

Book Review

Competitive Dialogue—A Practical Guide, by Michael Burnett and Martin Oder, (European Institute of Public Administration: Maastricht, 2009), 197pp, €120, ISBN: 978-90-6779-214-1.

In the years following 2004, there has been significant writing devoted to the competitive dialogue procedure, not least of all an entire volume of the 2006 Public Procurement Law Review wherein significant attempts were made to clarify the legal opportunities and restrictions set out by this new award procedure for complex procurement. However, most writing to date has restricted itself to an analysis of the legal provisions, merely observing that the Directive also leaves significant uncertainty for the operation of the procedure in practice. This practical dimension of the competitive dialogue procedure is addressed in detail in *Competitive Dialogue - A Practical Guide*. While the book also considers the legal framework presented by Directive 2004/18/EC, its true purpose is to collate national experiences with use of the procedure in practice and fill in those spaces that are not addressed in the EU legislation at all. The main purpose of the book is to set out what it calls an "optimal methodology" to the use of competitive dialogue, meant to provide contracting authorities with maximised value for money in using competitive dialogue in most non-exceptional circumstances.

The authors consequently use their combined knowledge of both public sector and private sector experience with the procedure to draw out 'best practice' approaches for public sector authorities. Their analysis commences with an introduction to competitive dialogue and the specific legal restraints and uncertainties presented by the EU rules (Ch.1). Following on from this, Ch.2, considers why contracting authorities may wish to use competitive dialogue and what lessons can be learned from pre-2004 use of the negotiated procedure with a notice to award complex contracts. In Ch.3, implementation strategy is discussed in detail, with best practice approaches set out for both the planning and implementation stages of a competitive dialogue; of significant use here is a chart that outlines what commitments contracting authorities should have secured from tenderers before a winning tenderer is selected. Chapters 4 and 5 then outline in detail how competitive dialogue should operate in practice according to the optimal methodology: Ch.4 focuses on the pre-dialogue and the dialogue phases, and Ch.5 focuses on the post-tender phase, when the preferred bidder has been identified. All observations made in Chs 3 to 5 are then consolidated in Ch.6, which the authors end with recommendations to European and national policy makers as well as contracting authorities on how to further improve use of competitive dialogue.

The optimal methodology presented in the book is constructed through a combination of practical and legal advice; the authors highlight what can be done according to the Directive before recommending that a certain approach be taken. Of particular note is their use of previous experience with the negotiated procedure to support their recommendations—they stress that significant post-tender negotiation with the winning tenderer, as was common practice under the negotiated procedure, places the contracting authority in a very weak position and actually diminishes the chances of value for money (*p.25*).

While the promise of an optimal methodology may sound very ambitious, given that in many countries there is very limited experience with the procedure, this collation of previous practice with the new legal framework and some new practical experiences results in a solid overview of the issues contracting authorities will need to deal with appropriately at different stages of the award process. Noteworthy is that the authors stress that the optimal methodology is not intended to instruct or limit contracting authorities in making individual choices on, *inter alia*, short-listing criteria, award criteria, or objectives of the contract, but rather that in planning to conduct a competitive dialogue, contracting authorities need to become clear about these types of issues and set them down on paper prior to actually commencing the dialogue phase. By presenting all of these key issues and focal areas of the dialogue in bullet-form, the book is written in a manner that is very practice-friendly; the use of rhetorical questions in certain parts of Chs 3 to 5 enables contracting authorities to use the text as a check-list before commencing a further step of the dialogue process.

This book is a unique addition to the existing literature on competitive dialogue, which has frequently been contributed to either by academics or from an academic perspective. Writings from 2006 are furthermore understandably limited by a lack of practical experience with the procedure, focusing instead on whether or not the EU rules permit certain types of behaviour. Burnett and Oder are significantly firmer on such points. In their book, certain issues that have been previously indicated to be debatable are actually set out quite explicitly: for instance, the authors strongly advise against leaving financial due diligence for the post-tender stage and instead recommend that financing is secured by the final tender stage, even bearing in mind the lending difficulties presented by the recent economic crisis (p.52-53). Another example of firm practical advice lies in the area of solution reduction; Burnett and Oder actually recommend against reducing the number of solutions during the dialogue phase as a matter of practice, and argue that this reduces the competitiveness of the dialogue itself (p. 127). This is a very interesting addition to the general literature on competitive dialogue, where solution reduction is generally seen as a great advantage of competitive dialogue over the restricted procedure; however, the authors persuasively put forward both practical and legal reasons as to why retaining the tenderers as a general rule is 'best practice'.

The divide between EU law and national procurement practice on competitive dialogue is in many ways substantial, but can be bridged by successful information sharing from the practical side to the legal side. This book is an example of how such information can be shared: Burnett and Oder set out their findings in a clearly written, illustrative and practically relevant manner. Even though the book is very successfully aimed at European decision makers and national level practitioners, it would also greatly benefit procurement academics to read this text and use it to inspire legal research into the operation and implementation of competitive dialogue in different Member States.

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