The Need for Sensemaking and Negotiation in Procurement Situations

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THE NEED FOR SENSEMAKING AND NEGOTIATION IN PROCUREMENT SITUATIONS

Mieke Hoezen¹ and Leentje Volker²

ABSTRACT

Since most of the infrastructure projects are being built with public money, public procurement regulations apply. Compared to regular partnerships, it is hard to develop trust in procurement situations. Inspired by transaction costs economics, procurement processes are still considered as predominantly legal processes that are required before starting a project. Consequently, the legal requirements usually prevail over the social process of deciding about the right partner to collaborate or the best proposal that would ensure project success. Nevertheless, the right partner and well-thought process design are critical for project success.

We argue that procuring services and works for construction projects requires parallel processes of organisational sensemaking and bargaining. Therefore tender processes should be considered as an essential step in project management and designed accordingly. We aim at demonstrating why procurement processes should be considered as negotiation processes in which the procurement system facilitates the actors in making decisions instead of forcing them into a predefined (legal) system.

The research is based on insights from two empirical case studies: one case about a Design Build contract for a Provincial Government House and once case about a Design, Build, Finance, Maintain contract for a large Tunnel. Empirical data from these cases indicate that sensemaking processes are necessary to induce mutual support for the contractual arrangement and a joint project execution. Difficulties in making sense of the project, the contract partner or the context result in execution problems that harm the success of the construction project. The findings of the cases are reflected upon literature from the field of organisation sciences about decision making and negotiating processes. In the conclusion we propose how sensemaking and negotiation can be included in the current procurement processes in construction.

KEYWORDS: infrastructure; partnering; procurement; trust; sensemaking

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INTRODUCTION

Already in the sixties, Higgin and Jessop (1965) concluded that the construction industry suffered most from poor communication resulting in abortive work, misunderstanding and delays. This was reinforced by a study of Franks (1998) in which 25 per cent of all construction employers cited communication as a basic reason for failure. In the same year Thomas, Tucker and Kelly (1998) concluded that the ‘lack of effective communications’ was the major obstacle to project success, and Somogyi (1999) noted that inadequate information, late information and inadequate design brief were the three most common reasons for contract failures. In order to eliminate disputes and potential claims, Lavers (in Nicholson and Naamani 1992) therefore suggested that greater attention should be paid to improving communication. In the early 2000s, communication in construction gained interest amongst researchers. Accordingly Brown (2001) introduced the concepts of understanding and negotiations in relation to communication in design processes. He explained communication problems not just by focusing on problems of understanding between the construction parties, but also by showing how communication problems are useful ‘as a commercial negotiating tool’ for hidden agendas.

The combination of increased project complexity (Baccarini 1996, Laufer, Denker and Shenhar 1996, Alderman et al. 2005, Walker 2007), changing government roles (Blanken 2008) and the construction sector’s poor professional functioning (Construction Task Force / Detr 1998, National Audit Office 2001) has changed interactions involved in construction projects. Public principals remain more distant to construction projects, sourcing out more and more of the work. Contractors became involved in projects more early, and as a consequence, the contracts to govern construction projects had to be signed earlier in the process, when the chances to unforeseeable contingencies were great. Yet, communication and negotiation between different parties usually starts in the procurement phase. Renegotiations during the execution stage of projects therefore occurred on a regular basis (Dorée 2001) and perception differences often led to disputes (Reniers 2007). To come to a better understanding about project details, the allocation of responsibilities and risks and the terms for cooperation, both procuring authorities and contractors felt the need to have conversations before a contract was signed (Dorée 2001).

In order to be able to trust each other it is critical for contractors to understand the client’s initial motivation to invest time and money in design, and for clients to understand the contractor (Cuff 1996). In other words, both parties need to make sense of each other to cross organizational borders (Pemsel and Widén 2011) because once they start collaborating formal and informal communication mechanisms will develop (De Blois et al. 2011). Hence it is argued that developing trust, a common language and an understanding of all parties’ requirements should be critical in the procurement phase, to ensure maximum disclosure and allow for the identification of areas of deficiency within the team as a whole (Brown 2001). Especially in case of integrated contracts parties are condemned to collaborate for an extensive period of time. It is thus imperative that partners are able to develop a shared aim of the project before this relationship is made official in a legal document.

However, in current procurement practice tactical opportunities and opportunism for short-term financial planning are more commonplace than most dare to acknowledge (Hoezen 2012). Many projects exhibit minimal input to defining their needs and translating these to functional requirements (Volker 2010). They rather haste to move on to latter stages of the building process based on a seemingly transparent image of the costs and time line of the project (Construction Task Force / Detr 1998). Moreover, the Construction Task Force concludes that a
lack of time is the most common reason to concerns of inadequacies in briefing and restricted communication.

In this paper we argue that procuring services and works for construction projects requires parallel processes of organisational sensemaking and bargaining. Therefore tender processes should be considered as an essential step in project management and designed accordingly. We aim at demonstrating why procurement processes should be considered as negotiation processes in which the procurement system facilitates the actors in making decisions instead of forcing them into a predefined (legal) system.

The research is based on insights from two empirical case studies: one case about a Design Build contract for a Provincial Government House and once case about a Design, Build, Finance, Maintain contract for a large Tunnel. Empirical data from these cases indicate that sensemaking processes are necessary to induce mutual support for the contractual arrangement and a joint project execution. The findings of the cases are reflected upon literature from the field of organisation sciences about decision making and negotiating processes. In the conclusion we propose how sensemaking and negotiation can be included in the current procurement processes in construction.

FRAME OF REFERENCES

Partnering in procurement situations

Procurement refers to the function of purchasing goods or services from an outside body (Arrowsmith 2005). On 13 March 2004 two European tender directives were passed: the Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and the Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The main objective of the procurement regulations is to ensure competition and accessibility for all market parties. In all tender processes, “contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way” (European Parliament and Council of the European Union 2004: art 2). In practice, this is referred to as the legal principles of objectivity, transparency and non-discrimination. It is assumed that by applying the regulations authorities act carefully towards citizens and entrepreneurs and create best value for taxpayers’ money (Arrowsmith 2005).

Implementing the procurement regulations every commissioning client in Europe is obliged to hold a tender for the selection of a partner that provides certain services and/or construct works above certain threshold amounts. Most of the infrastructure projects exceed this threshold. Procurement is often connected to the concept of transaction costs economics, which associates inter-firm exchanges with transactions costs caused by negotiation, administration, and contracting (Williamson 1998). A transaction is defined by Williamson (1998) as the transfer of a good or a service between separate units. Transactions have specific attributes that include asset specificity, uncertainty and frequency, and are associated with the assumption of bounded rationality (limited rationality due to cognitive constraints) and opportunism (self-interest). As transaction costs economics provides the basis for procurement, procurement processes in construction are still considered as predominantly legal processes that are required before starting a project. Consequently the legal requirements usually prevail over the social process of deciding about the right partner to collaborate in a project context.

Nevertheless, the right partner and cooperative procurement procedures are critical for project success (Eriksson and Westerberg 2011). To select their project partner authorities can
generally choose between an ‘open procedure’ - procedures whereby any interested economic operator may submit a tender, and a ‘restricted procedure’ - procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender (European Parliament and Council of the European Union 2004). In specific cases the client can select a procedure with an increased level of interaction between the buyer and the supplier. In the ‘negotiated procedure’ the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these. A ‘competitive dialogue’ is procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

These procedures are not specially developed for infrastructure projects. Yet, most of the research on tender and procurement is done in the context of construction projects. This is, amongst others, caused by the fact that trust, control, risk and performance are important variables in building inter-organizational relationships (Zaheer, Mcevily and Perrone 1998, Klein Woolthuis, Hillebrand and Nooteboom 2005, Kadefors and Laan 2010), issues that are hard to address in traditional procurement situations. Whereas in regulation business situations, the buyer is allowed to build on his or her relational network and previous experiences, a public commissioning client has to apply the principles of objectivity, transparency and non-discrimination to select a project partner. This results in a situation in which no one-to-one situation is allowed.

In these kinds of situations contracting authorities do not invest much in growing trust, since they have to await which one of the contenders will gain the contract. Contractors, on the other hand, remain distant from the contracting authority as long as they are in competition with others. They keep information to themselves, which also makes it difficult to develop trust. In this context Hoezen and Dorée (2008) clearly address the psychological aspects of the competitive dialogue procedure. They conclude that in case of dynamic dialogues (which are actually exclusively used in complex cases where written questions and answers would be insufficient), both contracting authorities and candidates feel insecure whether acting conform the legal principles of objectivity, transparency and non-discrimination to select a project partner. This results in a situation in which no one-to-one situation is allowed.

Negotiation as a concept of bargaining and sensemaking

According to Ring and Van De Ven (1994) organizations focus on formal bargaining and informal sensemaking during negotiations in inter-organizational relationships. By negotiating parties develop joint expectations about their motivations, possible investments and perceived uncertainties. To a certain extent they also get to know and understand each other. By information confinement, by turning tacit knowledge into words and schemas, by sharing knowledge, assumptions and mental models, and by reduced impact of biases, parties grow and create meaning of the transaction, the context of the transaction, and the value of it to the other party and to oneself. Within the field of transaction costs economics, procurement is viewed as a bargaining process, aimed at coming to an agreement in a situation where the parties involved have somewhat conflicting interests. The terms of the agreement are the subject of the bargaining. In their attempt to come to a consensus about these terms, several mechanisms occur, such as focusing attention, forcing articulation, deliberation and reflection, interacting, and
reducing biases, judgment errors, incompleteness and inconsistency (Vlaar, Van Den Bosch and Volberda 2006).

In current practice the written questions and answers and the presentation of a vision (or sketch design) are the most common communication tools during procurement processes of building projects (Volker 2010). Sometimes information meetings are organized by clients but visits to reference projects of tender candidates hardly ever take place. For the procurement of infrastructural works the most popular tender communication practices are written questions and answers and the assessment of a construction plan for the project. This indicates that the current procurement practice holds a very strict view on possibilities for the parties to interact. These practices with static interaction provide much confidence to the procuring agency, since clients know how to handle the legal principles of objectivity, transparency and non-discrimination. Yet, an independent supervisor of the communication process could support correct implementation of procurement law in situations of personal interaction (Chao-Duivis 2008) while also meeting the EU ground principles.

Vlaar, Van Den Bosch and Volberda (2006) state that the identified bargaining processes help in making sense of the inter-organizational relationship and to its context. Sensemaking is a social process during which members of an organization interpret their environment in and through interactions with others, thus constructing observations that allow them to comprehend the world and to act collectively (e.g. Starbuck and Milliken 1988, Isabella 1990, Weick 1993, Weick 1995, Maitlis 2005). Parties with different beliefs and assumptions have to create coherent understandings in order to come to collective action.

Whereas in transaction costs economics the emphasis is placed on the differences in interests between the parties, social psychologists tend to emphasize the risk that problems linked to understanding could arise because the two parties involved have different backgrounds, work in different cultures and have dissimilar belief systems (Sutcliffe and Huber 1998). Yet, since the two parties intend to work together, they will strive for congruent views on the purpose and expectations of the relationship. Sensemaking processes are therefore assumed to play a central role in the procurement of a project. The result of these sensemaking processes is an understanding of the transaction, the context of the transaction and the value of it to the other party and to oneself. Shared understandings between the two parties are reflected in mutual beliefs, norms, values and routines. These form the basis for commitment.

**Formal and informal contracts as a sign of commitment**

Next to contractual governance strategies also relational governance strategies have been studied (Vandaele et al. 2007, Poppo, Zheng Zhou and Zenger 2008). Governance refers to the formal and informal rules of exchange between partners (e.g. Nooteboom 1996, Vandaele et al. 2007). Contractual governance can be defined as an established formal, legal, and economic governance strategy; relational governance refers to the developing strength of the social norms present in the exchange and has often been referred to as relationalism. Relational governance usually employs a positive link with contractual governance. Commitment refers to the state of being bound to a course of action or to another party, and stems from both natural motivators as feelings of empathy or shared values, and from artificial motivators as contract clauses and reward mechanisms. Commitment to the project by both public principal and his contractor is reflected in agreements and the signing of a contract (Kamminga 2008).

Also in governance research in the domain of organization and management studies, transaction costs economics was the leading perspective for long. In transaction costs economics three governance forms were identified, congruent with the ordering principles of Williamson
Combining the three-way distinctions made in ordering principles and governance forms by Williamson (1975) and Nooteboom (1996), social psychologists have, however, developed a two-way distinction. They distinct between formal control based on measures, and informal control based on values (Eisenhardt 1985, Kadefors and Laan 2010, Hoezen 2012). Thus, commitment became reflected in two types of contracts: formal legal contracts and informal psychological contracts. This is depicted in Table 1 and explained in the next section.

The informal psychological contract is related to the term informal control, as used by relational governance academics. Following Kadefors and Laan (2010) “informal control is about purposefully establishing norms, values and routines, to reduce discrepancies in goal preferences and inclinations towards opportunism. Consequentially, informal control reduces risk through the establishment of shared values. A shared understanding encourages parties to establish reasonable and achievable goals, which as well reduces risk” (Das and Teng 2001). Thus, the informal psychological contract is referred to as the implicit set of expectations between procuring agency and its contractor, which are subject to continual change. As such, it is a highly flexible and undefined set of terms which are interpreted by the individuals involved. Although it is only implicit, it can be a significant determinant of behavior within transactions, and any perceived violations can have lasting effects.

Ring and Van De Ven (1994) describe how the informal contract becomes formally codified. Given that individuals act as agents for their organizations, these organizations will require formal documentation and standardization. Thus, the informal commitments made by interacting individuals will be put into writing for their organizations and for other individuals also acting as agents for these organizations. Furthermore, informal commitments become institutionalized over time due to the repetitive execution of acts by the individuals involved. Berger and Luckmann (1966: 57) describe this as follows: “Man is capable of producing a world that he then experiences as something other than a human product”.

The formal legal contract, a reflection of formal control, contains both limitations on the opportunities for opportunism and limitations on the material incentives to utilize these opportunities. There are several mechanisms with which contracting parties could address this form of control (Nooteboom 1996). These mechanisms, that are derived from transaction cost economics, are: a shift in rights/powers of decision (when the procuring agency delegates (part of) its rights or decision-making power to the contractor); reward systems (either output- or input-based payment); monitoring (a mechanism to check the contractor’s actual efforts); and bonding (a mechanism for the contractor to prove its efforts to the principal) (Douma and Schreuder 2008, Kamminga 2008).

Vlaar, Van Den Bosch and Volberda (2006) argue that there are several disadvantages in formalizing informal understandings. They come to the conclusion that formalization may have negative effects on sensemaking, causing new problems in understanding. The risk is that it may make events appear more comprehensible and controllable than they really are. It may lead to formalism, resulting in increased rigidity, a loss of creativity and flexibility, and diminished trust. Further, the preparation of formal legal contracts may involve large efforts and huge transaction costs, and it could hamper the conversation when the benefits of the contract are unclear to the parties. Furthermore, although standardized formal contracts guide the agents of organizations, Ring and Van De Ven (1994: 106) argue that “new agents may employ these blueprints without fully understanding the initial and changing intentions of a relationship. As this drift between appreciation of the formal and informal contracts develops over time, we would expect conflicts to erupt among the parties.” This suggests that these conflicts (problems
of understanding) can either terminate the relationship or initiate another cycle of negotiations (bargaining / sensemaking).

Table 1. From three governance forms to two contract types

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<tbody>
<tr>
<td>Social ordering</td>
<td>Benevolence</td>
<td>Informal control</td>
<td>Informal psychological agreement</td>
</tr>
<tr>
<td>Decreasing propensity for opportunism by using norms, values and loyalty</td>
<td>Limitation on inclination towards opportunism based on established, socially inculcated norms and values; and also on empathy, identification, affect and routines developed in specific relationships</td>
<td>Purposefully establishing norms, values and routines to reduce discrepancies in goal preferences and inclinations towards opportunism</td>
<td>Norms, values and routines</td>
</tr>
<tr>
<td>Private ordering</td>
<td>Incentive control</td>
<td>Forma control</td>
<td>Formal legal contract</td>
</tr>
<tr>
<td>Incentives such as shared ownership of specific investment, and reputation mechanisms or posting of hostages</td>
<td>Limitation on material incentives to utilize opportunities for opportunism</td>
<td>Establishing and utilizing contracts, formal procedures and monitoring policies</td>
<td>Contract, formal procedures and monitoring policies</td>
</tr>
<tr>
<td>Legal ordering</td>
<td>Opportunity control</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Means to constrain opportunism including contracts and monitoring</td>
<td>Limitation on the opportunities for opportunism</td>
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</table>

**ANALYTICAL FRAMEWORK**

The aim of this paper is to demonstrate why procurement processes should be considered as negotiation processes in which the procurement system facilitates the actors in making decisions instead of forcing them into a predefined (legal) system. By showing what impact perceptions of the legal system have on the development of procurement processes, we demonstrate that its restrictive and/or facilitating character is crucial to the development of procurement processes and establishing committments. Main research question is: “What’s the effect of the perceptions of the legal procurement system on negotiation processes that determine the commitment of public and private parties in infrastructure?”

The analytical frame guiding the collection of data was derived from the frame of references as described in the previous section. It consists of three consecutive and iterative stages of procuring a contract: initialization, negotiation, and commitment. The initialization is determined by the perception of the two logics that exist in infrastructure projects: the procurement logics and the partnering logics. From a procurement perspective the client and contractors bargain about the terms of agreement in the negotiation phase, while this kind of interaction causes the actors to make sense of their own internal environment and thus the future performances. The commitment stage focuses on the natural and artificial motivators leading to a certain action. These commitments are secured by formal legal contracts and informal psychological agreements. So across the whole process of awarding the contract, the
initialisation is determining the negotiation process and thus influences the commitment between the parties involved.

![Analytical framework](image)

**Figure 1: Analytical framework**

**RESEARCH APPROACH**

The research question about the effect of perceptions of the legal system on negotiation and commitment is an explanatory one. The nature of this type of question is that they deal with “operational links, needing to be traced over time, rather than mere frequencies or incidence” (Yin 2009: 9). Unlike exploratory “what” questions, that could be answered using almost any type of research, answering explanatory “how/why”-questions are likely to require the use of case studies, experiments or histories (Edmondson and Mcmanus 2007). The choice for one from these three, or perhaps a combination thereof, will be determined by the events that are being researched. Yin (2009) shows that this choice is determined both by the extent of control over and by the access to the events. When the researcher has neither control over nor access to the events under study, formulating a history is the preferred approach.

A case study is preferred when examining contemporary events, in a situation where the researcher is unable to manipulate relevant behaviors. When the relevant behaviors can be manipulated directly, precisely and systematically, experiments are likely to be a better option. Considering access and control aspects of the current research question, our problem satisfies the conditions set by Yin (2009) for case study research. The procurement process is a contemporary event, but one that cannot be influenced by the researcher. Case study research would therefore seem to be the best method to answer the research question.

Yin (2009: 18) defines case study research as “an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident”. In addition to this definition of the subject of case study research, Yin (2009: 18) also provides an indication of the appropriate data collection method: “the case study inquiry copes with the technically distinctive situation in which there will be many more variables of interest than data points, and [...] relies on multiple sources of evidence, with data needing to converge in a triangulating fashion, and [...] benefits from the prior development of theoretical propositions to guide data collection and analysis”.

9
For this study, data were collected through a combination of interviews, desk research and observations (see Table 2). Case studies were used as a rich empirical description of particular social entities that are typically based on a variety of data sources (Easton 2010). The variety of different forms of data allowed for triangulation between self-report, observed behavior and official justifications of the case data. The data were initially analyzed as separate case identities and then systematically compared on appearing constructs collaboratively. The concepts in the analytical framework are treated as sensitizing concepts. According to Blumer (1969: 148), a sensitizing concept “gives the user a general sense of reference and guidance in approaching empirical instances. Whereas definitive concepts provide prescriptions of what to see, sensitizing concepts merely suggest directions along which to look. The hundreds of our concepts – like culture, institutions, social structure, mores, and personality – are not definitive concepts but are sensitizing in nature”.

Throughout data analysis and reporting the authors were frequently going back and forth between the interpretation and the original data. This process can be characterized as ex ante use of theory in qualitative research (Andersen and Kragh 2010). The general aim of this approach is “not to build consensus aiming diverging theoretical perspectives but rather to use their divergences as vantage points for creating new insights” (Andersen and Kragh 2010: 53).

<table>
<thead>
<tr>
<th>Data collection method</th>
<th>Provincial Government House</th>
<th>Road Infrastructure Tunnel</th>
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</thead>
<tbody>
<tr>
<td>Desk research</td>
<td>15 documents (working documents, competition rules)</td>
<td>13 documents (2 evaluation reports, 4 procurement protocols, 6 versions of the contract and 1 document containing the 2780 dialogue questions and answers)</td>
</tr>
<tr>
<td>Interviews</td>
<td>Informal conversations with project team and client body members during a 7 month period noted in a research log of 30 pages.</td>
<td>29 interviews, generating 357 pages of transcribed interviews</td>
</tr>
<tr>
<td>(Participative)</td>
<td>Period before official announcement until the process was cancelled right after selection phase (July 2007 - January 2008) - 20 meetings (general reports)</td>
<td>During the first year of the construction stage (September 2008 until July 2009)</td>
</tr>
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</table>

**CASE DESCRIPTIONS:**

**Case A: DB contract for a Provincial Government Office**

This case concerns the selection of a Design and Build consortium for a new part of the governmental offices of the Province of Utrecht. The current offices of the Province consist of a tower, built in the 90s, and a lower block called ‘The Stars’, built in the 70s. The case concerns the tendering procedure for a new building replacing ‘The Stars’. The brief for the Provincial Government House read as follows (translated from Dutch by the author): “The new building has to form a new office concept with flexible workplaces and contemporary facilities …. The building has to offer about 10,200 m2 usable floor area (about 16,000m2 gross floor area) and space for about 500 workplaces.“

The Provincial agency chose to tender their contract as a Design and Build contract and to use a restricted tendering procedure. To apply for the tender interested parties were asked to
form a consortium, which should include at least an architect, a contractor and a project manager. The consortium would be responsible for delivering the new building (design as well as construction) for a fixed price of €39 million excluding VAT. All consortia participating in the award phase would receive financial compensation of €150,000.

Eight consortia applied for this tender. The exclusion and selection criteria were based on strict organizational and financial requirements of the consortium but the deciding factor was suitability of the architect, to be assessed based on three reference projects that were designed by the proposed leading architect. Three consortia were excluded for failing to meet the minimum requirements, resulting in five candidates.

The selection committee, consisting of members of the executive board of the Province and an independent chair, determined the degree in which the reference projects fulfilled the criteria of a ‘public, timeless, business-like character with a human scale’ in a single meeting of three hours. They were assisted by an architectural expert. This resulted in a decision to allow all five parties into the award phase. Unfortunately the tender was cancelled immediately after the selection phase due to reconsideration of the decision to replace the lower part of the building.

Case B: DBFM contract for reconstruction and expansion of an existing tunnel

The Second Coen Tunnel project is large (estimated net present value 300 million) and complex, and involves the maintenance of an existing, 40-year old tunnel plus the construction of a second tunnel alongside the current one. The project was procured by the Dutch Highway Agency called Rijkswaterstaat in a competitive dialogue procedure. Five consortia met the qualification criteria and were therefore invited to participate in the dialogue. Based on the evaluation of the intended actions for carrying out the project, three candidates were invited to the next consultation stage. These parties all went into a dialogue process about risks and optional requirements. The contract was awarded to the consortium having best met the agency’s requirements, both quantitatively and financially, based on the economically most advantageous offer.

The contract for the Coen Tunnel project was signed in 2008, and the maintenance of the existing tunnel was then transferred to the contractor. The construction stage for the new tunnel started in 2009. This service-led infrastructure project, the first to be procured using the CD procedure in the Netherlands, consists of widening approximately 14 kilometers of highways at the north and south entrances to the existing Coen Tunnel, and expanding the tunnel’s capacity from two lanes to three in each direction plus two further reversible lanes, enabling five lanes of traffic in one direction during peak hours.

The duration of the contract has been set at 30 years, from 2008 to 2036, and consists of the construction and maintenance of new infrastructure (construction due for completion in 2013) and the renovation and maintenance of existing infrastructure (roads and original tunnel). The service component in this project consists of making available eight traffic lanes passing under the Noordzee Canal which connects Amsterdam to the North Sea.

RESULTS

Initialization

Procurement logics

The two cases were procured with use of two different procurement procedures. Case A made use of the restricted procedure, whilst case B used the competitive dialogue procedure. In Case A the agency started the project about 2 years before the tender notification. Most of the
time was spent on identifying the actual technical and functional needs while they mainly ignored to specify the contextual boundaries. In a later stage of the project the political implication of such a commitment appeared to be one of the main motives to cancel the project. In Case B the preparations for the project started approximately 15 years before the tender was announced. For a long time the agency headed for a Design and Construct contract. Due to a lack of finances, it decided to transform the contract into a DBFM agreement. The specifications, until then primarily output based, were then rewritten into functional specifications. In both cases the tender specifications were not fully crystallized. This left room for substantial interpretation differences between the commissioning agency and the tender candidates but also within the project team members of the commissioning agency.

In Case A the minimum requirements and selection were based on strict organizational and financial requirements of the consortium but the deciding factor was suitability of the architect, to be assessed by three reference projects designed by the proposed leading architect. In this sense they successfully searched for an interpretation of the contemporary procurement practice that fitted their aims. However, since the tender was cancelled after the selection phase, we will never know the actual effect of the tender design on the negotiation and commitment processes. The criteria in Case B focused on risk allocation, optional requirements and bid price. Although these criteria met the legal requirements of transparency, objectivity and non-discrimination as such, in both cases the perception of the criteria differed significantly between the tender candidates and the commissioning agency.

**Partnering logics**

The procuring agency in case B was much more experienced in procuring and constructing infrastructure projects than the procuring agency in case A. However, the experience of the agency in case B did not include DBFM contracts nor the competitive dialogue procedure. This meant that both agencies had to make sense of the procurement process itself and of the specific implications of the process for the organization of their project.

For case A, the agency was looking for a contractor who could design and build their new governmental office building, of which the specifications were drafted at a conceptual level. Although the agency decided to offer a Design and Build contract, the observations indicated that the board members were not aware of the integrated – and therefore not traditional - construction process. So their perception of partnering was not linked to the legal format of the potential commitment.

For case B, the agency sought for a service-provider who could not just design and build, but also reconstruct and maintain their tunnel for a period of 30 years. The interaction with the different contractors during the procurement phase triggered the agency to rethink their assumptions that provided the basis for the contract and the actual roles and responsibilities of both parties. During the dialogue in the procurement phase risks and optional requirements were discussed at length. This created the basis for the partnering agreement.

**Negotiation**

*External bargaining*

In Case B the rules for negotiation were unclear due to a lack of experience with the specific tender procedure with the agency as well as the candidates. The legal principle of non-discrimination implicated that the procuring agency provided all candidates with the same tender information. Information given to one of the candidates during a dialogue conversation, should therefore be given to the other candidates as well. Reproducing information, exchanged during a
conversation, is difficult. It made the procuring agency reluctant to give any information at all. As one of the agency’s employees said: “I’d give as little information as possible: when I’d say nothing, it would not be possible to say something wrong either”. Before each dialogue conversation, candidates had therefore to hand in their questions in writing. During the dialogue, only these questions (and no complementary ones) were discussed. After the dialogue, answers to the questions were sent to all the candidates, except for the few questions that concerned intellectual property. Thus, the procuring agency made sure to act conform the non-discrimination principle. Candidates on the other hand, were not too convinced that the procuring agency would handle their design solutions confidentially. The legal principle of transparency did not comfort them at all: “We would not give too much information with concern to our design solution: who would know if another candidate would gain the contract using our brilliant ideas?”. As a result, the bargaining process did not include too much exchange of information: during the dialogue conversations the agency just answered the questions that were handed in at forehand, and candidates did not want to share too much either.

In Case A most of the uncertainties relates to the domain specific knowledge of the agency. The decision makers were uncertain about the response of the market parties on their announcement. The market was very tight at the moment and the project budget was limited. In the end eight candidates replied to the call, of which three did not meet the minimum requirements. The agency applied the selection criteria on these five candidates and concluded that they all had met the official selection criteria. The fear for insufficient competition turned out to be unjust. The selection was based on the mood boards that the candidates submitted to show their frame of references. This can be considered as a passive bargaining process by the means of architectural design. Since the selection committee consisted of members without any domain specific knowledge, they had invited an expert to inform them about the background of the firms. This kind of knowledge increased their information position, enabling them to internally reconsider inviting the consortia for the next phase of procurement. The actual bargaining process was about to begin when the tender was cancelled.

*Internal sensemaking*

In Case A the use of the procurement process uncovered the fear of negotiating a commitment. There were two aspects that caused a lack of support for the continuation of the project. Firstly, internally one was still not convinced that reconstruction on the proposed location was the best solution for their accommodation problem. The democratic character of the Dutch Provinces requires elections every four years. The decision to rebuild a part of the building was taken in a previous period of administration. This meant that the current director had to execute a decision of his predecessor which did not make sense to him. This also caused the second aspect to come to play: the fear of committing to an integrated Design and Build contract. Such a contract would mean losing control over the actual building: aspects that were not included in the specifications would never be realized. These internal process of sensemaking within the agency preceded the common process of sensemaking between the agency and the market party during the negotiation phase.

In Case B another dimension of sensemaking was touched upon. Due to the fact that neither one of the parties was willing to give too much information to the other, both of them had to go to internal sensemaking processes. They interpreted the acts and sayings of the other without checking if their interpretations matched reality. An example of a situation in which internal sensemaking took place, is when the Alignment Decision (formal legal court decision about the agency’s infrastructure plans) for the Second Coen tunnel was rejected. At that time,
two of three bids were already rejected, yet no preferred bidder had been appointed yet. The agency decided to await a positive Alignment Decision before it would appoint the preferred bidder. With a preferred bidder, the Agency faced the risk that it would have to pay the bidder anyways even when the project would not take place. Not appointing the preferred bidder was a cheap exit option in case the Alignment Decision would stay out. A bargaining process started, during which the remaining bidder tried to convince the agency to appoint the preferred bidder anyways. Instead of explaining its action, the agency keeps repeating that it will not appoint a preferred bidder. Then an internal sensemaking process starts, resulting in the conclusion of the remaining bidder that the agency wants to get rid of him. Meanwhile it did not know about the agency’s difficulties even to get the Decision to start the project.

**Commitment**

*Formal legal contract*

In Case A the formal control was held by cancelling the tender procedure. Fortunately for the agency this did not lead to financial claims of the candidates but did cause a lot of unnecessary internal and external transaction costs. These could have been prevented if more sensemaking would have happened within the organization of the Provincial agency. The commissioning agency is thus fully to blame for the lack of a formal contract.

In Case B, the agency got an Alignment Decision shortly after the bargaining process. When the agency is willing to appoint the preferred bidder, this bidder claimed financial losses. A new bargaining started during which the contractual terms remained the same. Yet the price was raised a bit and the delivery date for the project postponed. The contract contained a management plan and a monitoring system, combined with a negotiated allocation of risks between agency and contractor. The reward was raised since rates on loans increased, due to the collapse of the monetary system during the Alignment Decision delay.

*Informal psychological agreement*

The agency in Case A obviously had a different perception of the binding character of a legal procedure as intended by the European procurement law. It appeared as if they used the tender to consult the market about the prospective of their construction project. During the tender the agency realized that they had lost control over the project and hesitated about the initial starting position. The positive market reply, however, made them realize that starting a tender procedure could actually result in a legal obligation of several million Euros. Their formal action to cancel the project was a result of an informal loss of control caused by increased sensemaking.

In Case B, the agency felt that the contractor had claimed much more money and delay time than was realistic. This resulted in decreased benevolence from the agency’s side. During execution of the contract, bad performances of the contracted became immediate reason for penalty’s. This illustrates that although the formal legal contract appeared to be just, the informal psychological agreement has led to frictions in the collaboration between both parties. Further joint sensemaking processes could have prevented this to a large extend.

**CONCLUSION AND REFLECTION**

The selection of collaboration partners can be considered as an essential element of realising construction projects. Currently the economic and legal frame overshadows the social aspects of these kinds of partnering decisions. In Case A we saw that the prospects of taking on a substantial financial commitment made the agency decide to cancel the tender procedure. In this case the interaction and negotiation process with the market parties remained restricted to
announcing the call and judging the potential award candidates based on their portfolio. This selection process, however, accelerated the sensemaking process of the client, which eventually led to a reconsideration of the actual accommodation needs.

In Case B the competitive dialogue showed the opportunities and pitfalls of the project to both the client and the candidates. The procurement context hampered parties to share information. The fact that a dialogue is wished for, whilst the procedure is new, made parties insecure about what one can and cannot say. This makes that a real conversation stayed out. Candidates feared that their information would benefit other candidates, and the agency feared to disadvantage others when sharing information with particular candidates. The principles of objectivity, transparency and non-discrimination thus restrained the interaction rather than helping it: parties kept their information to themselves.

Based on two cases we conclude that room for sensemaking, negotiations and bargaining is required for the selection of the right collaborative partners in construction projects, even if the legal frame is tight. The complex and unique character of the assignment requires a thorough analysis of the problem; internally within the organisation and together with the potential partners. The legal frame of procurement regulations can provide the conditions in which these kinds of transactions are taking place, but should not determine the course of events. By making sense during the selection process the contractual agreements that follow from intensive negotiation processes increase the mutual understanding about the expectations from both sides at the table.

Case A showed that when an agency has not made enough sense of their actual needs, sensemaking processes do not develop parallel between the partners. This causes a lot of transaction costs, frustration and social unacceptance. The agency in case B decided to use the tender to increase communication and negotiations measures with the potential construction partners. Their decision showed that they were willing to invest in relational governance in a relatively early phase of the construction process. The fact that they were innovative and daring in their approach definitely contributed to the successful start of such a complex public private project.

During analysis of the cases we realised that negotiating performance based specifications replaces part of the traditional briefing processes since the sensemaking processes continue during partner selection. A complicating factor is that during procurement the legal requirements of transparancy, objectivity and non discrimination change the conditions of interactions. Yet, this can also be considered as an opportunity since it creates a parallel sensemaking process between supply and demand. This increases the chance of mutual understanding of the contract and decreased the information assymetry between the parties.

The use of multiple data sets made it possible to compare different perspectives on the process of partner selection. As shown in the data these perspectives differ per contracting agency and tender candidate. Especially the combination of semi structured interviews, informal documents and (informal) observations increased insights about possible conflictive elements.

Our research findings are based on two case studies in a different infrastructural and procurement context. Despite the limitation of this kind of case selection, we are convinced of the value of our findings. Further research could explore the differences and similarities more systematically. It would also be interesting to find professional agencies who are willing to experiment with a variety of interaction patterns during tenders. This would enable validation of assumptions about specific requirements of negotiation and bargaining processes, within and without the procurement conditions.
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