Using Best Value PiPS Procurement in Europe, Need for Compromise?

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Introduction

Best Value Procurement Performance Information Procurement System (hereinafter: BVP-PiPS) is a methodology developed in the United States and is now being used by private and public contractors in the Netherlands. For public contractors in Europe, application of BVP-PiPS is not straightforward because of the constraints of the European legislation on procurement. This paper describes how BVP-PiPS can be used in a European legal context. First, some basic aspects of European procurement law are explained. Next, the original BVP-PiPS method is described in short. Subsequently the method is tested against the European legal constraints. Implications from European procurement law to all phases from the BVP-PiPS method will be described. The paper ends with conclusions on how BVP-PiPS can be used within the European legal framework.

Some Aspects of European Law and Background

In this section different possible procurement procedures under European law are described, as well as the two basic ways to procure (“lowest price” vs the Most Economically Advantageous Tender”).

Procurement Procedures Under European law

The European Union Procurement Directives set out the legal framework for public procurement. Above a certain threshold public authorities have to comply with European Directive 2004/18 on the coordination of procedures for the award of public works contracts, supply contracts and public service contracts (hereinafter: “Directive”). The Directive gives contracting authorities a number of possible procurement procedures. Three of the most commonly used procedures are:

1. Open procedure. An open procedure is a procedure whereby any interested company that meets the applicable selection criteria (selection criteria are also referred to as ‘prequalification criteria’ which is probably more familiar to American readers; this paper will use the word selection criteria because it fits the terminology used in the Directive), may submit a tender. After publication of the tender, the contracting authority
organizes general consultations for interested companies. After consultations, tenders are submitted. In an open procedure selection of suitable companies (by assessing tenderers on pre-established selection criteria) and awarding the best tender (by evaluating tenders on pre-established award criteria) take place at the same time.

An open procedure is designed as follows (Figure 1):

2. Restricted procedure. A restricted procedure is a procedure in which any company may request to participate and whereby only those companies invited by the contracting authority may submit a tender. The companies are invited after selection on the basis of pre-established selection criteria. Subsequently the selected companies are invited to join consultations after which the tenders are submitted and evaluated on the basis of pre-established award criteria. Therefore, the selection of tenderers and awarding the contract to the best tender take place consecutively. A restricted procedure design is illustrated in Figure 2.

3. Competitive dialogue. A Competitive dialogue is a procedure in which any company may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure (on the basis of pre-established selection criteria). The procedure aims to develop one or more suitable alternatives capable of meeting its requirements in dialogues between contracting authority and the tenderer. In the competitive dialogue - in view of the flexibility which may be required and the high level of costs associated with such methods of procurement - contracting authorities should be entitled to make provision for the procedure to be conducted in successive stages in order gradually to reduce the number of tenders. This reduction should ensure that there is genuine competition. Tenders are subsequently awarded on pre-established award criteria. A competitive dialogue can be designed in different ways. For an example, see Figure 3:


**Figure 2. Restricted Procedure**

1. Publication of tender by contracting authority
2. Request for participation by interested companies
3. Selection of suitable companies
4. Consultations
5. Submitting of tenders
6. Award to the m.e.a.t. (or lowest price)
7. Contractual phase

**Figure 3. Competitive Dialogue Example**

1. Publication of tender by contracting authority
2. Request for participation by interested companies
3. Selection 5 of suitable companies
4. Dialogue phase 1
5. Reduction to 2/3 companies
6. Dialogue phase 2
7. Submitting of tenders
8. Award to m.e.a.t.
9. Contractual phase
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Award criteria

According to number Recital 46 and Article 53 Directive, contracts that fall under the scope of this Directive should be awarded on the basis of objective criteria to ensure compliance with the principles of transparency, non-discrimination, equal treatment and to guarantee that tenders are assessed in conditions of effective competition. (Contracts for pecuniary interest concluded between a contracting authority and an economic operator having as their object the execution of works, supply of products or the provision of services and which have a value estimated to be equal or greater than the thresholds stated in the Directive.) As a result two award criteria are allowed: “the lowest price” and “the most economically advantageous tender”.

In the past, procurement strategies based on the award criterion lowest price and detailed technical specifications have often been used to tender public works contracts. In many cases the outcome of these tenders have not been satisfactory. Choosing to tender with detailed specifications made low contractors’ performance possible (Toekomstperspectief Bouwsector). Using the lowest price as an award criterion even led to fraudulent behavior by contractors (TK 2009–2010, 29 385, nr. 55, p. 1.). This is why, in the last years there has been a shift towards using the most economically advantageous tender (m.e.a.t.) as an award criterion.

Rijkswaterstaat for instance, the largest public contracting authority in the infrastructure market, has the ambition to become the leading agency within the Central Administration (Rijkswaterstaat toonaangevend opdrachtgever (only in Dutch), 2008). One of the means to reach this ambition is to award 90% of all infrastructure contracts by using on the award criterion m.e.a.t in 2012. The following table shows the progress since Rijkswaterstaat started in 2005.

Table 1

| Progress Towards m.e.a.t. Goals | 2006 | 2007 | 2008 | 2009 |
|---------------------------------|------|------|------|------|
| Total number of tenders         | 170  | 146  | 85   | 103  |
| Tenders with MEAT               | 37 (22%) | 41 (28%) | 36 (42%) | 49 (48%) |
| MEAT was lowest price           | 59%  | 66%  | 72%  | 65%  |

When contracting authorities choose to award the contract to the m.e.a.t. they should determine economic and quality criteria, which as a whole determine which tender offers most value for money.

Three of the most commonly used ways to combine price and quality are:
1. Scoring-method: price and quality are both scored in points. The m.e.a.t. has the highest total score;
2. Monetarising: all “quality” criteria are “transformed” into “fictitious” Euros. To determine the m.e.a.t., the amount of “fictitious” Euros scored on quality is deducted from the offered price (see Van de Rijt, Witteveen, et al. in this Issue). The lowest fictitious price is the m.e.a.t.;
3. Price-quality ratio: points on quality are divided by the price offered. The highest scoring tender is the m.e.a.t.

The level of performance and the value for money of each tender is to be assessed in the light of the object (e.g. a highway or an engineering service) of the contract as defined in the (technical) specifications. This implies that the determination of the award criteria also depends on the object of the contract (Recital 46, Directive 2004/18/EC).

Under European law all award criteria have to be objective in order to meet the basic requirements of transparency, non-discrimination and effective competition. It is therefore not a surprise that contracting authorities have been struggling with determining award criteria that add value and at the same time meet all legal requirements. For instance, some contracting authorities have been focusing on transparency quite strongly so that all underlying aspects and points of interest on which a tender is scored, are stated in the tender documents. As a result these award criteria become minimum quality levels of performance and no dominant differences in quality levels are to be found between the tenders offered. The result of this tender process is then comparable to a lowest price tender.

BVP-PiPS offers a solution to the dilemma of determining award criteria that add value and at the same time meet legal requirements. The questions remain how BVP-PiPS can be used in the European legal context. This paper aims to answer this last question by ‘testing’ the BVP-PiPS filters against European legislation and case law. The next section describes the the BVP-PiPs process. Next, the European legal context on this methodology will be described.

**BVP-PIPS**

The method provides contracting authorities with a tool to identify, select, and manage the best contractor for a specific (complex) project. In the procurement process several different ‘filters’ are used by ranking tenderers on the basis of their capability (scores) in these 6 filters. In this way BVP-PiPS separates ‘high performers’ from ‘low performers’. The BVP-PIPS structure identifies the best value for the lowest price. The steps of the BVP-PiPS process are as follows.

*Filter 1: Past performance information*

In the BVP-PiPS method past performance information is the first indicator for selecting a high performing contractor. BVP-PiPS method is a top down quality/value process, and not a bottom-up or minimum requirements process. It uses potential capability, and does not address the performance based on minimum requirements. It therefore does not define which past performance information should be given. Companies are allowed to decide themselves which and how many references of completed projects will be turned in for review by the contracting authority. The minimum number of references is 3. If a company doesn’t turn in references, the score will be neutral (5 on the scale of 1 to 10). The past performance scores are evaluated together with the results of filter 2 and 3.
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Filter 2: Proposal and Project Assessment Plan

Subsequently companies submit a Price Proposal and two risk submittals, a technical risk and a non-technical risk assessments, and a Value Added plan related to the tendered project. These three plans contain only one to two pages each and allow companies to differentiate themselves based on their expertise rather than marketing information.

The technical risk submittal is used to force vendors to thoroughly understand the technical risk of the project. The technical risk submittal contains the prioritized major technical risks of the project (the risks that are the contractors responsibility) and the capability of the vendor to control these risks.

The Risk Assessment (RA) plan describes the risks that are outside the control and responsibility of the vendor and prioritizes these risks. Furthermore the RA-plan identifies how the vendors will manage and minimize the risks that the contractor does not control.

The Value Added (VA) plan covers items that are options for added value (beyond the scope of the project), such as: faster delivery and better quality. The Value Added plan provides more than the minimum requirements of the contract. The proposed options may fall outside the direct scope of the project but must contribute to the needs and goals of the contracting authority.

Filter 3: Interviews

The company’s key project individuals are interviewed to identify their capabilities to be proactive, minimize the risk that they control and do not control. The key individuals are the critical success factor for high performance. In the interviews individuals are questioned on their past performance, their ability to manage the specific project from beginning to end and how they will implement the company’s RAVA-plan. The interviews are to identify the capability for the key personnel to manage and control risk on the proposed project.

Filter 4: Identification of Potential Best-Value Vendor

All information gathered from filters 1, 2 and 3 (i.e. scores on past performance, the price proposal, evaluation of the RAVA-plan and interviews with key individuals) is imported in a decision making matrix model. The model uses pre-established weights, which are determined by the contracting authority for each project. The outcome is a ranking which puts the highest performing company at number 1. If the best value suppliers’ price is more than a predefined percentage (i.e. 10%) over the price of number 2, the best value tender will not be considered unless there is dominant information that dictates their selection. If there is no dominant information, the next prioritized best value contractor will be selected to go into the pre-award period.

Filter 5: Pre Award Period

In the Pre Award Period the highest prioritized performer will preplan the project in detail and prepare quality and risk control plans (the weekly risk report (WRR) and the risk management
plan (RMP.) The contracting authority and the potential contractor discuss the RAVA plan, the project planning and confirm the contractor’s proposed fixed price. Upon total agreement from both parties, the contract is finally awarded.

**Filter 6: Weekly Risk Reporting System and Final Rating**

Once the award has been made, the contractor submits a weekly report that measures its performance by documenting cost and time deviation from the contractor’s baseline plan. Only risks that impact time or cost are listed in the WRR. By managing and minimizing the deviation of cost and time, the high performance contractor maximizes the value of the project. Upon completion of the project, the contracting authority evaluate the performance of the contractor, and the rating will be incorporated into the PPI database (to be used on all future projects). Each project done in a client’s system is worth 50% of the future performance rating for that particular client. This means that the loop is closed and puts the best value contractor at risk. Adversarial or opportunistic behaviour after the award is punished by a low final ratings.

**BVP-PIPS Filers and European Law**

**Filter 1: Past Performance Information (PPI) and European Law**

Under European law there is a distinction between the selection criteria to select possible suitable contractors that will compete for the project and award criteria to determine most economically advantageous tender (m.e.a.t.). The so-called selection criteria can be divided in:

- mandatory reasons for exclusion as stated in article 45 sub 1 Directive, such as participation in a criminal organization, corruption and money laundering;
- optional reasons for exclusion as stated in article 45 sub 2 Directive, such as bankruptcy, professional misconduct, etc.;
- criteria of economic and financial standing as stated in article 47 Directive;
- criteria of professional and technical knowledge as stated in article 48 Directive;

**Reasons for exclusion**

The Directive gives an exhaustive list of reasons for exclusion. According to article 45.2 sub d, ‘a company that has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate’ can be excluded from tendering for a contract. The burden of proof for grave professional misconducts lies with the contracting authority.

Contracting authorities are free to choose the means of evidence. This means that PPI might be used in this context. However, all selection and award criteria need to be proportional to ensure effective competition. As a result the time of exclusion from tendering must be proportional to the level of poor past performance. Moreover, it is argued by some scholars that companies can only be excluded from tendering after an irreversible verdict comparable to a penal sentence (Pijnacker Hordijk c.s.). It is therefore not without legal complications to use PPI as grounds for total exclusion from tenders.
Personal and technical knowledge

To ensure that tenderers have sufficient technical knowledge contracting authorities can draw up selection criteria that see to a minimum level of technical knowledge. According to article 48 sub 1 Directive the professional and technical abilities of a company should be assessed in accordance with article 48 sub 2 and 3 Directive. Article 48 gives an exhaustive list of means of evidence by which a company’s technical knowledge should be examined. The most commonly used way to examine technical knowledge is ‘references of completed projects’. This is conformity with article 48 sub 2 which states:

Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services:
(a) (i) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority direct;

European (case) law demands that – in order to ensure effective competition - selection criteria should not be disproportional in relation to the project. This means that the requirements for the project that can be used as a reference should not be too strict. Moreover, according to article 48.2 sub a, only references of works carried out in the last five years can be used. This means that unlike the pure BVP-PiPS method companies are not entirely free to select the references they turn in for evaluation.

Furthermore selection criteria should be objective in order to ensure transparency, non-discrimination and equal treatment. This means that contracting authorities should find a way to eliminate the risk of subjectivity in the questionnaires about completed projects.

PPI as a selection or an award criterion?

As stated, in European law there is a distinction between selection and award criteria (See e.g. Cases C-532/06 (Lianakis) en C-199/07 (EC/Greece). Selection criteria see to the suitability of a company to complete a certain project. Award criteria see to awarding the contract to the most economically advantageous tender (m.e.a.t.). This means that selection criteria should in principle regard the tenderer and award criteria regard the tender (There are however exceptions to this rule, see paragraph ‘Interviews’). Even in an open procedure – where selection and award take place at the same time – this distinction is to be respected. PPI is strongly connected to assessing the suitability of a company. Other than in a ‘pure’ BVP-PiPS procedure, PPI is therefore not be used together with price proposal and RAVA-plan to determine the best performing tenderer (= m.e.a.t.).
Some practical remarks on using PPI

One of the questions that arise when putting PPI in practice, is how to treat companies that are new in the sector, as they can’t provide the contracting authority with relevant PPI scores. The proposed solution in the BVP-PiPS method to score companies without references as ‘neutral’ (5 out of 10) is questionable in fairness and does not improve effective competition.

Furthermore it remains the question how groups of companies that submit one tender as a group, should be scored. To meet the requirements of objectiveness and transparency, these questions need to be addressed in the PPI system.

Filter 2: Proposal and Project Assessment Plan and European Law

The offered price and plans to assess quality are a part of the award criteria to determine the most economically advantageous tender (m.e.a.t.). One of the often used m.e.a.t. quality criteria is in fact ‘risk management’. As said, under European law selection and award criteria must meet requirements of transparency. This means that contracting authorities must – at the start of the tender – make clear how all criteria will be evaluated and scored (percentages). It is however important that not all underlying aspects by which a plan is scored are stated in the tender documents. This strategy leaves room for the true expert/visionary to provide dominant information. At the same time, it might be necessary for transparency reasons that contracting authorities that use BVP-PiPS for the first time, educate their tenderers of what is expected so a level playing field is created.

Using the Value Added might cause some legal complications. The options in the Value Added plan can be seen as Variants as described in article 24 Directive. Article 24 states that it must be clear from the start of the tender (in the tender notice) that a contracting authority will allow Variants. Furthermore, the contract documents should describe minimum requirements for the Variants to be met. These minimum requirements make it possible to refuse undesirable Variants. The most complicating factor however is transparency and objectivity. The contracting authority must make clear in the tender documents how Variants and compliant tenders will be evaluated and scored. Furthermore, if a Variant tender turns out to be the m.e.a.t., all documented value added options therein, become (in principle) part of the contract. Only minor changes to the offer can be made after the final tenders are submitted (more information provided under Pre-Award section). This differs from a pure PiPS situation in which the contracting authority is allowed to choose from the proposed options after awarding the tender to the m.e.a.t in the pre-award phase.

Filter 3: Interviews and European Law

Possibilities under European law?

A much debated aspect of BVP-PiPS in Europe is interviewing key individuals. As described selection criteria should only be regarding the tenderer and award criteria should only be regarding the tender (Case of Gebr. Beentjes/ State of the Netherlands (C-31/87)). This means that the basic assumption is that interviewing key individuals should take place as part of the
selection phase. Nevertheless, it can be argued that interviewing key individuals on this specific project and the RAVA-plan is predominantly regarding the tender itself instead of the tenderer.

One of the most important cases about the distinction between selection and award criteria is the case of Lianakis (C-532/06). At first sight the judgment seems to rule out any evaluation of quality of proposed teams in the award phase. Although the award criterion in this case was ‘proven experience of the design team and its leader’, it was evaluated by references of completed projects of the firm. This means that the award criterion was in fact evaluating the tenderer. This is quite different from taking into consideration the individual experience of a particular team proposed and assessing that experience in the light of its relevance to the contract being awarded. It is also quite different from interviewing the proposed team on their understanding of the tender submitted. In the latter cases interviews are mainly regarding the contract or tender, not the tenderers suitability. Furthermore, many authors stress that there can be good reasons for allowing a more flexible approach to the distinction between selection and award criteria (Treumer, 2009; Lee, 2010). This is particularly the case for contracts that are of a complex nature, where the individual quality of team members closely relates to the economic value of the tender (Pijnacker Hordijk et al., Handboek van het Europese en Nederlandse aanbestedingsrecht, p. 444).

Some practical remarks on using Interviews

When a contracting authority decides to use interviews as an award criterion, it should take into account the following points of interest in connection to (the basic principles of) European law:
- using standard questionnaires to ensure equal treatment;
- no negotiations about price or the tender that has been turned in, offers are final.
- thorough documentation of the interviews to ensure transparency.
- Recording the interviews can be helpful in future legal proceedings.

Filter 4: Identification of Potential Best-Value Vendor and European Law

Under European law tenders are awarded to the m.e.a.t. on the basis of pre described award criteria using predetermined weights. This is in conformity with the BVP-PiPS method. However, in BVP-PiPS the best value supplier whose price is more than a pre-defined percentage (i.e. 10%) over the price of number 2, can only be considered for award if there is dominant information that they are the best value. Turning over the best tender (the m.e.a.t.) is only possible under European law when the tender is irregular or unacceptable (as meant in article 30 Directive). Tenders with a price which is 10% higher than the next best tender are not irregular or unacceptable as a rule. It is however possible for a contracting authority to establish a ceiling price. In order to ensure transparency this ceiling price must be stated in the tender documents (Pijnacker Hordijk et al., Handboek van het Europese en Nederlandse aanbestedingsrecht, p. 197).

Filter 5: Pre Award Period and European Law

In the vision of Kashiwagi and the BVP-PiPS, the pre-award phase is the most important phase. In BVP-PiPS, the pre award period is used to identify all risks and concerns and how the contractor will minimize the risks (risk management plan (RMP)). Another purpose is to create
the weekly risk report (WRR) which includes a milestone schedule and the tracking of any cost and time deviations. Upon agreement from both parties, the contract is awarded. The pre award period is therefore a pre contractual phase. The pre award period might be used in different stages of the procurement procedure.

**Before final tenders are submitted**

In a competitive dialogue procedure it is possible to discuss all aspects of the contract and to conduct the procedure in stages so that the number of tenderers is gradually reduced (by evaluating the tenders against pre established, objective criteria). (In open or restricted procedures such a reduction after selection is not possible.) A requirement at reduction is that the number of tenderers should still ensure effective competition. A general rule under European law is that effective competition is ensured with a minimum of three tenderers. Some scholars however argue that there is still effective competition when tendering with two tenderers in the last stages of the competitive dialogue. In exceptional cases, where there is only one appropriate candidate or solution, the contracting authority may even proceed the dialogue phase with one candidate (Competitive Dialogue – Classic Directive, CC/ 2005/04 rev 1 of 5.10.2005, p. 8.). A contracting authority might thus use the last stage of the competitive dialogue procedure as a pre award phase. In open or restricted procedure this is not possible.

**After final tenders are submitted but before the award of the contract**

Under European law contracting authorities are obliged to respect a standstill period between the notification of the award decision to tenderers and the final award of the contract. This standstill period, also known as ‘Alcatel period’ is at least 15 days but might be stretched to use as a pre award phase.

However, in looking at final tenders in a competitive dialogue procedure, contacting authorities can ask to clarify, specify and fine tune to provide additional information, as long as this does not involve changes to the features of the tender (article 29.7 Directive). Recital 31 of the Directive (on the competitive dialogue procedure, but applicable for all procedures) adds that fundamental aspects of the offer should not be changed:

“(...) However this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous.”

The wording of the recital shows that some minor changes are accepted at this stage, as long as fundamental aspects of the offer (price, risk allocation) are not altered. This is different from a pure BVP-PiPS situation, where all aspects of the offer and contract can be altered.

**After the award of the contract**

A contracting authority might also choose to use the first phase after awarding the contract as a pre award phase. In this scenario the contracting authority awards a conditional contract (with suspensive and/or resolutive conditions) to the m.e.a.t. If the pre award phase does not end
satisfactory the contract can be terminated. If and how a contract can be terminated, is not a question of European (procurement) law. Contract law is an issue of national law and will therefore not be discussed any further in this paper.

The question remains if a contracting authority, after terminating a contract, might go back to the number two tenderer and start a new pre award phase. National case law in The Netherlands suggests that this is possible (Case LJN BO 8078, 20 December 2010).

*Filter 6: Weekly Risk Reporting System and Final Rating*

European (procurement) law has no legal implications on this filter. The post-construction rating might conflict with the principles of non-discrimination of first time vendors (see above).

**Using BVP-PIPS in Open/Restricted Procedures and the Competitive Dialogue Procedure**

In paragraph 2 of this article three different procurement procedures are described. Because of the design of these procedures the BVP-PiPS filters are to be used in different stages of the procedures.

In an open procedure, where selection and award take place at the same time, the BVP-PiPS filters may be used as follows (Figures 4):

![Figure 4. BVP-PiPS: Open Procedure with Simultaneous Selection and Award](image)

In a restricted procedure, where selection and award take place consecutively, the BVP-PiPS filters may be used as follows (Figure 5):
Competitive Dialogue procedures may be designed in different ways, for example as follows (Figure 6):
Conclusion and Implications for Procurement in the European Public Arena

It is possible to use BVP-PiPS under European (procurement) law. However, some compromise is necessary. The main conclusions about the application of the six filters in the European legal system are:

1. PPI can be used in a tender, but should in principle be used as a selection criterion rather than an award criterion.
2. Risk assessment plans are commonly used as an award criterion and cause no problems from a legal perspective. The value added plan should be seen as a variant tender and evaluated as a whole. In principle all options become part of the contract. The format and minimum requirements of the value added plan should be clear from the start of the tender. It is possible to evaluate and score the value adds against the project goals in the same way as the scoring the risk assessment.
3. Interviews can be used as an award criterion, especially in complex projects. However, contracting authorities should take into account the requirements of objectivity and equal treatment.
4. The identification of the best value vendor is possible under European law. Best valued tenders that are 10% over the price of the next best tender, should not be automatically turned over. The impossibility of using the 10%-rule causes a problem when the best value vendor has offered a price that is not competitive. The European rules however do leave room to disqualify unrealistic bids.
5. If the pre contractual period is used before awarding the tender, the main aspects of the contract, such as price and risk allocation should not be discussed. It is also possible to award a conditional contract, case law suggests that if the pre award phase does not end successfully, contracting authorities may award to the number two tenderer.
6. European law has no legal implications on the weekly reporting system and the final rating.

The legal boundaries of the European legislation create some challenges for contracting authority’s procurement officers. First of all, using PPI as a selection criterion instead of an award criterion is a problem which can easily be overcome. PPI can literally be used as a filter, knocking out vendors that do not have good performance ratings. PPI is also the least important filter of the PIPS-process.

The issue of objectivity and equal treatment in interviews can be resolved by a well-designed process of assessment and thorough preparation of the interviews. In the fast-track project and the EDCA-project Rijkswaterstaat has successfully used the interviews due to a meticulously designed assessment process (see van der Rijt et al. and Veenendaal en Witteveen elsewhere in this issue).

The biggest dilemma for contracting authorities in Europe are the legal boundaries facing the pre-award phase. The pre-award phase is the most important phase in the BVP-PIPS process. The first four filters of the BVP-PIPS-process are meant to find the best expert for the project and not for designing an exhaustive risk management plan and preplanning. In the BVP-PIPS process the information asymmetry is dissolved in the pre-award phase, when (only) the best
value vendor receives all risks and concerns of the contracting authority. Reason for this is minimization of transaction costs.

The consequence of the legal framework is that fundamental negotiations about the scope, the schedule and about the risks have to take place after the award of the contract (Both in the fast-track projects and EDCA the pre-award phase took place after the award of the contract).

Although the pre award phase is not meant to negotiate the price, the lack of competition might cause opportunistic behaviour from the winning vendor. This could result in insufficient preplanning and risk management by the contractor in the absence of incentives (in particular not awarding the final contract).

Possible solutions for this dilemma are:
- disclosing the clients risk register at the start of the tender and/or
- more extensive risk assessment plans (more than two pages)
- the use of a competitive dialogue
- the use of a conditional contract

The first solution is to provide the clients risk register at the start of the tender. This could be combined with a more extensive risk assessment plan, the second solution. The contracting authority usually has a risk register before starting the tender. This risk register is provided to the tenderers at the start of the tender. The tenderers will then have to compete and prioritize the risk register and come up with ways to minimize the risks. Not providing the risk register is counter intuitive and seems to create an unnecessary information asymmetry or lack of transparency. Providing the contracting authorities’ risk register however gives low performers an advantage and high performers an advantage. High performers are more likely to identify risks they do not control than low performers. Low performers are more likely to become the best value vendor. Another problem of more extensive risk management plans is that it raises transaction costs.

This paper shows that the competitive dialogue can be designed to better fit the BVP-PIPS process than the open and restricted procedure. The RAVA plan and interviews can be used to reduce the number of tenderers. The pre award phase can then be completed in the dialogue phase. The competitive dialogue however is restricted to financial and/or complex projects. If a competitive dialogue is not possible or feasible, a contracting authority may choose to award a conditional contract. in the contract are not met.

In the near future Rijkswaterstaat will use the pre award phase in the competitive dialogue. The possibility of using a conditional contract will also be investigated.

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