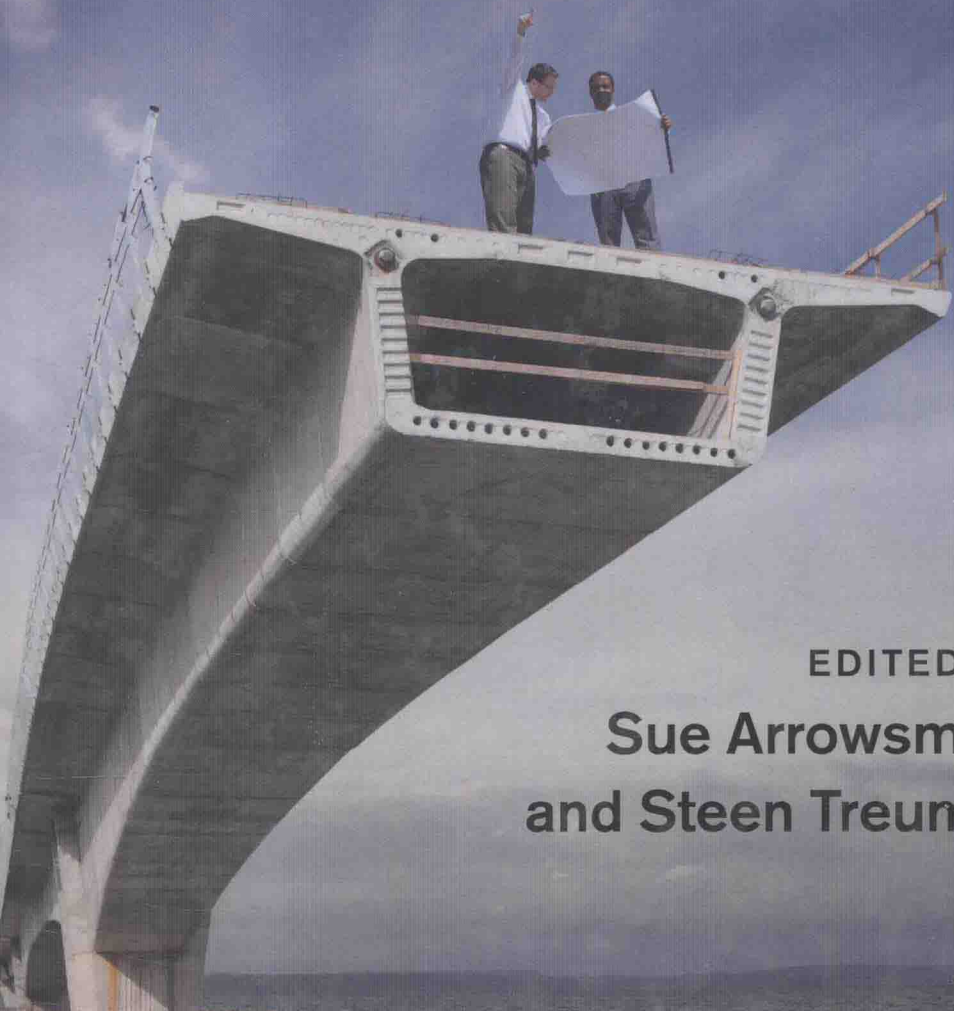


# Competitive Dialogue in EU Procurement



EDITED BY

**Sue Arrowsmith  
and Steen Treumer**

CAMBRIDGE

# COMPETITIVE DIALOGUE IN EU PROCUREMENT

Edited by  
SUE ARROWSMITH  
and  
STEEN TREUMER



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## CONTRIBUTORS

PROFESSOR SUE ARROWSMITH is Achilles Professor of Public Procurement Law and Policy at the University of Nottingham, where she is also Director of the Public Procurement Research Group and of the School's postgraduate Executive programme in Public Procurement Law and Policy. Her numerous publications have been extensively cited by courts and legislators in North America, Asia and Africa as well as Europe. Authored books include *The Law of Public and Utilities Procurement* (2nd edn, 2005); (with Linarelli and Wallace) *Regulating Public Procurement; National and International Perspectives* (2000); and *Government Procurement in the WTO* (Kluwer, 2003). In 1992, she launched the first international academic procurement journal, *Public Procurement Law Review*. In 2007, she was awarded the CIPS Swinbank Medal for thought innovation in purchasing and supply. She has taught university modules on procurement since 1995 and from 2009 to 2011 was Project Leader of the EU-funded Asia Link project for developing a global academic network on procurement regulation, which included setting up the global Procurement Law Academic Network (PLAN, [www.planpublicprocurement.org](http://www.planpublicprocurement.org)). She has been a member since 1997 of the European Commission's independent Advisory Committee on public procurement; is a member of the UNCITRAL Experts Group on Procurement; and has been consultant and trainer for, *inter alia*, the UK Office of Government Commerce, UN, WTO, European Commission, OECD, EU, European Central Bank, ILO and Law Commission of England and Wales.

PROFESSOR STEEN TREUMER is Professor of Procurement Law and Privatisation Law, in the Faculty of Law, Centre for Enterprise Liability (CEVIA), University of Copenhagen. He is a graduate in law and wrote his prize-winning doctoral thesis on the principle of equal treatment of tenderers in the EC public procurement rules. He is currently Professor of Procurement Law and Privatisation Law at the University of Copenhagen and Director of Studies. He has published widely on public procurement

law, including numerous international publications on public procurement law. His publications in 2011 include *Enforcement of the EU Public Procurement Rules* (Copenhagen: DJØF Publishing) (co-editor Professor François Lichère, Aix-Marseille III). Since 2006, he has been Assistant Editor of the international academic journal, *Public Procurement Law Review* and one of the Editors of the *European Procurement Law Series* established in 2009 (co-editor, Professor Roberto Caranta, Turin). He is also a consultant in public procurement law and has been involved as such in many public procurement procedures and has assisted practising lawyers in several disputes. Steen Treumer has organised more than thirty international conferences and seminars on EU law. About fifteen of these have concerned public procurement law. He was the conference programme director, together with Professor Sue Arrowsmith, for the global public procurement conference, 'Public Procurement: Global Revolution V', and also for the 1st Interdisciplinary Symposium on Public Procurement organised in 2011 together with Professor Gustavo Piga, Rome. In 2000, he was awarded the Spar Nord Foundation's Research Prize for his doctoral thesis. The prize is awarded to a researcher at Aalborg University who has concluded a particularly excellent project at the university. He is also Chairman and co-founder of the Danish Association for Public Procurement Law.

PROFESSOR DR MARTIN BURGI is Professor of German and European Public Law (since 1999) and Director of the only research institute in Germany for the Modernisation of Administrative Law and Government Procurement Law, at the Ruhr-University Bochum (since 2004). He is a member of the board of directors of the Institute for Mining and Energy Law at the Ruhr-University Bochum and a Research Fellow at the George Washington University Law School in Washington DC. His areas of expertise are: modernisation and privatisation of the state, administration and local governments and privatisation in the international context; privatisation in Europe; government procurement law; protection of fundamental rights of enterprises; legal protection at international courts; and the role of regions and municipalities in the global change. He is an official expert for parliamentary institutions and legal consultant for stock exchange enterprises, states and local municipalities. Furthermore, he is the scientific supervisor of the 'Düsseldorfer Vergaberechtstag', which is one of the leading annual conferences on government procurement law in Germany. He has written numerous books and articles (more than 10 books and over 100 essays) on all his research areas, for example: 'Small and Medium-Sized Enterprises and Procurement

Law – European Legal Framework and German Experiences' (2007) 16 *Public Procurement Law Review* 284; *Kommunalrecht* (2nd edn, Munich: Verlag C. H. Beck, 2008); 'Die Bedeutung der allgemeinen Vergabegrundsätze Wettbewerb, Transparenz und Gleichbehandlung' (2008) NZBau 29; 'Tagungsband zum 10. Düsseldorfer Vergaberechtstag' (2009); 'The Policy on Regulating Electronic Communications in Germany', in S. Arrowsmith (ed.), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (2009), pp. 305–27; 'Die Modernisierung des Vergaberechts als Daueraufgabe' (2009) DÖV 829; 'Federal Republic of Germany', in N. Steytler (ed.), *Local Government and Metropolitan Regions in Federal Systems* (2009), pp. 136–65; and *Damages as an Effective Remedy? German Perspective* (2010).

DR DARIO CASALINI is Assistant Professor of Public Law at the Faculty of Economics, University of Turin, where he teaches public law for economists and EU public procurement law. He is a lawyer at the Bar of Turin, and was visiting researcher at King's College London in 2008–2009. He has taken part in several research projects focused on European public procurement law and has published various articles on the issues arising in the national implementation of EU procurement law, including a book on the notion of a body governed by public law and in-house provision, *L'organismo di diritto pubblico e l'organizzazione in house* (Jovene, 2003). He has presented papers at international conferences (IGU 2009, IPPC 2010, PLPR 2011) and his research interests lie in the area of public and administrative law, public procurement, public utilities, NHS, public service, water and natural resources law, and public ownership in a comparative perspective.

RICHARD CRAVEN is a PhD candidate at the University of Nottingham. His research explores the operation of competitive dialogue in the UK, combining a socio-legal analysis of the legal rules with qualitative interviews with key actors (contracting authority procurement officers and internal legal advisors, external legal advisors, and policy-makers). The research is supervised by Professor Sue Arrowsmith, Professor David Fraser and Susie Smith (Bevan Brittan LLP), and is funded by the Economic and Social Research Council and Bevan Brittan LLP.

ANNA GORCZYNSKA holds the Chair of European Economic Law in the Faculty of Law and Administration, University of Lodz, Poland. She read law at the University of Lodz, where she prepared her masters thesis titled

'Direct investments of the foreign capital in Poland'. In 2005, she prepared her dissertation titled 'Public procurement in the European law' and she is now preparing her habilitation on public-private partnerships. She was previously a law student at the German universities of Muenster, Giessen and Bonn. She was a postgraduate student at the International Law and Business Law School organised by the Catholic University in Washington in co-operation with Jagiellonian University (1994, 1996). In 1999, she participated in the Internationale Parlements Praktika in Bundestag, Germany, and from 2000 to 2002 worked in regional lobbying offices in Brussels. She was also a guest professor at the Freie University in Berlin and University in Giessen. In 2010, she was invited as a guest speaker at the International Public Procurement Congress in Beijing. She directs postgraduate studies on European structural funds in the Faculty of Law and Administration. She is also a member of the European Law Association. Her main scientific interests and publications concern public procurement law, public-private partnership, European economic law, competition law, regional policy and the structural funds of the EU. Parallel to her academic work she has been working for regional self-government as head of the unit responsible for international co-operation of the Lodz Region (since 1999). She is also involved in the legal practise in Eurokancelaria.

DR SYLVIA DE MARS is a Lecturer in Law at the Newcastle Law School, Newcastle University. She obtained a Bachelor in Social Science from University College Utrecht and thereafter specialised in international law, obtaining an LLM and a PhD at the University of Nottingham. She is currently lecturing in the fields of public procurement law, international trade law, EU internal market law, and financial regulation. Her main research interests include comparative EU procurement law, regulatory theory, and general EU internal market law.

MRS JACOBIE MUNTZ-BEEKHUIS is senior counsel for the Professional and Innovative Procurement Network for Contracting Authorities (PIA-NOo), an expertise centre for public procurement which is part of the Ministry of Economic Affairs, Agriculture and Innovation in the Netherlands. From 2005 to 2008, she was a senior counsel within the PPP Unit of the Government Building Agency. She holds a law degree in civil law and a law degree in notarial law from the University of Amsterdam (1994). She is specialised in procurement law, having gained experience as a licensed attorney for Trenité van Doorne, and as a legal counsel for Siemens. Previous publications include 'The Competitive Dialogue', a guide based

on the experience of the Rijksgebouwendienst, Rijkswaterstaat and the Ministry of Defence.

MS MARIJKE NAGELKERKE is a senior consultant on legal affairs with the Ministry of Infrastructure and Environment, Department of Water Management and Public Works in the Netherlands. From 2007 to 2011, she was a senior consultant with the PPP Unit of the Department of Water Management and Public Works. Currently, she is a senior legal consultant with the Service Organisation Infrastructure of the same department. She holds a law degree in civil law from the University of Tilburg (2000). Her field of expertise is procurement and contract law. Recently, she has started her dissertation research, focused on PFI contracts in the Netherlands for her doctoral degree with the Delft University of Technology. She has extensive experience of contract and procurement law, both during her career with the Ministry of Infrastructure and with the Ministry of Defence. Previous publications include 'The Competitive Dialogue', a guide based on the experience of the Rijksgebouwendienst, Rijkswaterstaat and the Ministry of Defence.

MRS FRÉDÉRIQUE OLIVIER has been a Partner at DS Avocats in Paris since 2005. She advises public authorities and private economic operators on national and international public procurement and litigation matters. She specialises in public contracts and especially in public-private partnerships. Previously, she was the head of the legal department of ADEME, a French public organisation in the field of environment, energy and sustainable development, from 1982 to 1990. She was then part of the legal department of Cité des Sciences et de l'Industrie from 1990 to 1996 and the legal department of Federation Française du Bâtiment, a French professional building federation, from 1996 to 2005.

PROFESSOR GABRIELLA M. RACCA is Professor of Administrative Law, Deputy Dean at the Faculty of Economics, University of Turin and Member of the Scientific Board of the Master of Science in Public Procurement Management for Sustainable Development jointly organised by the International Training Centre of the International Labour Organisation and the University of Turin. She led several national and European research projects on the contractual autonomy of health authorities (PRIN 2005 and PRIN 2007) and on educational paths regarding collaborative public procurement financed by the Region of Piedmont (European Social Fund). She is responsible for the Procurement Contract topic of the Ius

Publicum Network, founded in Madrid by the Editorial Boards of *Die Verwaltung*, *Diritto amministrativo*, *International Journal of Constitutional Law*, *Public Law*, *Revista de Administración Pública* and *Revue française de droit administratif*. Her research interests include public services, public contracts and public procurement, PPP, collaborative procurement and central purchasing bodies particularly in European healthcare systems, and sustainability (environmental and social considerations) in public procurement; public liability and compensation for damages; and accountability of public administrations. She has presented papers at international conferences (Paris 2010, Symposium international des acheteurs publics et privés de la santé; New York University 2010, The New Public Law in a Global (Dis)Order; George Washington University 2010; IPPC 2010, Seoul; and WP Carey Law School, Arizona University 2011). She recently published in *Public Procurement Law Review* ('Collaborative Procurement and Contract Performance in the Italian Healthcare Sector: Illustration of a Common Problem in European Procurement' (2010) 19 *Public Procurement Law Review* 119), and in European Procurement Law Series, in Quaderni Consip – Consip website with R. Cavallo Perin and G. L. Albano on competition in the execution phase of public procurement.

DR DEIVIDAS SOLOVEIČIKAS is a lecturer at Vilnius University Faculty of Laws where he teaches courses on public procurement law and EU public procurement law. He received the degree of Master of Laws at Vilnius University (2001). He also studied at the Faculty of Law of Lund University, Sweden (1999), continuing his studies at the University of Essex, England, where he obtained the degree of Master of Laws (LLM) in European Community Law (2004). From 2001 to 2005, he was a PhD candidate and studied at the Faculty of Laws of the University of Vilnius. In 2005, he successfully defended his PhD dissertation on the subject of comparative aspects of corporate criminal liability, on the basis of which the degree of Doctor of Law was received. He is a member of the Lithuanian Bar Association and a managing partner of the MAQS law firm's Vilnius office. In 2011, he became a Member of the Chartered Institute of Arbitrators.

DR PEDRO TELLES is a Lecturer in Law at Bangor University, Wales, teaching procurement-related modules and media law. He is a member of the team for the Winning in Tendering project, a €3.7 million INTERREG-funded project assessing different aspects of procurement in Wales and Ireland. Within the project, Pedro is leading the research on low-value procurement with the aim of improving participation by small and

medium-sized enterprises (SMEs) and experience in this type of procurement without overburdening contracting authorities. Pedro joined Bangor in January 2011 after concluding his PhD in the University of Nottingham with a thesis on the implementation of competitive dialogue in Portugal and Spain, under the supervision of Professors Sue Arrowsmith and David Fraser. For his thesis, Pedro conducted qualitative analysis through semi-structured interviews with lawyers, contracting authorities and law-makers as to assess competitive dialogue use in practice. Previously, after graduating from the University of Lisbon in 2003, he practised law in Lisbon and Barcelona until 2007, working mostly in public procurement and international contracts. He has been a member of the Portuguese Bar Association since 2005.

DIEDERIK VAN DER STAAY has been active within the Dutch Government Buildings Agency for thirteen years. From the very first pilot DBFMO project starting in 2003, he has experienced the development of DBFMO at the Government Buildings Agency. He has developed himself to become a dedicated trainer in this field. His main tasks now are helping anyone who is at the beginning of an integrated project to learn the skills before trying them out for real.

## PREFACE

The introduction of competitive dialogue into the EU's legal regime on public procurement was indisputably one of the most important elements of the latest revision of this regime in 2004. Competitive dialogue was introduced in order to improve on the procedures previously available for realising complex projects, such as privately financed infrastructure projects, complex IT systems, and new types of services. Prior to this, many stakeholders considered that the award procedures for such projects were either too inflexible or were not sufficiently widely available in law, and competitive dialogue was added to fill the gap. The complex contracts to which it applies are significant both because they often involve considerable public expenditure and because they concern vital public services and infrastructure, and a suitable legal regime for awarding such contracts is therefore of utmost importance.

The main aim of this book is to provide a critical examination of the legal regime on competitive dialogue, in light of its objective of providing a procedure for complex procurement across the diverse Member States of the EU. This involves considering both the legal rules at EU level and the way in which those rules have been implemented and applied at national level, the latter being essential for a full perspective on the EU rules themselves. Through this analysis, the book also, significantly, aims to contribute towards the sound future development of the rules on competitive dialogue, both at EU level and in its implementation in national law and practice – whether that be through legislative change, judicial development, government guidance or simply application by contracting authorities. The work also offers an interesting case study of the way in which EU public procurement law has been received in national law and practice, and has influenced, and been influenced by, national approaches to regulating public procurement.

Enhancing the simplicity of the EU's legal regime and the flexibility of the procurement procedures it offers are also at the top of the agenda in the current process of modernising the EU procurement regime. A first

proposal for a new basic Directive on public procurement was forwarded by the European Commission in December 2011, after the text of this book was completed. The outcome of the legislative process is by its very nature uncertain. However, it is notable that it will become much easier to access the competitive dialogue procedure if the European legislator follows the proposal of the European Commission. As this book demonstrates, its current scope is very uncertain, and this is one of the main reasons for the remarkable variation in the frequency of its use between Member States; but the Commission has proposed that the procedure should in future become more generally available, eliminating this uncertainty and the legal risks that may arise in choosing this procedure.

To increase the value of this book we have conducted several empirical studies. These studies have examined the way in which the legal rules 'in the books' have been applied and interpreted in practice by those responsible for operating and/or advising on competitive dialogue – mainly lawyers, procurement practitioners and policy-makers – in several of the Member States covered. This information is supplemented with information from other empirical studies, mostly from national governments. It is our hope that this element of the book will be a source of inspiration for practitioners, as well as informing policy-makers of the practical difficulties and concerns that need addressing in relation to this relatively novel procedure.

Many persons contributed to the production of this book or otherwise provided necessary support. Early versions of some of the papers incorporated in this volume were included in a workshop, held at Copenhagen Business School in September 2009. Subsequent versions and some additional papers included in the volume were presented at the conferences, Public Procurement: Global Revolution IV in Nottingham in April 2010, and Public Procurement: Global Revolution V in Copenhagen in September 2010, both of which were organised jointly by the University of Nottingham and the University of Copenhagen. We are grateful to all those who made presentations at these events, as well as to the delegates who provided interesting feedback on the papers presented there. We would also like to record our thanks to those assisting with the organisation of these events, in particular Justine Goodenough and Paula Faustino at the Nottingham event and Tina Futtrup Borg at the Copenhagen event.

At the School of Law of the University of Nottingham, thanks are due to all those who worked on technical aspects of the manuscript, in particular to Richard Craven and Gabor Soos for their very efficient

contributions. Sue Arrowsmith would like also to express her great appreciation to the sponsors of the Public Procurement Research Group, in particular to Achilles Information for funding and support for many aspects of the project, including the empirical studies on Spain and Portugal, and to Bevan Brittan for co-funding the empirical research on UK practice. We are also grateful to the ESRC for the funding that it provided for this UK project under the CASE studentship scheme. The editors would also like to express their great appreciation to the many practitioners and policy-makers who were willing to take part in the empirical study on competitive dialogue in the UK, Denmark, France, Spain and Portugal.

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We also record our very sincere thanks to the authors/co-authors of all the chapters of the book, who freely gave of their time and insights and whose contributions made the book possible.

The information in this book is in general up to date as of July 2011. However, it has also been possible to a limited extent to note some important later developments, including, in Chapter 3, a change of policy on use of competitive dialogue announced in the UK in November 2011.

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