

THE INTERPLAY BETWEEN PUBLIC PROCURING AUTHORITY AND PRIVATE COMPETITORS: EXPERIENCES WITH THE COMPETITIVE DIALOGUE

S. Lenferink, MSc

Faculty of Spatial Sciences, University of Groningen
The Netherlands
s.lenferink@rug.nl

Ir. M.E.L. Hoezen

Faculty of Engineering Technology, University of Twente
Rijkswaterstaat, Ministry of Infrastructure and the Environment
The Netherlands
m.e.l.hoezen@ctw.utwente.nl

Abstract

In 2004 the European Commission introduced the competitive dialogue as a procurement procedure to enable for an open public-private dialogue leading to more innovation, increased competition and more trust. Since 2004 this procedure has been increasingly applied in complex Dutch road infrastructure projects. In this paper experiences from practice are analysed to assess if the goals of the European Commission are met. Conclusions were drawn on the basis of interviews with experienced public and private actors and validated during expert meetings with contract managers.

Results indicate that the competitive dialogue can lead to more innovation when overcoming the reserved attitude and risk avoidance of public procuring authorities. Competition in Dutch procurement increased by use of the dialogue, and although the public-private contact in the procurement procedure leads to increased trust, it is hard to maintain this in an environment driven by competition. It is concluded that notwithstanding the use of de competitive dialogue, the ideal of an open public-private dialogue has not yet been realised. Recommendations are to stimulate innovation by not specifying the desired end-result in detail beforehand, reward openness and limit the dialogue to the complex issues.

Keywords: competitive dialogue, road infrastructure projects, innovation, competition, trust

INTRODUCTION

In 2004 the European Commission introduced the new procurement procedure competitive dialogue. The competitive dialogue can be applied in the case of particularly complex contracts, where contracting authorities consider that use of the open or restricted procedure will not allow the award of the contract. The new procurement procedure, an alternative to the negotiation procedure, is aimed to include a more open public-private dialogue, with more innovation and increased competition (European Commission, 2004).

Over the last years the competitive dialogue procedure has been increasingly applied in Dutch planning practice. Road infrastructure projects have become increasingly complex,

amongst others due to increased involvement of more outspoken stakeholders and scarcity of space. The competitive dialogue therefore has become a popular procurement procedure in road infrastructure projects at the national level. Illustrative for this is the fact that in 2007 16 construction projects (including road infrastructure as well as buildings) were procured by the CD procedure. In 2010 at least 15 infrastructure projects were procured by this procedure (Stichting CROW, 2011).

Although the procedure is becoming more commonly applied, it remains unknown whether the goals of the European Commission are met in Dutch practice. Evaluation of the instrument is often limited to its application in isolated cases; a thorough evaluation of the instrument relating to the goals of the European Commission is lacking. In this paper an analysis is described of experiences from the Dutch practice in order to assess whether the goals of the European Commission are met. Additionally, it aims to provide recommendations on how to improve public-private interaction in general and the competitive dialogue specifically.

EFFECTIVENESS ASSESSMENT

The question of how effective the CD procedure actually is, is an evaluative one. Without going into detail about all the methods used in policy evaluation studies, one can note some common typologies found in evaluation research. Next to plan evaluations, also process and product evaluations are defined (Swanborn, 2007). The evaluation of a policy instrument like the CD procedure is a product evaluation, also called end evaluation, effect evaluation, impact evaluation, outcome evaluation, summative evaluation or goal-fixed evaluation (Swanborn, 2007, p. 58). This type of evaluation study contains both impact and efficiency aspects, with the effectiveness assessment being one of three impact studies (see Figure 1).

| Product evaluation |
|--|
| <p><u>Impact study</u></p> <p><u>Sensu lato</u> (Comparison between the objectives of the policy and its impact).</p> <ul style="list-style-type: none"> ○ <i>Goal attainment assessment</i> (to what extent are the goals achieved?) ○ <i>Effectiveness assessment</i> (are the goals achieved and, if so, to what extent is this due to the policy?) <p><u>Sensu stricto</u> (Focus on the effects of the policy, without reference to the objectives)</p> <ul style="list-style-type: none"> ○ <i>Impact assessment</i> (what are the effects of the policy (both aimed for effects and side effects, both direct and indirect)?) <p><u>Efficiency study</u></p> <p>(The interrelatedness of the benefits/effects and the costs of the policy (cost-benefit analyses or cost-effectiveness studies))</p> |

Figure 1: Types of product evaluation studies (Swanborn, 2007)

Effectiveness is a criterion that reflects how the effects of a policy instrument relate to its objectives. Alongside the intended effects (the objectives) of the policy instruments, one also has to consider the unintended effects (side-effects), since these could make the policy less effective. This is why Vedung (2000, p.36) speaks of effectiveness evaluations as “side-effect evaluations”. This is schematically illustrated in Figure 2 (Vedung, 2000, p. 50).

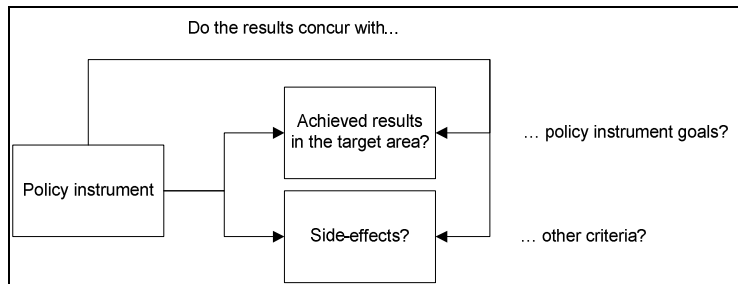


Figure 2: *Effectiveness assessment*

Thus, to assess the CD procedure's effectiveness, both its objectives and its effects need to be mapped. A description of the CD procedure its characteristics and the objectives of the European Commission (the policy rhetoric) is provided in the first part of this paper. The next part will describe both the effects and side-effects of the CD procedure, after which these are related to the initial objectives of the procedure and possible counter-effective effects, thus drawing conclusions about the overall effectiveness of the CD procedure. However, first the methodology and the validity of the research is discussed in the next paragraph.

RESEARCH DESIGN

As we have seen in the previous section, the assessment of policy instrument impact consists of overviews of both its effects and its side-effects. A description of the objectives of the European Commission with the CD procedure (the policy rhetoric) will be provided in the next Section. To compare these objectives with results in the target area and with possible side-effects, both effects and side-effects should be mapped. Interviews with several stakeholders in the process of procuring complex projects were conducted to come to this overview. On the basis of these interviews, conclusions were drawn about the experiences with the dialogue of involved public and private actors in several Dutch infrastructure projects. Subsequently, the results were validated during expert meetings with contract managers.

Interviews

The individually conducted interviews were of a semi-structured nature so that we would obtain general information concerning the EC's objectives with the CD procedure and to gain insight into these issues. The stakeholders interviewed at this stage of the study were experts from science, procuring agencies, contractors and advisors (See Figure 3). All of the 51 selected stakeholders were willing to participate in the interviews, which lasted 45 minutes and consisted of three main parts. Part A served to assess the general opinion of the experts about the CD procedure. Part B considered the positive and negative effects of the CD procedure, and Part C was included to determine chances and limitations of the CD procedure. This last part was added to the earlier parts about the direct (side)-effects to derive indirect (side)-effects of the CD procedure.

| Main group | Function |
|---------------------------|--|
| A. Law / science | 1 Professor in Dutch private law, contract law, construction and procurement law |
| | 2 Professor in Construction law, Lawyer in construction and procurement law |
| | 3 Lawyer in e.g. Construction, Development, International Arbitration, Joint Ventures, Projects, Public Procurement |
| | 4 Attorney and lawyer in corporate law transactions, privatisations, large-scale contracting processes, PPP and project financing |
| | 5 Lawyer in environment and planning practice, including PPP |
| | 6 Chartered accountant and senior lecturer at the European Institute of Public Administration in PPP, public procurement and comparative public service delivery |
| B. Procuring agencies | 1 Infrastructure project manager Dutch Department of Infrastructure and the Environment |
| | 2 Contract manager Dutch Department of Infrastructure and the Environment |
| | 3 Project manager Dutch Department of Infrastructure and the Environment |
| | 4 Project director Dutch Department of Infrastructure and the Environment |
| | 5 Advisor PPP Dutch Department of Infrastructure and the Environment |
| | 6 Senior Financial Advisor Dutch Department of Infrastructure and the Environment |
| | 7 Senior advisor Market relations and procurement Dutch Department of Infrastructure and the Environment |
| | 8 Purchasing manager Dutch Department of Infrastructure and the Environment |
| | 9 Advisor to the Infrastructure Board of the Dutch Department of Infrastructure and the Environment |
| | 10 Contract manager Dutch Department of Infrastructure and the Environment |
| | 11 Contract manager, Dutch Department of Infrastructure and the Environment |
| | 12 Manager Back office, Dutch Department of Infrastructure and the Environment |
| | 13 Purchasing manager, Dutch Department of Infrastructure and the Environment |
| | 14 Contract manager, Dutch Department of Infrastructure and the Environment |
| | 15 Judicial advisor, Dutch Department of Infrastructure and the Environment |
| | 16 Planning manager, Dutch Department of Infrastructure and the Environment |
| | 17 Judicial advisor, Dutch Department of Infrastructure and the Environment |
| | 18 Environment manager, Dutch Department of Infrastructure and the Environment |
| | 19 Judicial advisor, Dutch Department of Infrastructure and the Environment |
| | 20 Contract manager, Dutch Department of Infrastructure and the Environment |
| | 21 Project director, Dutch Department of Infrastructure and the Environment |
| C. Industry (contractors) | 1 Project and contract manager, large construction firm |
| | 2 Director Concessions, large construction firm |
| | 3 Director PPP, large construction firm |
| | 4 Project manager from a large infrastructure construction firm |
| | 5 Project manager for discipline and work exceeding projects, large construction firm |
| | 6 Director PPP Projects, large infrastructure firm |
| | 7 Project manager PPP, large construction firm |
| | 8 Project director, large construction firm |
| | 9 Project director, small construction firm |
| | 10 Director Integral Projects, large construction firm |
| | 11 Director Tender Division, large construction firm |

| | |
|-------------|--|
| | 12 Senior project advisor, large construction firm |
| | 13 Project director, freelance, hired by large construction consortium |
| | 14 Operations superintendent, large construction firm |
| | 15 Director Tender Division, large construction firm |
| D. Advisors | 1 Senior Consultant in Contract and Project Management, large engineering firm |
| | 2 Senior Consultant, large engineering firm |
| | 3 Senior advisor, association of Dutch construction and infrastructure firms |
| | 4 Consultant, project management firm |
| | 5 Consultant in Contract management and Procurement, consultancy firm |
| | 6 Management consultant, consultancy firm |
| | 7 Senior consultant, project management firm, Partner for infrastructural projects in the Dutch network of innovators in construction |
| | 8 International Procurement Policy Advisor at the Office of Government Commerce |
| | 9 Transport and Traffic advisor, large engineering firm |

Figure 3: Stakeholder participants

The qualitative data analysis software QSR Nvivo was used in the analysis of the transcribed interviews. After transcription, codes (called ‘nodes’ in NVivo) were assigned to text fragments using a bottom-up approach (starting without any strong prior assumptions about coding classifications). The purpose of bottom-up coding is to classify a large number of textual data units into a smaller number of homogeneous categories. The subsequent use of software in analysing the qualitative information allowed a more objective assessment and facilitated more complex examination of the data (Weitzman and Miles, 1995; Marshall, 2002), leading to conclusions about the effectiveness of the CD procedure on the procurement of complex construction projects.

Validation

Based on the results from the NVIVO database, we are able to tell what the majority of participants sees as most important effect of the CD procedure on the procurement of complex construction projects. Although the validity of these conclusions is strived after by several means of triangulation, we decided to validate the conclusions after all. This was done by discussing the conclusions in the form of statements with a group of 15 project managers from the Dutch Highways and Waterways Agency. The discussion did not fundamentally change the conclusions, but did lead to adjustments of the conclusions: the project managers nuanced some of the bold statements, making the conclusions doing more justice to reality.

COMPETITIVE DIALOGUE PROCEDURE

The European Commission provides several procedures for the procurement of public works: the open procedure, the restricted procedure, the negotiated procedure and the competitive dialogue. In the open and the restricted procedures contract negotiations are not allowed. In the negotiated procedure this is allowed, but there are no detailed rules as to how this should take place or when this should end before contract signature. This made the European Commission question the appropriateness of the negotiated procedure in complex projects as substantive negotiations with a preferred bidder could distort competition (OGC, 2008). Therefore, the competitive dialogue (CD) has been introduced in 2004. With the introduction the European commission aimed at achieving several goals: increased *competition*, increased

innovation, stimulated *trust*, and a more open and structured *dialogue* (see Hoezen and Doree (2008) for a reconstruction).

Competition is visible in the set-up of the procedure. The contracting authority has the possibility to select a preferred bidder over several rounds. In these confidential individual rounds, the contracting authority discusses the preliminary offer with the private competitors. The confidentiality and the staged selection ensure a competitive process.

Besides the competitive character, the CD is aimed to be a flexible procedure that could stimulate *innovative* solutions (Nagelkerke et al., 2008). Innovativeness is stimulated by applying MEAT-criteria (Most Economically Advantageous Tender). In these criteria more than just the price of construction work determines the outcome of the procurement. Quality criteria, which can contain all kind of factors, have to be used if the CD-procedure is applied.

In an advise of the Committee for Legal affairs and the Internal Market to the European Parliament it was suggested that “the content and limits of the negotiated procedure should be made transparent for both procuring authorities and contenders and, in the interests of both parties, should provide the basis for collaboration based on trust” (Committee on Legal Affairs and the Internal Market of the European Parliament, 2001, p.100). From then on, the objective of the CD procedure of *stimulating trust* was reflected in the design of the CD procedure.

Another aim of the CD-procedure is to stimulate an *open and structured dialogue*. In the procedure extensive negotiations after a preferred bidder is chosen is prohibited (OGC, 2008). The CD is restricted to particularly complex contracts, where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract (article 1.11 of 2004/18/EC, European Commission 2004). Projects are complex if contract authorities are (1) not objectively able to define the technical means or capable of satisfying their needs or objectives, and/or are (2) not objectively able to specify the judicial and/or financial make-up of a project. When these conditions are met, negotiations in a dialogue are a crucial element to come to sound proposals and project delivery.

The CD-procedure consists of several stages (see Figure 4). Before the dialogue itself starts, the project has to be announced in an official notice in the journal of the European Union(1). Subsequently, bidders can be selected on the basis of pre-qualification criteria, after which the actual dialogue can start. The dialogue can consist of several rounds of negotiations between the procuring authority and individual bidders over (parts of) preliminary bids. After this phase of dialogues, the final tenders are submitted and the bids are evaluated on the basis of the predetermined award criteria. These need to be MEAT-criteria, that besides price also take quality aspects into account. Next, the preferred bid is chosen and the contract can be closed.

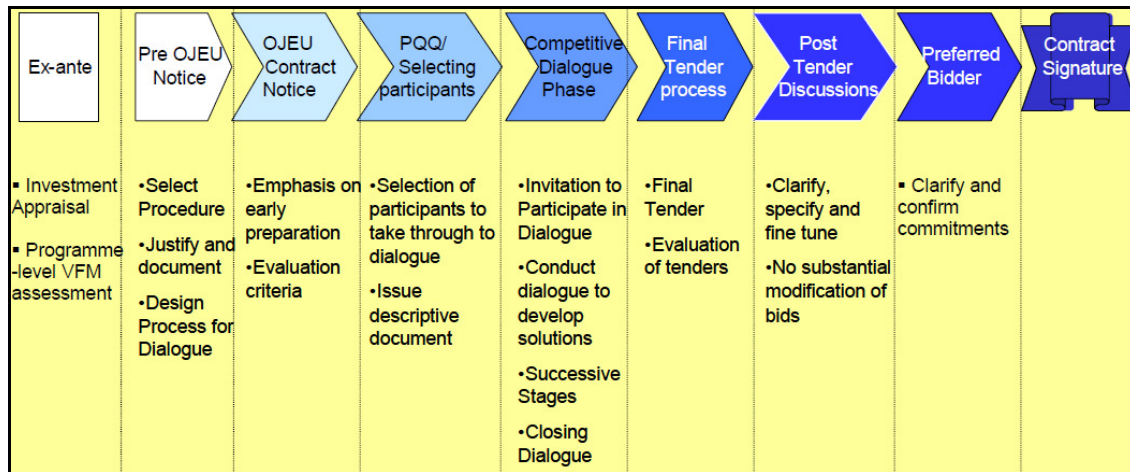


Figure 4: Overview of CD-procedure (Source: HM Treasury and OGC, 2008, p.11)

EFFECTS OF THE CD-PROCEDURE

This part will describe both the effects and side-effects of the CD procedure. But first an overview is given of some issues that play a role in the CD-procedure.

The CD procedure has been applied in several infrastructure projects since it was implemented into Dutch law in 2006. The size and order of the projects it concerns differ from small (about 25 million euro's) to large (about 3 billion euro's) and from constructing to reconstructing. The experts taking part in the interviews as well the contract managers involved in the validation were experienced in a wide range of projects with diverse characteristics.

General impressions

In general it can be stated that the set-up and the implementation of the procedure has improved looking back from the end of 2010 to the first experiences in 2006. To a certain extent, this can be attributed to the increased experience with applying the procedure at the side of the contracting authority. It is increasingly efficient in organising effective dialogue rounds, asking and answering questions, meanwhile keeping the level-playing field intact. Private competitors have also attributed to the improvement of the CD procedure. Designated tender organisations have been set in place in which experience with dialogues is shared and the gained experience with the 'open' initial rounds of the dialogue make the CD procedure run more smooth.

However, some operational problems still remain. It proves to be difficult to collect all relevant information for carrying out the dialogue and distribute information effectively from the contracting authority to the competitors. A reason are the different integrated contracts that are procured through the CD procedure. These contracts require that not only information concerning the construction, but also information on financing, maintenance and operation needs to be available up-front. If this information is available, the way in which it is distributed can also be improved. Currently, contracting authorities simply hand over all available information, which causes the competitors to be overloaded with information. They need to spend a considerable amount of time to assess the quality, relevance and usability of the distributed information.

Another issue that is discussed extensively is the compensation for participation in the CD procedure. In the Netherlands, it is common practice to compensate the private competitors for their efforts in the dialogue rounds. Time and money is spent to come to competitive bids that take into account the wishes of the contracting authority. However, according to the private competitors, the compensation often does not properly reflect the investments made to come to this bid. The transaction costs are higher than expected. Reasons can be found at both the public and the private side: The public authority often requests too much detail in the bids and the dialogue rounds and the private competitors work out their solutions too much to reduce uncertainties.

A last issue that deserves attention is the continuity in the personnel. The long span of infrastructure procurement processes makes that tender teams at both the public and the private side undergo changes during procurement. This causes a loss of valuable project-specific, tacit knowledge that is difficult to replace (see Lenferink et al. (2011) for an extensive discussion).

Now that the major issues in implementing the procedure have been described, the effects of the CD procedure will be discussed for the four main goals of the European Commission: innovation, competition, trust and dialogue.

Innovation

Results indicate that the competitive dialogue can lead to more innovation. However, this innovation mainly consists of *process innovation*. The private competitors prove to be more efficient in bridging the boundaries between different fields, and regarding projects in a more integral way. The project process innovation includes smart ways of combining procedures and methods to adjust activities in the several stages of a project to each other. The project process innovations can positively influence the time planning a project takes and could amongst others, lead to less nuisance in construction due to smart phasing of activities.

Besides project process innovation, also the process of the CD-procedure has improved. The main driver behind this kind of process innovation is experience. The involved actors get more experienced with the procedure and with the processes involved. They have to spend less time fabricating requested products or discussing these products in dialogue rounds. For example, the functions and contents that should be in a “plan of action”, as often requested by the contracting authority in the initial stage of the CD-procedure, need not to be discussed anymore in a separate meeting. The competitors all have gained experience in writing such plans.

Product innovation on the other hand proves to be more difficult to achieve. A reason for this is the reserved attitude and related risk avoidance at the public contracting authority. Although it advocates open output specifications, on basis of which the private competitors can make their bid, the attitude in the dialogue is often reserved. It proves to be difficult for the public authority to distribute tasks and responsibilities fully to the private sector. This difficulty is reflected in strict planning and tender documents which limit the room for innovative solutions. The cautious attitude strengthens this effect; parties involved tend to prefer proven solutions to minimize risks.

Competition

The dialogue has proven to increase competition in Dutch procurement. In fact, the procedure is more dominated by competitive forces than expected beforehand by the European

Commission. Complex projects, in which the competitive dialogue is allowed, usually involve great sums of money. The involved competitors are therefore cautious to keep the perceived chances and opportunities to themselves. This is manifested in the character of the different dialogue rounds. Chances and opportunities which could be of added value to the project quality are only limitedly discussed and at a late stage in the dialogue. Because of the fear of cherry-picking, competitors keep the project-winning ideas as long as possible to themselves.

In contrast, the competitors are very open on perceived risks and threats. If they see problems, that affect their bidding price negatively, they want to make sure that the other competitors see it as well and take it into account in their offers. Together with the large sums of money involved, this makes the competition in CD-procedures fierce. Competitors are willing to spend some resources to come to a winning bid. It is therefore no surprise that the compensation offered by the contracting authority is perceived as insufficient.

Trust

The competitive dialogue procedure has led to increased trust between the public and private parties involved. The necessary exchange of information provides the parties with an understanding in each other's position and insight in the grounds for certain behaviour. Although the public-private contact in the procurement procedure leads to increased trust, it is hard to maintain this in an environment driven by competition. In this respect, also the strong focus on maintaining the level playing field plays a role.

Dialogue

The strong competitive forces that play a role in the CD-procedure make that the dialogue gets a judicial character. The contracting authorities are fuelled by fear of breaking the guidelines for applying the procedure. This puts a strong focus on maintaining the level-playing-field. The contracting authority is afraid of unconsciously giving a competitive advantage to one of the contenders. Therefore, interaction in the dialogue rounds is limited. At the contracting authority, there is a risk that a conservative attitude is stimulated that is reflected by the statement "just say nothing, so that there is no risk of saying something wrong".

CONCLUSIONS AND RECOMMENDATIONS

It can be concluded that although the competitive dialogue has proven to be a useful procedure to procure complex projects, the ideal situation of an open public-private dialogue has not yet been realised. Strong competitive forces and risk avoidance limit the openness of current dialogues, strengthening the judicial character with a focus on maintaining the level-playing field and limited innovation possibilities. Competition makes parties more reserved, it stimulates strategic behaviour and has a negative effect on trust-building. A successful CD-procedure is therefore dependant on an open attitude of the parties involved.

It is recommended for public authorities to provide more possibilities for innovation by not specifying the desired end-result in detail beforehand. This will stimulate real interaction on the basis of sincere questions, instead of the strategic masquerade that is sometimes currently taking place. Furthermore, openness of private competitors in the dialogue should be rewarded. This can be put into practice by partly selecting bidders on the basis of their cooperation. Also past performance could be taken into account. Another recommendation is

to limit the dialogue to the complex issues for which public-private interaction can lead to added value. Only the aspects that need discussing in the dialogue, because they are complex, should be discussed. This will prevent the CD-procedure from being penny-wise and pound-foolish.

Applying these recommendations could lead to less (unwanted) strategic behaviour, decreased transaction cost and an open dialogue with a focus on seizing chances and possibilities. This will also change the competition in the CD-procedure. Decreased transaction costs will allow smaller size competitors to join in the procurement. It will help the European Commission in reaching all the goals for innovation, trust, competition and dialogue.

REFERENCES

Committee on Legal Affairs and the Internal Market of the European Parliament (2001), ****I REPORT on the proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts*. A5-0378/2001, Brussels, 29 October 2001.

European Commission. (2004). *Directive 2004/18/EC of the European parliament and of the council* No. 2004/18/EC. European Commission, Strasbourg, France.

HM Treasury and OGC (2008). *Competitive Dialogue in 2008 – OGC/HMT joint guidance on using the procedure*. http://www.ogc.gov.uk/documents/OGC_HMT_2008_Guidance_on_Competitive_Dialogue.pdf. (Last accessed April 2011)

Hoezen, M.E.L., & Dorée, A.G. (2008). "First Dutch Competitive Dialogue Projects: A Procurement Route Caught between Competition and Collaboration." Paper Presented at the *24th ARCOM Conference*. Cardiff, UK, pp. 535-548.

Lenferink, S., Arts J. & Tillema T. (2011). Ongoing Public-Private Interaction in Infrastructure Planning: An Evaluation of Dutch Competitive Dialogue Projects. In: Thai, K.V. *Toward new horizons in public procurement*, PrAcademicsPress, Boca Raton, Florida, pp. 236-272.

Marshall, H. (2002) Horses for courses: facilitating postgraduate research students' choice of Computer Assisted Qualitative Data Analysis System (CAQDAS). *Contemp Nurse* 13(1), pp. 29-37.

Nagelkerke, M., Rijn, M. v., Huith, G.J., & Valkenburg, M. v. (2008). "Competitive Dialogue: Abyss or Opportunity?". *3rd International Public Procurement Conference Proceedings*. Amsterdam, the Netherlands, pp. 275-294.

OGC, Office of Government Commerce (2008). *Competitive Dialogue in 2008 - OGC/HMT Joint Guidance on Using the Procedure*. HM Treasury, Norwich, UK.

Stichting CROW (2011), *Aanbestedingskalender [Procurement Calendar]*, <http://www.aanbestedingskalender.nl>, searched for "competitive dialogue" in the time between 01/01/2010 and 31/12/2010. Checked upon at January 25th 2011.

Swanborn (2007) *Evalueren [Evaluating]*. Amsterdam: Boom Onderwijs.

Vedung, E. (2000) *Public Policy and Program Evaluation*. New Brunswick, NJ: Transaction Publishers.

Weitzman and Miles (1995) Choosing Software for Qualitative Data Analysis: An Overview *Field Methods*. 1995; 7: 1-5