

**INTERWEAVING PLANNING PROCEDURES FOR ENVIRONMENTAL
IMPACT ASSESSMENT FOR HIGH LEVEL INFRASTRUCTURE
WITH PUBLIC PROCUREMENT PROCEDURES**

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ABSTRACT. In the traditional setting of a tender procedure on infrastructure in the Netherlands, the procedure starts after the public decision-making procedure has been completed. In recent years, however, the Department of Transport and Water Management has considered advancing the start of the tender procedure in relation to the start of the planning procedure by interweaving both procedures. The possibilities and added values of this market approach have been researched in this paper. Added value has been found in the area of utilisation of knowledge, innovation and creativity of the market, thus gaining time and obtaining a more business-like character of the planning procedure. Solutions are proposed for impediments concerning disclosure versus confidentiality, adapting tender conditions and award criteria, (re)using market party ideas and procedure period.

INTRODUCTION

Traditionally, in the Netherlands a tender procedure with respect to the construction and adaptation of the infrastructure does not begin until the procedures to be followed by the government related to public decision-making are completed. This public decision-making procedure by the Dutch Department of Transport and Water Management (Department of TWM) concerns the spatial and physical

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incorporation of the infrastructure into the environment, hereinafter also referred to as the "planning procedure." This procedure eventually ends up in a solution chosen and elaborated by the Department of TWM, recorded in a decision that must be implemented, namely "track decision." This decision sets down the layout of the road as far as height and width are concerned. Deviations from this track decision can only be marginal. Implementation of the track decision is then offered for tender. The consequence of this classic approach is, as is apparent from the experiences of the Department of TVM, that parties participating in a tender procedure have very little room to deviate from the solution as specified in the track decision. The result of which may be that creative ideas in the market that differ from the track decision stand no chance. Optimising can then only take place on a technical and implementation level, while the design of the road is, to a great extent, fixed. This may result in the loss of large public advantages and cost savings. After all, deviating from the track decision in concurrence with the Track Act quickly signifies that the planning procedures have to be repeated either partially or entirely. This is time-consuming and expensive. Enabling such changes during or after a tender procedure may - in addition to considerable delay - also have a substantial impact on the scope of the project with respect to what is included in the official notification. This creates a risk that the tender procedure must be repeated because an essential change has occurred in the tender conditions.

The policy of the Dutch Department of TWM has recently been subject to re-orientation. The Department of TWM wants to focus primarily on its core tasks. Tasks that are not part of the core activities are left to the market. These developments result in the fact that the demand from the Department of TWM in tender procedures has been changed essentially. Projects that have been elaborated to the ready-for-use stage and are only in need of a price quotation are no longer offered for tender. Rather, an open functional request is posed, leaving the elaboration to the market.

In 2001, the Department of TWM has, for the first time, made interweaving the tender procedure with the planning procedure on infrastructure subject of a study on PPP/PFI (Public Private Partnerships/Private Finance Initiative) projects. Ensuing from this study a proposal has been made for an interweaving procedure,

which at this time was called “a model of interaction.” This model of interaction with the market has been presented at a national lecture organised by the Dutch Institute on Contract Law in June 2002 on the subject of “Infrastructure and combined projects: area planning, tendering and contracts.” Above-mentioned model of interaction was described on its main features and focused on advancing the start of the tender procedure in relation to the start of the planning procedure (Bregman 2003; Petit, 2003; Van der Bend, 2003). At that time no experience was available on interweaving the planning procedure with the tender procedure for infrastructure. There was however experience on linking the tender procedure with municipal procedures for area planning (Bregman, 2003). These procedures however are (far) less complex than the procedure for track/environmental impact assessment (EIA) of infrastructure. Since then knowledge has been accumulated in connection with the preparation of possible interweaving procedures, e.g. the project on the “Zuiderzee”-railway track. At the moment there are a few projects in preparation at the Department of TWM. None of those projects has publicised the invitation to tender as of yet. Therefore, no actual experience on interweaving has been acquired as yet.

In this framework, the Department of TWM has set its goal to utilize the knowledge and creativity of the market to the fullest extent. One of the means to achieve this is to interweave the planning procedure with the tender procedure, also referred to as the “new market approach.” Running these procedures parallel to each other, together with realisation of creative and innovative solutions, is expected to gain considerable time in establishing and implementing sizeable infrastructure projects. By an integral approach of incorporation design and construction of infrastructure in cooperation with the market, the market will gain more influence in the planning procedure and the solution to be selected. The public decision-making is also expected to obtain a more business-like character as a consequence of this approach. The government policy on the subject of this new market approach has been embedded in a work directive for interweaving the track/EIA procedure and tender procedure for infrastructural projects (Department of TWM, 2006a). In this work directive is stated that the Department of TWM intends to issue a number of pilot projects on the subject of the new market approach. On the footing of these experiences above-mentioned market approach will be developed further.

DEFINING QUESTIONS

On the basis of the above-mentioned developments, the authors pose the following question:

Does interweaving the tender procedure and the planning procedure provide added value in the area of utilisation of knowledge, innovation and creativity of the market, gaining time and obtaining a more business-like character? What impediments are confronted and what are the possible solutions to these problems?

Because the subject is sizeable and complex, the authors restrict themselves in this paper to infrastructure projects of the Dutch Department of TWM. To give this paper international utility, the authors will focus on the main issues, a result of which the juridical subtleties are inevitably not discussed in this article. The scope of current experiences in the Netherlands involving interweaving procedures is still limited. While this article is being written, a few major PPP/PFI projects – one of which is the A2 near Maastricht – are in preparation, and their tender is scheduled to begin in 2006/2007.

In this paper, the authors provide insight into the possibilities of interweaving the tender procedure with the planning procedure. First of all the manner in which planning decisions are made in the Netherlands will be described. Furthermore, the safeguarding of the various interests and the consequences of the track decision will be described. Subsequently, the “how,” “what” and “why” of the interweaving procedure will be discussed. A practical example is linked to the description of the three interweaving models (A2 Maastricht). A number of impediments from practical experiences are discussed, with which one can be confronted during (the preparation of) interweaving procedures. In conclusion, the possibilities and focus points for successful interweaving will be discussed and concluded with a recommendation for the future.

PLANNING PROCEDURE

In the Netherlands, the public decision-making procedure regarding construction and adaptation of infrastructure is embedded in the government policy for traffic and transport. The planning procedure is divided into three phases, which are, respectively:

- the exploratory phase, resulting in a planning study decision;
- the planning study phase, resulting in a track decision in which the environmental impact assessment is included; and
- the realisation phase, resulting in an implementation decision and the actual realisation of the project.

The manner in which the planning procedure has been described in this paper is based on the Track Act ca. (Department of TWM, 2006b; Department of Agriculture, 1994) and the current policy in the Department of TWM (Road and Waterway Engineering Department, 2001a, 2001b).

Bottlenecks in infrastructure are established in the *exploratory phase*. Next, possible solutions and their global consequences are inventoried. In short, it is decided upon whether an infrastructure project must be started and if so, why. This is recorded in a planning study decision, which then forms the further basis for the planning.

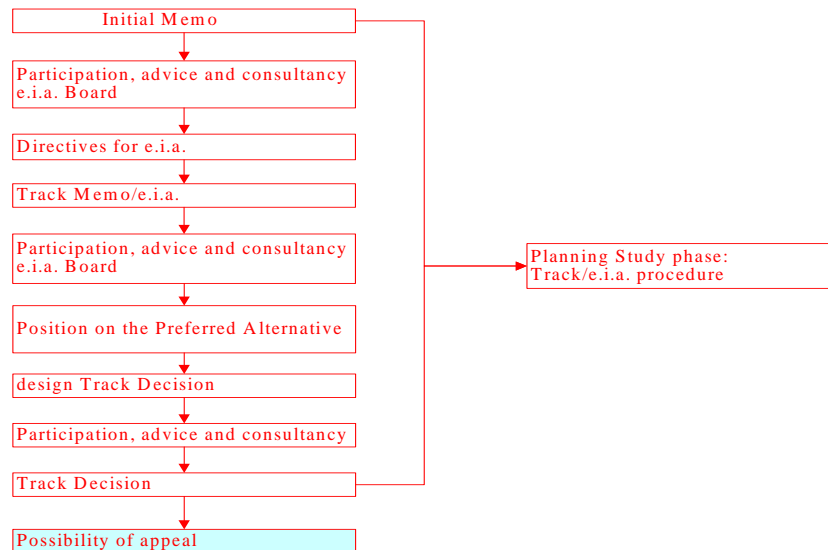
Subsequently, the “what” and “where” are elaborated in the *planning study phase*. The alternatives inventoried in the exploratory phase are studied for their possible (environmental) consequences. The preferred track is decided upon and subsequently the way in which the project will have to be implemented and incorporated in the environment is elaborated. A track/environmental impact assessment procedure (hereinafter “track/EIA procedure”) must be followed in the Netherlands (Figure 1).

The *realisation phase* contains tendering and subsequently the actual realisation of the project. The planning study phase is especially important to the interweaving, since the tender procedure already starts during this phase, as opposed to the classic situation, where tendering does not start until the public decision-making procedure is completed with respect to the track. We will briefly discuss the track/EIA procedure in order to provide insight into the interweaving of the planning procedure with the tender procedure.

The track /EIA procedure begins with disclosure of the initial memo. The initial memo states the demarcation, problem definition, objective and scope of the project.

Participation and consultation on the content and approach of the track memo/EIA to be drawn up in a following phase takes place on

FIGURE 1
Schematic Summary of the Track/EIA Procedure



the basis of the initial memo. Final directives are drawn up on the basis of the recommendations of the EIA Board, local governments and the participation of other stakeholders. These directives contain requirements for the follow-up study.

Subsequently, the track memo and the environmental impact assessment (EIA) are drawn up. Both studies are prepared simultaneously and in mutual consistency and will result in one document, the so called track memo/EIA. This document substantiates the problem analysis in more detail and elaborates the alternatives from the directives mentioned above. It also describes, among other things, the most environmentally friendly alternative, the reference situation - which boils down to a description of the existing situation and its autonomous development - and whether the demand for traffic and transport can be provided for without construction or modification of the existing infrastructure.

The track memo/EIA is made available for public inspection after which participation and consultation take place. After this round of

participation and consultation, the competent authority, i.e., the Minister of Transport and Water Management and the Minister of Housing and Environmental Affairs, decides on the position on the preferred alternative. This position on the preferred alternative indicates whether the procedure is to continue or not. If the decision is made to continue the procedure, the position on the preferred alternative also indicates the preferred track. The preferred track is elaborated by the Department of TWM into a design-track decision on the basis of the position on the preferred alternative, in which the requisite securing of zoning is meticulously decided upon and substantiated. Subsequently, the design-track decision is made available for public inspection and the local governments, such as provinces and municipalities, can once more voice their opinion. The track decision is then decided upon by the competent authority. The possibility of appeal is the last resort for legal protection. Should the term of appeal expire or the track decision is otherwise confirmed, implementation of the plans can take place.

With this complex and interactive planning procedure, the Dutch government intends to adequately safeguard the interests of all stakeholders involved and to arrive at a carefully made decision. To this end, a proper and well-considered decision-making procedure within the public sector is subject to standards that ensure careful decision-making in the Netherlands. The following standards are hereby especially important for the planning procedure, to wit: proportional consideration of interests, the formal and material precision and the equality principle. Safeguarding these standards requires transparency of the public decision-making procedure. This is realised by participation, advice and consultation.

The track decision directly affects the spatial policy of municipalities and acts as an exemption for the long term area plans of these municipalities. The Track Act provides for a coordinated granting of permits primarily by local governments, whereby the minister can enforce a decision if and when the occasion presents itself. The spatial layout of the track is decided upon in the track decision. The track decision also serves as the basis for possible expropriation of private property. The above-mentioned means that strict requirements are set for careful decision-making. The result of which is that an obligation of effort for open consultation with local governments and other stakeholders must be met and that

responses from participation, advice and consultation must be dealt with meticulously.

One characteristic of the track/EIA procedure is that the further the procedure has progressed the less room remains for alternatives. In fact, only one alternative remains after the position on the preferred alternative: the so called preferred track. Moreover, within this preferred track room for solutions is essentially limited. This freedom is restricted even further during the course of the procedure, whereby few or no possibilities for deviation remain in the (design) track decision. The reverse is also true: the earlier a tender is inserted in the planning procedure, the more possibilities there are to affect the alternatives and the solution to be selected.

POSSIBLE INTERWEAVING PROCEDURES

The previous section explains the current planning procedure. We will now consider the situation where the track/EIA procedure is “interwoven” with the tender procedure. This so called “interweaving procedure” involves the market in the public decision-making procedure.

Tender procedures suitable for interweaving with the planning procedure are the negotiated procedure with prior publication (hereinafter: negotiated procedure) and the competitive dialogue. Both procedures include the possibilities of:

- developing solutions on the basis of a functional specification;
- holding a (confidential) dialogue with participating market parties;
- dividing the tender procedure into phases, to be concluded with (interim) bids (Bregman, 2003; Van der Bend, 2003); and
- realising competition throughout several phases (Petit, 2003).

On the basis of the General Directive,¹ application of the competitive dialogue is the most obvious choice (Department of TWM, 2005; Jurgens & Orobio de Castro, 2005). Therefore, this procedure is selected in this paper as the basis for further discussion of the interweaving procedure. In places where reference is made to the competitive dialogue, one can also read the negotiated procedure.

The next question is how these procedures can be interwoven, thereby generating added value from the prior involvement of the

market parties. The key to interweaving is primarily the manner in which the tender procedure is designed. Hereby it is important that (1) there is room for creative solutions; (2) there is intensive exchange of ideas; (3) the procedures are synchronised; and (4) the procedures run in phases.

Reasons for Interweaving

There must be insight into the reasons for interweaving in order to establish the interweaving model. An important reason for interweaving is the utilisation of the knowledge and creativity of market parties by involving their contribution in the planning procedure. By having market parties compete in the planning study phase, one can expect that an optimum solution will be produced. One also expects parallel linking of procedures and involvement of both the Department of TWM and the market parties to cause the decision-making procedure in the Planning Study phase to obtain a more business-like character. More explicit agreements must be made and also timely and correct compliance with agreements must be enforced more strictly. This provides possibilities for more budget certitude on the one hand, and better control of terms on the other hand, thus gaining time.

In the interweaving procedure, one makes decisions on the basis of underlying tenders, so that the quality of decision-making and the foundations for it can be improved. In the classic situation, the government makes its own estimate of whether something is technically feasible and how much a solution will cost. However, these estimates will only prove themselves later in the tender procedure. With interweaving this moment is much earlier in the process; after all, tenders are the basis for guaranteeing price and technology in the decisions in the Planning Study phase.

How to Interweave

A corresponding funnel-shaped process is part of both the competitive dialogue with interim bids and the planning procedure. In both procedures various solutions can be generated, studied and elaborated in more detail from the definition of the problem. In both procedures, one solution is eventually selected by means of an evaluation framework: the track decision and the economically most advantageous tender, respectively.

An essential component of interweaving is therefore that the procedures of tendering and planning *link to each other*, meaning that the phases of both procedures are combined and that the moments for decision-making of the separate procedures coincide. In this the planning procedure is leading and the tender procedure is linked in parallel and “intertwined” at essential moments with the planning procedure.

The difficulty to solve is to prevent the two procedures from diverging and to arrive at different “end points.” For this reason, it is important that the information from one procedure feeds the other (exchange of ideas) and that, to the greatest extent possible, the same evaluation framework is applied for the decision-making procedure (Jurgens & Orobio de Castro, 2005).

When to involve the Market in the Interweaving procedure

A planning procedure normally takes several years, while a tender procedure usually takes less than a year. Therefore, the *moment* at which the market becomes involved in the planning is an important project-specific choice.

It is important that the question is clearly and unambiguously specified. However, infrastructure projects are created in an arena of often-contradictory interests among the federal government, lower governments and other stakeholders. The risks ensuing from this are often difficult to estimate for a market party neither can they be controlled by it or only with difficulty. It often takes considerable time before the necessary political support is established. For this reason, most interweaving procedures cannot begin until this support has been established, so that the market is presented with a clear question.

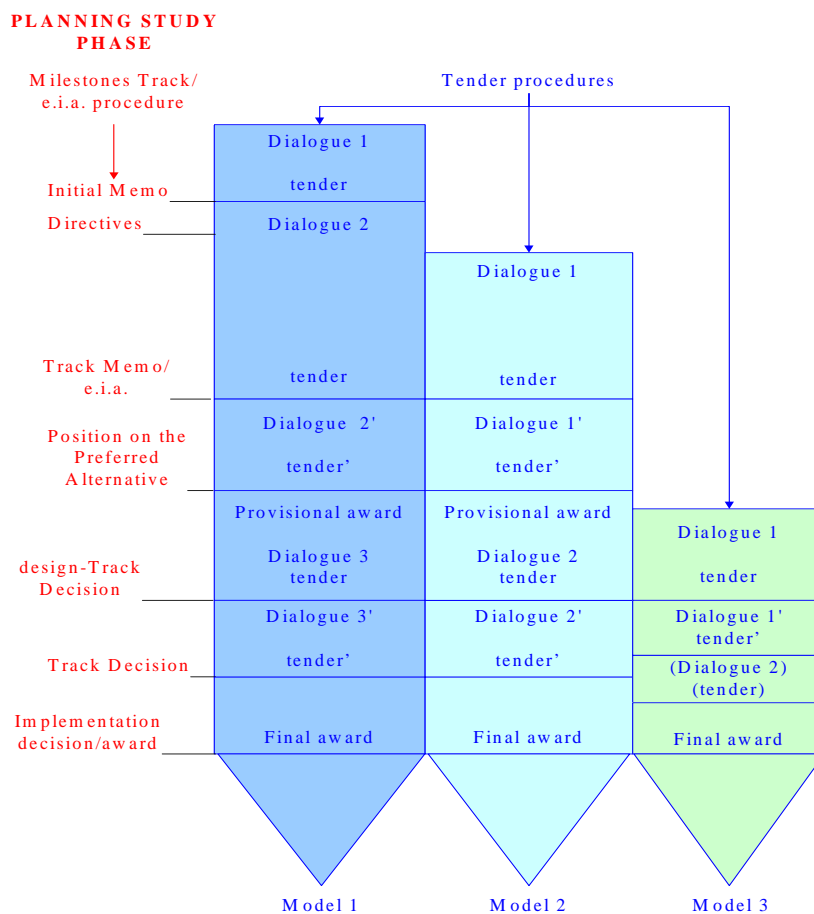
Therefore, interweaving will be tailor-made for every project. Each project must be checked a priori to see whether and how interweaving can be established and how the maximum possible added value can be created. The interweaving procedure must be developed on the basis of an analysis of the project including its administrative and political environment. However, the market can also be approached by means of a market consultation (technical dialogue),² for example by having the market indicate how it views the possibility of interweaving.

Three Interweaving Models

Three (main) models of interweaving can be distinguished (Department of TWM, 2005), depending on the moment the market is called in (Figure 2):

Model 1: start of interweaving before the initial memo.

FIGURE 2
Models of Interweaving Procedures



Model 2: start of interweaving after the initial memo, but before the position on the preferred alternative.

Model 3: start of interweaving after the position on the preferred alternative.

Hybrid forms are obviously possible. These three interweaving models are explained briefly hereafter.

Model 1: Start of Interweaving before the Initial Memo

Market parties will be asked for their ideas in the first phase of the tender procedure as input for the initial memo. Ideas will be selected from the responses, which are subsequently elaborated during the course of the procedure. The added value of interweaving is in generating and elaborating possible solutions by market parties. In order to achieve the best added value, only the parties submitting the most attractive ideas are allowed to continue (Bregman, 2003; Jurgens & Orobio de Castro, 2005; Petit, 2003).

Model 2: Start of Interweaving after the Initial Memo, but before the Position on the Preferred Alternative

This model is appropriate for a situation where the playing field of possible solutions is so extensive that it would be unreasonable to call in the market parties at an earlier stage. The public query is still too broad at that time and the risk of damage too high; the initial memo and the directives must first be established. The competent authority will use these in order to determine the scope of the planning study. A risk is that the query unintentionally defines the scope for a solution, based on the initial memo, too narrowly, which may impede a successful interweaving.

Model 3: Start of Interweaving after the Position on the Preferred Alternative

The competent authority has taken up a position on the preferred alternative in this model on the basis of the track memo/EIA and the responses to it. The position on the preferred alternative must subsequently be elaborated in the design-track decision and the track decision, respectively. In this model, the market is not so much involved in finding a proper spatial solution, but more in fitting the

track in the environment to the fullest extent and optimising its realisation.

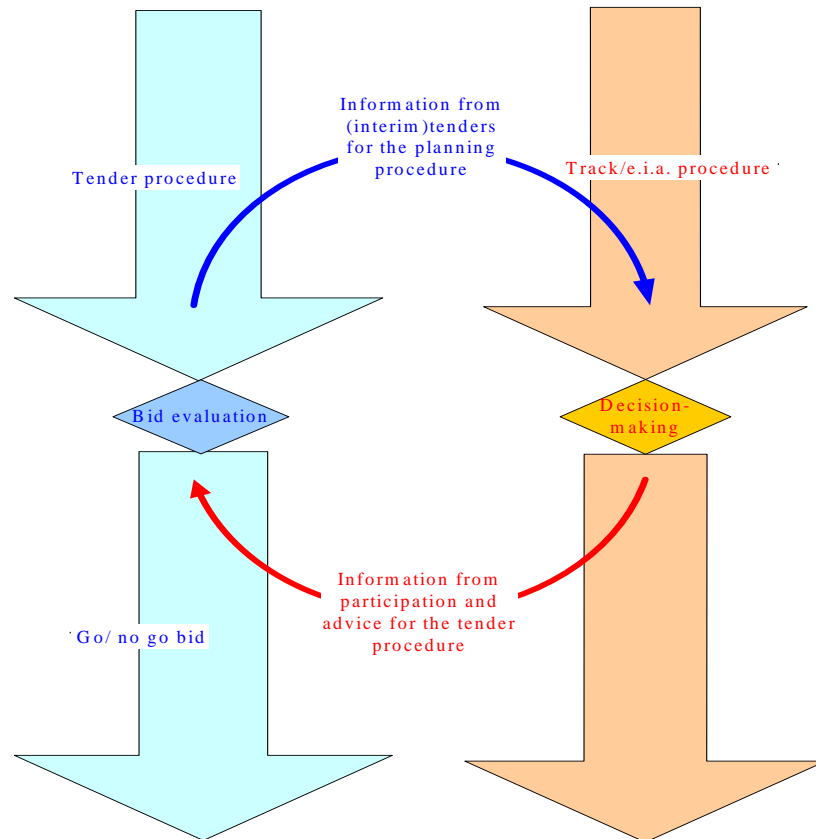
Having the design-track decision elaborated by several market parties in parallel can be considered in all three models, followed by a provisional award of contract. The condition is that these bids fit in with the position on the preferred alternative. Subsequently, participation and consultation must take place on one design-track decision. The economically most advantageous tender must be decided upon before this moment.

Description of a Node

The description above demonstrates that interweaving essentially involves the decision moments at which the procedures are actually interwoven. We call these "nodes" (Figure 3). It is important that information flows and decision-making frameworks are properly synchronized during the cross-linking process in order to prevent the procedures from diverging both in time and content. Nodes may occur round about the initial memo, the position on the preferred alternative and the design-track decision. It applies to any node that decision-making may occur in connection with the planning procedure. Decision-making must take place on the basis of information obtained from the tender procedure. Relevant information for the decision-making procedure is drawn from interim bids from participating market parties. The results of public decision-making are subsequently partly decisive in the continuation of the tender procedure. This shows that the two procedures have an effect on one another repeatedly.

There are several focus points involved in a node. Each alternative must provide similar information for the planning procedure. This may create an area of tension between what the competent authority wants to divulge in the planning procedure and what parts of the tender the market party finds appropriate to divulge. There is also an area of tension between the public decision-making frameworks and the award criteria. Divergence of the results of the two procedures must be prevented. The way in which and the degree to which the scope of the project can be adapted as a result of the responses from participation and consultation is also a focus point.

FIGURE 3
Node in Interweaving, Separated and Still Linked Procedures



Furthermore, the division of risk as a result of adaptations ensuing from participation and consultation (subcontractor or participants) is important.

Example

An example of a Dutch interweaving procedure is the Maastricht A2 project. The city of Maastricht is faced with traffic flow, accessibility and quality of life problems in and around Federal Road

A2 (hereinafter: A2), which runs right through the city. The purpose of the project is to achieve a durable and integral solution by digging tunnels below the A2 and developing housing units and companies in correspondence. The competent authority has published the requirements and possible solutions for the Maastricht A2 in an initial memo, participation has taken place and the directives have been established. Partly on the basis of these data, a programme of requirements and a contract have been drawn up. The track/EIA procedure is subdivided into two phases in the project.

The Department of TWM and the city of Maastricht tender the project jointly. The political support is largely established in covenants. The objective of the interweaving is to save time and use ideas of the market parties to the fullest extent.

The intention was initially to begin the tender procedure directly after the 1st phase of the track/EIA procedure. Before the competent authorities would determine the preferred alternative, the contracting authority intended to establish in dialogue with the participants whether environmental factors (air quality requirements and requirements concerning the condition of the water level) could create any impediments for a successful project. These findings are of great importance for the decision with respect to the preferred alternative. Should the desirable preferred alternative (digging a tunnel under A2) not be possible, the tender procedure would be terminated.

Eventually, the chosen model of interweaving was considered too risky because of the large number of possible variations in the layout of the track and it was decided to start the tender procedure after the position on the preferred alternative in which the preferred alternative has been established by the competent authority. This implies that the tender procedure will presumably begin end 2006. At that time, the establishment of the administrative support will also have been concluded. The various possibilities within the preferred alternative are variations on/below the current N2 and the intention is to have these elaborated by the participants and incorporated in (interim) bids. The participants will be asked to present their solution in connection with the planning procedure in a (voluntary) consultation. Thus, the possibility of inserting ideas created by the participants in the planning procedure will be created. On the basis of participation and consultation, the participants can better synchronise their

solution to the social requirements in order to process them in their final tender. After the participants make their design solutions (variants) available for public inspection, they must process the participation and consultation responses in their bid and make a final tender. The design-track decision will be decided on the basis of the final tenders and the contracting authority will make an award decision. After award of contract, the final tender of the participant awarded the project will form the basis for further decision-making in connection with the planning procedure.

ANALYSIS OF POTENTIAL IMPEDIMENTS

There is a fundamental difference between the legal systems that form the basis of the tender procedures and that of the planning procedure. While the necessity for protecting the public from the "powerful" government forms the basis for the public decision-making procedure, the private law oriented tender is based on the idea of equality of the parties involved. Moreover, procedures in connection with the public decision-making process touch the democratic principles of the Netherlands and take place in a political administrative setting. The result of this is that areas of tension and/or impediments are created during the interweaving. These areas of tension and/or impediments have an effect on the objective of making optimum use of market creativity. A number of possible impediments are recognised from an analysis of the available literature and jurisprudence. We will briefly discuss these impediments and possible solutions.

Disclosure versus Confidentiality

Guarantees are incorporated in the planning procedures to give the public the opportunity to safeguard its interests. To realise this, transparency is necessary in the public decision-making procedure. In the planning procedure this occurs for example by making the concept decisions available for public inspection in advance so that everyone can acquire information on these plans and if necessary raise objections (participation). However, the tender procedures are not given publicity other than that necessary for open and honest competition, safeguarded by the principles of equal treatment, transparency and non-discrimination.³ If publicity could damage this competition, publicity is no longer required.⁴ On the basis of the

General Directive⁵ there is an injunction - except when participants agree to publication - against informing other participants of proposed solutions and other confidential information. This confidentiality goes beyond the confidentiality that must be safeguarded due to protection of commercially justified interests, such as corporate secrets, etc.⁶

As indicated in the "possible interweaving procedures" section, it is necessary to include components of the tenders in the documents required for the planning procedure in the interweaving procedure. This requires an intensive exchange of ideas, since information from one procedure feeds the other.

We provide the following *example* to clarify this point. The following data must be distilled from the bids for drawing up a (design) track decision: (1) detail and summary maps, (2) the results of an acoustic study, (3) intended values for the highest permissible noise load and (4) justification of the layout of the track and the compensating measures to be taken. Up to the present, the track decisions in the Netherlands may only include limited deviation possibilities (1 m upwards or downwards and 2 m to either side, while length profiles are indicated in relation to the Normal Amsterdam Level). In interweaving, aspects of the (interim) bids are included in the (design) track decision that are generally marked as confidential by candidates because they may divulge (parts of) the solution(s) selected. This will create the risk of cherry picking by other participants, with the result that participants may be less apt to provide their most innovative solutions.

In order to interweave both procedures successfully and stimulate the necessary creativity, measures to prevent cherry picking are necessary. The following measures can be considered:

- processing the bids at the highest possible abstraction level in the documents for the planning procedure;
- only including information from the tenders strictly necessary for a careful decision-making procedure (e.g., a general estimate instead of specific price information from participants);
- formulating the manner of interweaving and the degree to which information from the (interim) bids is divulged in the tender documents so that participants know what they are getting in to;

- having participants agree to publication of (part of) their bid in advance; and
- limiting the possibility of adapting the bids tendered to those ensuing from the public participation and consultation.

Confidential aspects of the tenders that are not directly related to the planning procedure can thus remain confidential.

Adapting Tender Conditions and Award Criteria

A condition for successful completion of a tender procedure is an unambiguous and clear question to the market. In an interweaving procedure the scope and/or components of the contract may change as a result of participation and consultation in the planning procedure. An additional consequence may be that the award criteria are no longer appropriate. In this case it may be necessary to adapt the award criteria in order to prevent the tender procedure from failing.

According to the jurisprudence of the Court of Justice of the European Community⁷ (hereinafter referred to as the Court), the contracting authorities must carefully take criteria drawn up by them into consideration. In its explanatory note,⁸ the European Commission explicitly states that modification of the award criteria is not permitted on the basis of the equality principle.

Using the principle that tender conditions (including the scope) and/or award criteria must remain unchanged during the entire tender procedure (too) strictly appears to be an impediment to a successful interweaving (Van der Bend, 2003). A certain amount of freedom to adapt or further elaborate the tender conditions and/or award criteria is necessary in order to prevent the tender procedure from failing. In that case, the contracting authority must safeguard that the principles of transparency and equality are being observed. For example, this could be done by clearly indicating in the publication in what manner and on what occasion possible changes or elaborations of the tender conditions and/or award criteria could be made. Changes or elaborations if any must also be announced to all participants at the same time. In this way, participants can include above-mentioned changes or elaborations in their bid(s).

(Re)using Market Party Ideas

If the interweaving procedure fails, this does not automatically imply that (components of) the (interim) bids submitted by participants become useless for the planning procedure. In these cases, it may be desirable for the contracting authority to adopt (components of) (interim) bids from said participants. However, the problem is that these bids from the tender procedure are confidential. This area of tension is related to the issue of “cherry picking.” Using ideas from participants without any compensation may conflict with the obligatory confidentiality and the implicit prohibition of cherry picking (Van der Bend, 2003, p. 23).

There are three possible solutions to this problem. First of all, the contracting authority may reserve the right, under certain predetermined conditions, to use the ideas of participants, whether or not coupled with compensation. However, the question is whether or not participants will agree and if this is a reasonable point of view. Parties will be less apt to put forward their best ideas without adequate compensation. A second solution may be to leave the matter as-is and negotiate the use of (components of) the tender with the relevant party for a possible follow-up at the moment the tender procedure fails. A third solution is having the participants in the tender procedure declare that they will accept the obligation to negotiate in good faith on the issue of transferring their ideas at a reasonable price determined at that time (Jurgens & Orobio de Castro, 2005, p. 3). This declaration should occur prior to the invitation to participate. The authors give preference to option three as it respects the interest of both parties, even though the question remains whether this is sufficiently acceptable to the market.

Difference in Procedure period

If the track/EIA procedure is compared with the tender procedure; the difference in time lag becomes visible. The time period of the track/EIA procedure is usually about five years. This period differs from the average period of the competitive dialogue. It is true that the complexity of the order and the time period necessary for preparation⁹ must be taken into consideration, but even then such a procedure can be concluded in 8 months to a year.

The cost of preparing bids in the interweaving procedure is higher in comparison with those in the classic situation. More information

must be generated by participants for the tender situation in the interweaving procedure, for example, information related to the air quality, the noise load permitted, drawings and justification for the solution(s) selected as input for documents that must be inserted in the planning procedure. In the classic situation, the track decision has already been established, so that the bids can be limited to the (design) data necessary for the final contract documents to be drawn up in case of award of contract. In case of interweaving, the contracting authority will in all fairness have to pay these costs of preparation or at least a considerable portion of them. For that matter, not making a reasonable compensation available for the cost of preparation may result in limiting the competition. Therefore, the contracting authority will have to ask itself if the (expected) benefits outweigh the costs when an interweaving procedure is selected (Petit, 2003, p. 5). When limiting the costs of preparation by entering into a dialogue with fewer candidates, e.g., 2, the question is whether sufficient competition remains.

In spite of a (design) compensation, there is the possibility pending the long duration of an interweaving procedure that one or several participants will step down voluntarily or will no longer participate in the tender procedure for other reasons; e.g. bankruptcy, take-overs, etc. An additional problem is that it may create a situation in which sufficient competition is no longer guaranteed. This can be solved partially - provided enough candidates have applied - by working with a "waiting room" in which candidates who initially do not qualify for invitation, but who do meet the minimum requirements, are "placed" in anticipation of the possibility of being invited to participate in the dialogue if one of the selected participants were to step down.

CONCLUSION

Although there is limited experience with interweaving in the Netherlands, the authors are convinced that interweaving provides opportunities. The concrete design of the interweaving procedure naturally depends on project-specific possibilities. In addition, successful interweaving depends on the willingness of the parties involved in the project - the contracting authority, the competent authorities involved in the planning procedure and local governments - to open themselves for solutions furnished by the market, the

content and impact of which are not yet entirely known at the moment the tender is announced.

It is shown that the anticipated added value will be gained at 3 points:

- (1) Optimum utilisation of knowledge, innovation and creativity by involving the market in the public decision-making procedure at an earlier stage. Market parties can present their ideas and solutions in the tender procedure at a time when the competent authority can include this in the public decision-making procedure. The best solution can be included in the track decision.
- (2) Saving time by linking the planning and tender procedures in parallel. The tender procedure is started before the track decision has been established. By linking the procedures in parallel, the tender procedure can be concluded and the contract can possibly be awarded before the track decision is confirmed. This means saving as much time as the period a tender procedure would take.
- (3) The decision-making in the planning procedure will obtain a more business-like character. Bids that, among other things, consist of well-substantiated plans and/or solutions in which quality and prices are guaranteed, are the foundation of the public decision-making procedure. These plans have been made in a competitive setting and serve as the input for the public decision-making procedure. In addition to this, the time pressure and milestones of the tender procedure ensure strict planning of the public decision-making procedure.

As the areas of tension described in the section "analysis of potential impediments" point out, legislation and regulations result in impediments for successful interweaving. Therefore, the authors recommend carrying out further study of impediments that are raised by the tender directives as well as by regulations related to the planning procedure. Pursuing these topics however is beyond the scope of this paper.

It is also important to acquire experience with interweaving so that it becomes more distinct where the current regulations are too strict and need to be adapted. However, it is clear that the above-mentioned legislation and regulations constitute too tight a

straightjacket, which prevents an interweaving procedure from being implemented to the fullest extent and leaves opportunities unused.

Insofar as the regulations on the planning procedure are concerned, the authors are of the opinion that the decision-making procedure in the track/EIA procedure is rigid. The number of mandatory steps and consultation rounds, the amount of participation and the alternatives to be investigated cause the procedure to take up too much (unnecessary) time. The question is whether all participation and consultation rounds are necessary for careful establishment of the track decision. And finally once a track decision has been made, deviations are not feasible in practice.

With respect to the tender regulations, the authors are of the opinion that the inflexibility of the award criteria and the application opportunities of the competitive dialogue and the negotiated procedure are too strict. The Court as well as the European Commission place a strong emphasis on the principle of equality and the obligation for transparency and objectivity based on the interpretation of the rules and regulations. Even if these principles are taken into consideration as-is, there should be some freedom left for further explanation or supplementing the award criteria. In that case, however, an explicit condition is that open and honest competition among the participants is unambiguously safeguarded.

The authors are convinced that solutions can be created for the inflexible legislation on public planning as well as the tender regulations that fit within the meticulousness standards of public decision-making and the tender principles.

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NOTES

1. Article 29 of General Directive for Tendering Work, Deliveries and Services No. 2004/18/EC.
2. Consideration No. 8 of General Directive for Tendering Work, Deliveries and Services No. 2004/18/EC.
3. Articles 2, 3 and 12 of the Treaty for foundation of the European Community; Rome, March 25, 1957, most recent modification Trb. 2003, No. 150, as well as Consideration 2 and article 2 of General Directive No. 2004/18/EC.
4. See for example Articles 6, 29, Paragraphs 2, 3 and 30, 35, 41, and 69 of General Directive No. 2004/18/EC.
5. Article 29, Paragraph 3 of General Directive for Tendering Work, Deliveries and Services No. 2004/18/EC.
6. European Commission, “Explanatory Note – Competitive Dialogue” European Commission, Directorate General Internal Market and Services (Public Procurement Policy), corresponding to document CC/2005/04_rev 1 of 5.10.2005, page 7.
7. SIAC-decree, CoJEC Case C-19/00 (2001, October 18); *Succhi di Frutta*, CoJEC case C-496/99P (2004, April 29); and *Universale-Bau AG*, CoJEC Case C-470/99 (2002, December 12).
8. Explanatory Note – Competitive Dialogue p. 6.
9. Article 38 of the General Directive no 2004/18/EC.

REFERENCES

- Bregman, A.G. (2003). “Infrastructure and Combined Projects within the Framework of Public Law” (in Dutch). *Bouwwrecht*, (1): 7-13.
- Department of Agriculture and the Department of Housing and Environmental Affairs (1994, July 4). *Decision, Containing Implementation of the Environmental Impact Report Chapter of the Environmental Management Act* (in Dutch). Delft, The Netherlands: Author.

- Department of Transport and Water Management (2005, February), "Work Directive for Interweaving Track/EIA and Tender Procedure for Infrastructure Projects" (in Dutch). Delft, The Netherlands: Author.
- Department of Transport and Water Management, Directorate of Public Procurement (2006a, February 6). *Work Directive for the New Market Approach* (in Dutch). Delft, The Netherlands: Author.
- Department of Transport and Water Management, Chief Directorate of Legal Affairs (2006b). *Track Act 2005* (in Dutch). The Netherlands.
- Jurgens, G.A., & Orobio de Castro, D.C. (2005, August). "Interweaving Procedures for Public Procurement with Planning Procedures for Environmental Impact Assessment" (in Dutch). *Tender Newsletter*, (5): 1-3.
- Petit, C.N.H.M. (2003). "Interaction with Government Contracts" (in Dutch). *Bouwrecht*, (1): 1-7.
- Road and Waterway Engineering Department (2000a, December), *Handbook for the Track/EIA Procedure* (in Dutch). Delft, The Netherlands: Author.
- Road and Waterway Engineering Department (2000b, December), *Handbook for the (design) Track Decision Phase* (in Dutch). Delft, The Netherlands: Author.
- Van der Bend, G.W. (2003). "Filter in at this Point: An Advice That Deserves to Be Imitated on the Motorway; An Advice That Needs to Be Considered When Dealing With Planning Procedures and Tender Procedures" (in Dutch). *Bouwrecht*, (1): 18-23.