)

9.5 Conclusion

Given the difficulties that CEDR members face in proving abnormally low tenders, TG S6 proposes that CEDR acts on Paragraph 5 by exchanging information with regard to:

- average prices of road construction and the provision of investor's oversight services between the agencies participating in CEDR;
- incorrect assumptions or practices of agencies and contractors with regard to valuation of bids (in technical, economic, or legal terms);
- non-completed contracts or contracts unduly performed as a result of the offering of an ALT.

Furthermore, the TG suggests that NRAs:

- perform a joint evaluation of the behaviour of both contractor and agency within contracts with an abnormally low bid;
- make available internal information such as statutory regulations, implementing regulations, commonly applied collective systems, or national technical standards concerning evidence and documents submitted in connection with the aspects related to the examination of an abnormally low bid price.

All these actions are helpful when transposing the new directive into national law. Furthermore, this could lead to a standardised approach to bids that are considered abnormally low that could be discussed with the EU legislator. This may ultimately result in an amendment of the new directive, 2014/24/EU, to provide specific guidelines to examine bid prices in cases of suspected ALTs. TG S6 has started a working group with specialists from the NRAs that participated in TG S6 to take action on the above mentioned suggestions. First results are expected at the end of 2016.

10 Dispute resolution

10.1 Challenges concerning dispute resolution

Construction contracts can give rise to disputes both during the procurement stage and during the execution stage. Because of their nature, the resolution of disputes can be expensive and time consuming. In the case of procurement, prolonged dispute resolution can result in a project losing its funding or being significantly delayed. In extreme cases, it may even result in the project being abandoned. It is essential, therefore, that efficient dispute resolution mechanisms are utilised to expedite the dispute process and that the methods available should ideally be quick, effective, relatively inexpensive, and legally binding for the parties to the dispute. Except for the Remedies Directive, 2007/66/EC, there are no regulations for dispute resolution at European level. Current practice in European NRAs shows differences in handling disputes.

The challenge for all NRAs is to prevent disputes, and should they occur, to resolve them in a quick and fair, relatively inexpensive, not resource intensive, yet binding manner. The new directive does not provide any assistance in this respect. It is, however, possible for NRAs to learn from one another.

10.2 Current practice in participating countries

Construction contracts can give rise to disputes, both during the procurement and the execution stages. The mechanism by which disputes relating to procurement are to be resolved, are usually specified in the Instructions to Tender. The Conditions of Contract will usually set out the dispute resolution mechanisms for disputes during construction. In all cases, such mechanisms must comply with the provisions of national law, regularised by means of government regulation, which should be in accordance with the requirements of the Remedies Directive 2007/66/EC.

Disputes are handled in various ways in the participating countries. Procedures are specific, but have a certain similarity. Going to court is often the last step in a process.

10.1.1 Procurement-related disputes

Disputes relating to procurement can cause the award of a tender to be delayed and in some cases may even cause a project to be retendered. It is therefore important that processes are in place to deal with such situations quickly. In extreme cases, a procurement delay may result in a project losing its funding.

In respect of procurement disputes, the remedies available under the Remedies Directive set out the general framework open to tenderers to rectify perceived injustices in the procurement process. These are not available in respect of all public procurements, but only where the procurement concerns a contract that is within the scope of the directives. The term 'contract' in this regard covers all public contracts (including framework agreements, public works concessions, and dynamic purchasing systems).

The remedies under the Remedies Directive are only available where the applicant first notifies the procuring authority in writing of the alleged infringement.

The Remedies Directive sets out minimum time limits that must be respected by the member states in establishing their own time limits within which review may be sought. These are:

- in the case of decisions which have to be notified (e.g. decisions on selection and award), 10 calendar days (where electronic means are used with effect from the date following dispatch;
- 15 calendar days (where non-electronic means of communication are used), with effect from the day following dispatch (alternatively 10 days with effect from the day following receipt):
- the Remedies Directive provides that the communication should be accompanied by a summary of the relevant reasons. This implies that the time limit should not begin in cases where reasons have not been provided; and
- where the decision does not have to be specifically notified (an example would be a procuring authority's choice of procedure, which would be stated in the OJEU contract notice), the time limit must be at least 10 days from publication, commencing on the day after the date of publication (in the example given, the 10 days would run from the day after publication of the information in the OJEU).

Clearly, the processes to be adhered to are quite onerous on a tenderer. Some countries (e.g. Ireland, Denmark, and Italy) have formal or informal processes that allow dialogue/discussion at the initial stage of the dispute but ultimately, failing resolution procurement disputes, end in some form of litigation.

Bearing in mind the requirements of the directive, arbitration can in some countries come first as a dispute resolution mechanism during the procurement stage, this then being followed by the courts (Poland, for example. According to the ECJ, the Polish National Appeal Chamber is recognised as the first instance court in the meaning of Remedies Directive. It is a mandatory step before court, which is the second instance). In other countries, the courts are the only remedy, which can result in consequent delays and significant cost.

It would seem that the majority of disputes in most countries centre around the issues below:

- procurement method, documents, or procedure (Ireland and Sweden)
- qualifications of suppliers (Sweden and Estonia)
- abnormally low tenders (Poland)

From the survey of participating countries, it seems that if procurement disputes are not settled prior to going to court, then a dispute can typically take upwards of one year to resolve, which is not at all satisfactory from the developer's perspective.

10.1.2 Disputes during the execution of a contract

During the execution stage of a project, dialogue/negotiation is often the first step, after which, adjudication (UK), arbitration, and the court can follow.

Most procuring agencies indicate that court cases take more time and are more expensive than arbitration or dialogue. Consequently, all of them try not to end up in court. The Polish NRA has, however, good experience with the national courts. Given the quick response time and adequate solutions, the procuring agency in Poland rarely opts for arbitration, which is considered very expensive and time consuming in that country.

For construction disputes, all participants opt for negotiation. If negotiation is not successful, then arbitration and ultimately litigation in the courts is the only way forward. In general, when

construction disputes are not settled by means of negotiation, the way forward can be time-consuming and expensive.

10.3 Changes under the new directive and expected challenges

Typically, the new directive, 2014/24/EU, does not help NRAs find a resolution that is
1 quick and fair
2 relatively inexpensive
3 binding
4 not resource intensive

Given that the Remedies Directive 2007/66/EC is in place and applies to all sectors, it would not be realistic to expect a solution from the new Procurement Directive, 2014/24/EU. Therefore, sharing best practice under the current directives seems the most effective way to find convenient dispute resolutions. The Remedies Directive does not seem to take account of the fact that time-consuming resolutions are harmful to projects. An exchange of methods for resolving disputes fairly, in a relatively inexpensive and yet binding manner, might lead to a solution that could become common practice or even produce a revised Remedies Directive.

10.4 Best practice: Ireland

Procurement stage

During the procurement stage, it is worthwhile ensuring that the procurement stage criteria for selection and award follow the general principles of openness, transparency, and proportionality. Not doing so results in challenges to the procurement process.

It is important that an unsuccessful tenderer knows why its bid is unsuccessful.

During procurement, the Remedies Directive (Directive 2007/66/EC) requires member states to ensure that tenderers have access to effective and timely remedies when breaches of the procurement rules occur. What tenderers mostly want is the possibility to rectify breaches quickly and cheaply before the contract is awarded. Accessing remedies is often difficult and costly.

Some rulings of the Court of Justice, most notably in the Alcatel case, went some way towards improving the situation. The increased emphasis on transparency and the obligation to give reasons in the new Public Contracts and Utilities Directives (as well as freedom of information legislation) also made it easier for tenderers to uncover evidence of breaches when they occurred. It is therefore important that any system of appeal in the procurement process is:
1 open, transparent, and effective;
2 quick and relatively easy to access;
3 (most importantly) binding on the parties.

In order to ensure that all parties have confidence in the process, such a system will need to be given the force of law in the Remedies Directive and then be transposed into national law as appropriate.

It is important that the directives set out in clear and unambiguous requirements what constitutes appropriate processes and thresholds for realising these aims.

Execution stage

Dispute resolution procedures should be set out in the tender documents and should comply with national law. Procedures should ideally include informal methods of dispute resolution in the first instance.

Disputes generally revolve around the claims for extra payment due to the following issues:
1 inaccuracies or errors in quantities
2 inaccuracies or errors in specifications
3 errors in the data provided with the contract
4 inequitable risk transfer to the contractor

Many countries include dialogue/negotiation at a high level before any formal or informal dispute resolution processes are initiated (e.g. dialogue between the employer or the contractor at director level with a view to narrowing the issues in dispute or agreeing a method to move forward as quickly as possible and with the least possible cost and delay). The United Kingdom has such processes depending upon the form of contract used.

In Ireland, a mandatory process is about to be introduced for contracts over €5 million. This will include formal discussions at a high level, in an attempt to resolve the dispute before it is referred to the formal dispute resolution mechanisms. This mechanism was trialled a few years ago on larger contracts and was found to be quite effective in preventing disputes.

In the United Kingdom there is a mandatory adjudication process whereby a dispute is referred to a third party for decision, and the dispute process must be concluded, ideally within 28 days, or 42 days at most. Appeal to arbitration and court is provided for.

Similar provisions are on the statute books in Ireland and it is expected that these will be commenced in 2016. Arbitration can then begin, failing resolution at the adjudication stage.

With such mechanisms, it is very important that the courts give strong backing to the processes and show that frivolous or unjustifiable appeals do not succeed.

Experience in the United Kingdom shows that adjudication is certainly quick, effective, and quite inexpensive relative to arbitration, and that the number of adjudication decisions which are overturned in the courts is relatively small.

There are then processes for mediation and conciliation where a neutral third party is employed to assist negotiations between the parties and suggest a solution. Sometimes these solutions are binding in the interim, and can be reviewed at a later stage. These processes are in common use throughout Europe, with varying degrees of success.

Some countries provide for a process similar to the appointment of a permanent dispute adjudication board, as set out in the FIDIC forms of contract, which sits throughout the duration of the contract and decides on disputes as they arise. This has been found to be quite effective in terms of finality, time, and cost and has given rise to relatively few appeals.

Most countries provide for arbitration, but the results are mixed, and the process can be both very long and expensive. The general opinion is that it is far better than going to court, which is perceived as being a very long process and very expensive.

10.5 Conclusion

It is imperative that any forms of dispute resolution provided for within a contract are backed up by national law, are as quick and inexpensive as possible, and are final and binding, given the nature and complexity of the disputes to be considered.

It may well be that the most efficient form of dispute resolution is a dedicated division of the courts dealing exclusively with construction disputes, rendering final and binding decisions in a timely and cost-effective manner.

The exchange of experience within CEDR could well mean that the Irish method of dispute resolution becomes a common approach to disputes. It is up to us, the participating NRAs, to find out. If a common approach can be found, this might help CEDR influence a revision of the Remedies Directive.

11 Conclusion

11.1 Conclusion, based on the discussions in TG S6

In general, the new directive guides NRAs on the issues they face in procurement. The main topics of interest to the NRAs in TG S6 are innovation, qualification and selection, past performance, MEAT, social return on investment, abnormally low tenders, chances for SMEs, and dispute resolution. Although the new directive does provide guidance, this guidance is not as helpful as NRAs would have liked on all of these topics:

- Although more attention is paid to innovation, not all obstacles NRAs face are expected to be covered by the new directive. The directive provides NRAs with new procedures, 'Public Procurement of Innovation' and the 'Innovation Partnership'.
- The new directive contains new measures for small and medium-sized enterprises. The challenge facing member states is to take these into account without giving up the advantages of aggregated public purchases.
- In an open, more internationally orientated market, it is more difficult for procuring agencies to assess new (foreign) tenderers. For the purposes of qualification and selection, NRAs expect e-Certis to be of help when it comes to fact-checking the self-declarations submitted by bidders.
- In essence, past performance is a selection tool. It focuses on the performance of a company, not on the bid during the tender. In the new directive, past performance is still included as an incentive against misconduct and not as a tool for ranking companies on the basis of their performance. Member NRAs regret that the new directive still doesn't provide the option of rewarding good (past) behaviour.
- The new directive gives more direction to include qualitative and social aspects within tenders. The effectiveness of MEAT and social return on investment is nevertheless determined by how countries substantiate it. It is important that criteria on which a bid is scored are not only essential to the procuring agency (e.g. risk management, environmental impact, or number of unemployed placed in the project), but also distinctive. Otherwise the risk remains that price alone will be dominant in determining the winning bid.
- Unfortunately, the new directive does not give more direction on abnormally low tenders than the previous directive. The difficulties that CEDR members face in proving abnormally low tenders are expected to continue. In 2016, the task group will work on a brochure about best practice in handling ALTs in different NRAs.
- Dispute resolution is not covered by the Procurement Directive. The Remedies Directive, however, does not help to duly overcome disputes, which is costly and not very practical.

The general conclusion on these topics is that sharing experience might help to identify best practice in the implementation of the new directive:

- More innovation could be achieved when sharing experience of the new Procurement of Innovation method and building experience by starting experiments in the joint procurement of innovation such as the Danish–Dutch initiative on dimmable lighting, which started at the end of 2015.
- Some member states already have experience of SME-friendly procurement. The lessons they have learned can help others implement new measures for SME participation. Market analysis and a more strategic market approach will help to find a good balance between an efficient tendering process and an optimal role for SMEs.
- Transaction costs could be lowered if NRAs learn from each other which selection criteria are effective and how to cope with qualification and selection of new, foreign bidders. NRAs expect e-Certis to be of help when it comes to fact-checking the self-declarations submitted by bidders.

- Cooperation within CEDR could well lead to a joint approach for positive past performance within the framework of the directive.
- In particular, NRAs could learn from each other how to make quality a substantive part of MEAT, and how to monitor MEAT in the execution phase of projects. Experience in the Netherlands shows that the winning bid is often both the most economically advantageous one and the one with the lowest price. With the right incentives, contractors are stimulated to focus on the needs of the procuring authority and find efficient and effective solutions.
- All member states are experimenting with how to increase social return on investment in a durable way. Exchanging both effective and less effective experiences might help NRAs to learn more quickly, so that they can jointly develop methods for social return. Recent experience in Sweden can show NRAs how to effectively use contract clauses to stimulate more internships and other work experience initiatives.
- TG S6 proposes that CEDR NRAs exchange information with each other and perform a joint evaluation, so that NRAs can come to a joint approach to abnormally low tenders when implementing the new directive. During 2016, the task group will work on a list of recommendations and best practices for NRAs on how to deal with abnormally low tenders.
- The sharing of experience within CEDR could help NRAs arrive at a practical common approach to dispute resolution. If a common approach is found, this could help CEDR to influence a revision of the Remedies Directive.

To conclude: the new directive provides guidance on many important procurement topics. Sharing experience could help NRAs find ways of working with the directive in a solid, efficient way.

11.2 Procurement, the next steps

Over the past decade, public procurement became much more professional. The EU procurement directives have given procurement a boost, the consequence of which is that procurement is no longer a technical discipline for some specialists at the end of the line of a project. Nowadays, procurement is often at the heart of a project. In many countries, the emphasis is on a mix of make, buy, or share. This means procurement often has to play its role very early in the project, when decisions are made about the scope, goals on innovation in the project, and collaboration with public partners and the private sector. At the same time, policymakers like to use the purchasing power of government to pursue policy goals, which are hard to achieve in a different way. For example, the purchasing power of government is sometimes used to pursue sustainability goals or to give unemployed people a chance on the labour market. This puts pressure on the people who not only have to procure a good product but also have to realise a number of political goals not necessarily linked to the project. Finally, the procurement directives in themselves are a source of professionalisation, because they set higher standards for the procurement authorities and the people working there.

Up until now, TG S6 has focused on enhancing NRAs' professionalism by learning from one another on an operational level. The operational level relates to the execution of a procurement process by implementing the Procurement Directive and using new procurement instruments, such as the most economically advantageous tender. This operational level is very important for the people doing the actual tendering. However, in order to bring the organisation to the next professional level, procurement has to be part of more strategic policies and decision-making in the organisation.

New topics will arise in the near future. These topics relate to broader political and organisational issues, which TG 6 refers to as strategic and tactical. Strategic issues concern the make, share,

and buy decisions and will be part of early project decisions, where scope, environment, and cooperation issues are still open. The tactical level comprises issues that concern the way we contract work, deliveries, or service. On the tactical level, the new Procurement Directive contains new procurement methods, such as the negotiating method and the innovation partnership. But there are also changes in existing procurement procedures.

If CEDR decides to follow up with procurement in Strategic Plan 4, TG S6 advises shifting the focus from learning-by-doing on an operational level to more tactical and strategic issues. To address more tactical and strategic issues, the group will need to be expanded. The task group is now doing much of the work with a core of five countries. That is possible when learning from each other with a limited assignment. However, to really bring procurement to a higher level within CEDR, more countries are needed.

Other issues also arise. Government organisations face the constant need to reduce costs. The assignment of the task group emphasises 'efficiency in road public procurement'. Efficiency can focus on the process and on the solutions. So far, TG S6 has focused on efficiency in the process. The aim is to obtain a good quality product for a fair price in an efficient process. An efficient process is the result of good knowledge of your own needs, the market, and the tools needed to fulfil the procurement process. This was why TG S6 began by discussing lean management in relation to procurement.

Another aspect of procurement is the increasing use of innovations and the high expectations regarding the use of procurement by governments to stimulate innovations. So far, most NRAs have little experience in the use of procurement of innovation procedures and tools. TG S6 hopes to stimulate the knowledge of procurement of innovation by instigating an initiative. The Danish and the Dutch Road agencies (Vejdirektoratet and Rijkswaterstaat) have taken the lead in an initiative that is aimed at the procurement of dimmable lighting for highways. Successful cooperation between NRAs will stimulate knowledge about procurement of innovations and can be the basis of further cooperation between NRAs within CEDR.

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