

# **PUBLIC PROCUREMENT AT LOCAL LEVEL IN THE NETHERLANDS: TOWARDS A BETTER CLIENT-CONTRACTOR COOPERATION IN A COMPETITIVE ENVIRONMENT**

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In the early 1990s, Dutch municipalities procured works mainly by invited tenders. The drive behind this policy was to maintain continuity of the relationship and cooperation between client and contractor(s). Towards the turn of the century the procurement policy moved to more public tendering. This was supposed to ensure more competitive pressure and to minimize suspicion over ‘cosy’ contacts between client and contractors. This ‘more competition’ policy was promoted even more after the exposure in 2001 of widespread collusion in the Dutch construction industry. For a number of years after this, client-contractor relationships remained distant and formal under the process of traditional contracting, open tendering and low cost selection. In 2009 representatives from the municipalities and contractors mutually expressed the wish to explore more integrated and cooperative contracts. These municipalities became participants in Pioneering<sup>1</sup> to start pilot projects focusing on relational contracting or partnering for design and execution. The assumption was that more cooperative problem-solving would lead to less conflict and greater added value. The first pilot project is finished and the results are promising, but there are also some lessons. The willingness to cooperate between client and contractor existed during design and execution phase. The cooperation produced better solutions than the initial client solutions. Also, the focus on cooperation produced a more open atmosphere between client and contractor. However, this atmosphere sometimes hampered a critical attitude and influenced the process efficiency negatively. The delivery of reliable information by the client was especially critical and held back due to the time constraints caused by other projects also being executed. The tendering for qualitative criteria only and no prices led to competitive discussion about the budget. The new procurement law implemented on the 1<sup>st</sup> April 2013 no longer allows this form of tendering. Furthermore, the cooperation intention in the execution phase was supported by traditional Design-Bid-Built) legislation. Therefore, extra costs were allocated according to the traditional client contractor framework. The future management of the process and further development of the cooperation concept into the execution phase both need attention.

Keywords: cooperation, municipality, procurement, project management

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<sup>1</sup> Pioneering is an organization for public clients, contractors, suppliers and consulting firms which aims to make Twente the outstanding region and an example for the Netherlands with regard to the construction industry

## INTRODUCTION & LITERATURE REVIEW

In the early 1990s Dorée (1996) studied the way competition was organized by municipalities. Continuity of relations and cooperation was, for a long time, the favoured procurement policy and followed the third transaction costs economics safeguard of Williamson (1975, 1985). This strategy restrained opportunistic behaviour by contractors. A more cooperative way of working, e.g. partnering based on trust, was favoured above competitive tendering. Towards the end of the century the procurement strategy by local authorities slowly changed towards more public tenders, e.g. a stronger price competition, and, on a small scale, the use of innovative and more integrated contracts forms like Engineering & Construct and Design & Construct (& Maintain).

The first change was due to an increased concern over legitimacy and transparency. This coincided with the introduction of the ‘Market, unless, ...’ policy by the Dutch State’s Department of Economic Affairs in the late 1990s. This policy was aimed at early contractor involvement to stimulate innovation.

After the 2002/2003 parliamentary inquiry into collusion in the construction industry distrust towards contractors escalated (Dorée, 2004). National organizations like P*Si*Bouw and RegieRaadBouw were formed to institutionalize and support the overall reform and change of procurement policy in the construction industry. These organizations were also used as platforms for restoring a working relationship between clients and contractors.

The Dutch reform initiatives followed the “rethinking construction” format. The Egan (1998) report in the United Kingdom provided indicators for the way forward. Five driving forces, which apply to the Netherlands also, were anticipated to spearhead any reform initiatives and improve construction. These were: issues of leadership; a focus on the customer; integrated process and teams; a quality driven agenda; and, a commitment to the people.

In the Netherlands the exposure of collusion influenced the procurement policy and cooperation between parties for a number of years. However, a study by the contractors association Bouwend Nederland (2009) showed that clients, as well as contractors, preferred a more cooperative way of working and were seeking a way to move from competitive relationships towards cooperative partnering. Also, the national introduction of Innovative Procurement Program and new contract models ensured that the Economically Most Advantageous Tender (EmaT) was used more often. EmaT seeks the best quality/price ratio by outsourcing design, in combination with construction and, sometimes, even maintenance, to develop new products, creative solutions and process efficiency (Drechsler, 2009).

A widespread introduction of a more collaborative framework was hampered due to three factors: difficulties of translating the client’s problem into clear functional requirements; the collusion history; and, the complications caused by the non-quantifiable bid evaluation criteria related to legal obligations for ‘objectivity’ (Veldink, 2007, Bouwend Nederland 2009).

The use of non-quantifiable, subjective criteria is not a problem in a well-formalised tender procedure, but the fear of a legal discussion is often a motive to choose the lowest price selection and traditional Design-Bid-Build contracts with design responsibility for the client. (Koper, 2006; Bouwend Nederland, 2009).

Cooperation (or collaboration, partnership) faces competition and competitive behaviour. Gray (1989) compares competitive and cooperative ways of handling a problem. The main characteristics of cooperative problem-solving that he distinguished were: shared problem-solving; shared search for facts; underlying interest in workable solutions; satisfactory outcome for all the parties; integration of interests; and, integrated collaborative negotiations.

The acknowledged factors for a successful start of cooperation are commitment; self-assessment; the qualitative way in which partners are selected; the determination of mutual objectives; problem resolution mechanisms; and, the identification of responsibilities and risks. These factors do not easily fit into a competitive price procurement paradigm.

Furthermore, the success of cooperative partnership during the process relies on aspects such as: communication; teamwork; an understanding of each other needs; trust and openness; and, early involvement in the process (Walker, 2003; Erikson, 2010). Further factors stated by Chan (2003) which were believed to be significant underlying features leading to success were: the establishment and communication of a conflict resolution strategy; a willingness to share resources among project participants; a clear definition of responsibilities; a commitment to a win-win attitude; and, regular monitoring of partnering process.

In partnering relationships different types of cost incentives are used. A guaranteed maximum price for the client or a target cost with sharing of gains and losses (Walker, 2003; Broome & Perry, 2002) in combination with financial incentives to align business goals (Rose & Manley, 2010).

Commitment to partnering may be, and often is, only skin-deep. It can often disguise traditional attitudes and power relationship (Wolstenholme, 2009). Also, the problem of establishing and maintaining collaboration between client and contractor is complex given the dynamic interactions between the contracts, relationship management and attitudes of individuals (Kadefors, 2004; Bresnen, 2007; Rose and Manley, 2010; Laan et. al., 2011).

While cooperation can be profitable, its success is influenced by many factors. It requires some conviction and perseverance to implement. The way competitive pressures of different procurement methods are dealt with and contractual arrangements managed, these both set the stage and climate for how well cooperation develops, or not. How the representatives of the client and contractor deal with these pressures is pivotal for how actual partnership and cooperative problem solving emerge during the execution of a project.

This paper documents the structure and unfolding cooperation of a pilot project in the Eastern Region of the Netherlands. The aim is to learn about the practicalities of procurement and contractual incentives; the dynamics of cooperation; and, the potential added value of cooperative problem-solving.

The next section briefly introduces the pilot project and explains the research approach. The third section presents the findings and insights. These are reflected upon and discussed in the fourth and final section finishes with our conclusions.

## **RESEARCH APPROACH**

This paper describes the monitoring results of a civil engineering project which was deliberately procured and contracted to experiment with more cooperative arrangements.

The project started in 2010 to replace a pumping station and to reconstruct the sewer and mainly residential street in Daarlerveen, a small village. The project was tendered on 'problem description' with a minimum of functional and technical requirements and a target budget. The main activities of the project were the design and execution of a sewer and street work.

### **Method**

A longitudinal study was applied to study the project. This aimed to achieve the following ends: to characterise the cooperation; to examine the cooperation during the process; to assess how the parties and team members dealt with the success factors and aspects of cooperation; and to identify threats associated with the cooperation concept.

We chose to combine different methods of qualitative data collection to create a reliable picture of the process and factors influencing the cooperation as supported by all the team members. Also, as cooperation is mainly about behaviour, a qualitative approach seemed the best way to identify the important factors. The results from this research project will be used in forthcoming projects to combine a quantitative and qualitative research approach.

A first list of the factors influencing the cooperation process was identified by attending the meetings and studying the meeting reports. In-depth research of the resulting factors was then carried out. The concept report based upon this data was sent to all the team members and discussed in a final meeting with the intention to create a consensus about the cooperation process and factors influencing the functioning of the team. The final comments from this session were included in the final report.

We attended various meetings including: through the preparation phase; whilst the audit team met to discuss the bids and select a contractor; and, during meetings of the design and execution team. We studied information from the contracts, reports, bids and meeting minutes.

After the project execution phase in-depth interviews were held with the parties involved to look back and analyse the whole process. We interviewed the main players from clients, contractors, advisors and bidders. The monitoring results (e.g. meeting reports, the tender documents and contract) were compared with the characteristics, the success factors and aspects of cooperation. The discussions and choices were shared during the interviews to deepen the experiences of the parties involved.

The project finished in November 2012. The concept report was discussed in March 2013 and the final report soon after.

Table 1 summarises the different methods of data collecting. Semi-structured questionnaires are used for monitoring.

Table 8: *Methods of Data Collection*

| Teams/Project Phases                  |   |   |   |
|---------------------------------------|---|---|---|
| Tender Team                           |   | Design Team   | Execution Team  |
| Preparation Phase                     | Tender Phase  | Design Phase  | Execution Phase   |
| Document study contracts              | Document study bids   | Monitoring design team  | Monitoring execution team   |
| Monitoring internal process           | Selection meeting   | Meeting reports   | Meeting reports   |
| Interviews with internal stakeholders | Interviews project manager client and tender managers bidders | Interviews project manager client and design manager contractor | Interviews project manager, client, design manager contractor, and members of execution and design team |

An overall analysis of the different steps performed includes: the development and execution of the (functional) requirements and contracts; the tender strategy, the tender process, the award of the bids and the selection of a contractor and the contract; the design and execution process.

## FINDINGS

The procurement characteristics for this project are shown in Table 2.

Table 2: *Project Characteristics*

| Tender Form | Award On | Influence Of Price                         | Main Criteria                                     |
|-------------|----------|--|---|
| Public      | Quality  | Not applicable as target budget determined | Organization, project organisation and references |

### *The tender team*

The project manager and the central purchaser of the municipality were the important people to prepare the contract and tender documents. The tender team was provided with an advisor from an engineering firm who had experience with innovative contract forms, and a student from Pioneering for monitoring. The client used personality assessments to form the team, but not to select a contractor. The selection of a contractor was based only upon the documents of the bidders.

The contract award criteria and the tendering procedure concentrated on selecting the bidder on qualitative criteria, as is discussed below. The information provided to the interested parties consisted of a description of the problem in general; a limited technical specification; and, a description of the procedure by which the bids would be evaluated.

The client chose an EmaT tender procedure using three main qualitative criteria, with each divided into several sub-questions, e.g. the organisation quality (i.e. the way the bidder would organise the project internally with subcontractors, suppliers and the client); the project quality (i.e. the way the bidder would organise the project with regard to the process); and, reference projects.

These three parts were weighted 30%, 40%, and 30%. Also, the target budget was announced and a financial incentive implemented in the contracts such that the further below the target budget the bid was, the higher the profit.

The client received six bids. The contractor with the best offer, according to all the tender team members, described an integral approach to the project and its organisation. The others answered the questions in chronicle order, analogous to the (post-by-post) calculation of a traditional Design-Bid-Built contract.

The main point and criticism put forward by four of the six bidding parties was their concern as to whether the quantitative criteria would be able to assess whether a bid would fit the client's requirements and wishes. These bidders also feared subjectivity: "the one with the best talk gets the job" was a common reflection. However, the second placed contractor did not support these statements and urged for qualitative criteria to be used to differentiate between bids.

According to all the bidders, if cooperation is the aim, then two improvements would be: the use of face-to-face interviews; and, having sufficient time together to learn about each other. Both these were seen as being important criteria to create commitment in line with the partnering conditions.

We note from this that the improvements suggested above by the contractors simultaneously contradict their criticism on the selection method used.

#### *The design team*

The client, contractor and advisors formed a design team<sup>2</sup>. The client is responsible for the technical requirements, the data of the actual situation, and communication to the environment. The contractor is responsible for the design and calculation, and the advisors are responsible for technical support and detailed requirements.

Instead of the planned one year to design and execute, the design phase alone took almost one year. The delay was due to client's lack of capacity to provide reliable location data and requirements, as well as a bottleneck created by unexpected soil pollution at the site.

The gathering of reliable data conflicted with the other divisions of responsibility and tasks of people within the municipality. The project manager and planner followed the traditional long-term approach in compiling data. This frustrated the progress of the design. The experienced design manager noted the problem, but hesitated to bring this forward for discussion. As he stated later, he put this down to the lack of experience of the client in outsourcing the design, as well as a fear that this might undermine the cooperation.

The unexpected soil pollution in fact was the responsibility of a private citizen and the province as the responsible authority. Since the project had to remedy the on-site pollution problems in advance, this became an issue for the client with the contractor (as expert and certified executor of such remedial works) in an advisor role. The preparation for this extra work was executed in the traditional client-contractor relationship mode. This change of role was not in line with the cooperation concept, but was inevitable to abide with the environmental regulations that defined the required responsibilities very strictly.

Instead of the intended systematic, regular time-based way of scheduling meetings by the design team, following the winning bid of the contractor, the progress of an activity and the planning of a meeting became contingent upon, for example, the deployment of a team member or external stakeholders. The upside of such delays was the improvement of the design, but the downside was the lack of dynamic action in the process as there were sometimes long gaps of time between the meetings. The resulting lack of integrated teamwork was indicated by six months of hesitancy by the contractor over the technical requirements for the capacity of the sewer.

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<sup>2</sup> e.g. the regional water board to secure the input of the necessary project constraints and technical specifications, and a consultant firm to support the client

The contract contained no detailed information about the tasks or responsibilities of the advisors. At the start-up meeting, the role of the team was discussed, but not the individual roles of the team members. The project manager described the role of the advisors in finding solutions as passive, rather than a preferred active one. The manager of the consulting firm, who had widespread knowledge about the situation from his prior involvement, referred to his limited role in being able to support the client and the contractor in finding solutions.

The expected cost escalated from the target budget for the preliminary draft design to almost a 20% budget overrun for the final design. A short negotiation between client and contractor ended with an offer by the contractor to finish the job for the target budget. The time between preliminary design, final design and the signing of the execution contract was within a month. The focus on an optimum solution created a lack of attention on the budget controls according to the project and design manager.

The project and design manager stated that the financial incentive in the contract had no influence on the willingness to cooperate by the contractor. Instead, a discussion about the reliability of the target budget occurred. In the new Procurement Law (implemented 1<sup>st</sup> April 2013) the use of a target budget without any further price agreements is no longer allowed. However, the early involvement of the contractor in the design phase, and the close cooperation between client and contractor to optimise technical requirements, did result in a significantly improved design compared with the initial design which was used to determine the target budget for the project.

#### *The execution team*

As stated above, negotiations between client and design contractor resulted in an execution contract for the target budget. However, the pollution issue caused a delay which itself was created by unforeseen procedural discussions between the private citizen and the province. Works that should have started in September 2011 were postponed until March 2012, by which time the project manager of the municipality had fallen ill and had to be replaced by the planner.

The rapid completion of the design phase to allow a start in September 2011, together with the delays by the municipality in supplying information, meant design changes were necessary in the execution phase. Although the municipality had intended to follow a cooperation model in the design and execution phase, the execution contract turned out to be a traditional Design-Bid-Build contract. As a result, the extra cost for extra work and rework became the responsibility of the municipality. A lawyer specialised in procurement law (a member of Pioneering) noted the gap between contract and intentions.

## **DISCUSSION**

This project in the Eastern region of the Netherlands emanated from a wish of various parties to work in a more cooperative manner to promote better working relations and to obtain the benefits of collaborative problem-solving. The results are promising, but various points for discussion arise also.

Following on from the literature review we can pull out three areas for discussion,

#### *Factors for a successful start of cooperation*

The use of qualitative criteria only to select a partner is less favourable for some traditional contractors. An on-going discussion between clients and contractors about appropriate criteria is necessary to preserve competition, expectations and developments.

The lack of early widespread discussion on these issues at the beginning created some problems with regard to the determination of mutual objectives, problem resolution and identification of responsibilities and risks in the design and/or execution phase. The winning bid and client expectations should be discussed to create a common framework and support effective cooperation.

A late check of (dated) information of the current situation is risky and a standard procedure should be a meeting at the beginning of the design phase to identify essential information required.

#### *Characteristics of cooperative problem-solving*

The shared gathering of information for the design requirements during the design phase stimulated cooperation and discussion as the team searched for an optimum solution. Clarity is needed over which information should be a shared responsibility and which information should be the responsibility of each team member.

This project has shown that a fully reliable cost calculation is only possible after the final detailed design. Therefore, any cost estimation of a target budget in the beginning must be viewed as approximate only. Thus, any financial incentives linked to an initial target budget do place the potential benefits at risk.

The price negotiations for the execution contract are competitive. The contractor had to offer to match the target budget, or else the contract would have been tendered for and awarded at the lowest price. In the current market situation prices are under heavy pressure. So, although an improved design was the result of the cooperation, the contractor had to offer a (traditional market) project discount in order to succeed in being awarded the execution contract. Therefore, the benefits for the contractor to cooperate were less than expected. This might influence unfavourably their view about participating in future cooperation scenarios. The determination of a cost price should be competitive, but a discount to get the contract actually undermines cooperation and should be avoided. Thus, following the literature, the lesson is that cooperation should be supported by the use of 'smart' financial incentives.

#### *Process success*

An early discussion about the organisation, but also an early involvement of future team members, is highly recommended to support and further the process efficiency and effectiveness of the team in the different phases. Also, an open discussion about the role of the advisors is important to connect the needs and expectations of the team members and investigate possibilities for a more active role and a closer cooperation between advisors and client/contractor.

Furthermore, frequent meetings help to monitor and to support the process of collaboration and force partners to work together. A place to work together is highly recommended to create three opportunities: to allow people to escape from the traditional environment and engage in the new 'cooperative' space; to support shared communication; and, to stimulate commitment, informal contacts and openness.

Although the cooperation was legally limited to the design phase, a discussion about the way to lengthen the cooperation to the execution phase should be considered. A change halfway towards traditional client contractor roles, as in this case, hampered future cooperation. A parallel and critical review of the current legislation is necessary to better support the cooperation and to identify such possibilities with regard to the newly implemented Procurement Law.



## CONCLUSION

The tendering for a cooperation partner is, in a way, a return to the situation of the mid-1990s of invited tender, cooperation and long-term relation between client and contractors. However, nowadays the Dutch municipality's procurement preference practice is less cooperative and long-term more towards public tenders, transparency and objective price tendering.

In the case of the project discussed in this paper, the intention for cooperation was not a long-term relationship, but to get experience and insight as to whether cooperation could offer benefits compared with the traditional client contractor relations in single projects.

The results are interesting. The cooperation studied produced a better solution than the initial design which was used to calculate the target budget. The open atmosphere, which is characteristic of the cooperation required, was extended into the execution phase. However, the degree of cooperation was legally restricted to the design phase.

The study found various differences and views on the success factors, the characteristics and the cooperation process. The majority of the bidders, except the contractor and second choice contractor in the tender, preferred the use of measurable criteria to be able to measure their bids which, in a way, is a traditional way of thinking. However, the success of cooperation is highly dependent upon various factors: the composition of the team; the willingness to cooperate; the mission and priority given to a project; and, the employment of the less measureable criteria as used in this tender procedure.

The idea that a financial incentive stimulates cooperation is not proven. A lack of experience means that not all the documented guidelines for creating and monitoring a cooperation project have been worked out or put in place.

We observed various other responses. For example, there were: no in-depth discussion to create a common framework; less commitment and sense of priority given the lack of time and other responsibility outside of the project; the limited role of advisors in the design phase; and, differences between the parties' intentions and the legal framework to which they had to adhere.

In general the escape from the daily traditional working environment in the design phase was sometimes problematic for the municipality involved. Also, external stakeholders influenced the progress and threatened the cooperation. The lack of actual and reliable information caused changes and, due to the legal context, provided a return to the well-known traditional, client contractor relation in the execution phase. The only way to reduce and off-set these disturbances would be through a thorough investigation of the conditions and the required preparations.

For the future, the managing of the process needs attention, as does the need for further development of a proper supporting legal framework for design and execution under a cooperation model.

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