

**AANBESTEDINGEN IN NEDERLAND: CENTRALE PLANNING OF
FUNKTIONELE SPECIFICATIES?**

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Summary

This paper describes the evolution of the allocation of service design power (i.e. the 'tactical level') between transport authority and transport operator evolved. With now about 6 years of experience with CT, interesting developments can indeed be observed and opposite tendencies can be encountered.

In confirmation of the conclusion of a former paper on this topic, we can still observe a variety of configurations within the institutional setting both at the governance level and at the contractual level. There is also some additional confirmation of the appearance of the tactical level as a separate or half-separate institution.

Some transport authorities chose strategies that gave substantial service redesign freedom to their operators in a first contracting round, either during the contracting stage and/or during contract realization, this in conformity with the aims of the new legislation. Later some of these authorities moved to a completely opposite stance by keeping almost all service design powers in-house.

Time pressure and the legal problems that appeared during earlier CT-procedures have led some authorities to adopt a more formal and distant relation between operator and authority during recent years. This then sometimes generated a climate of distrust, penalties and the tendency for those authorities to specify more rigidly the tactical level. Note, however, that the relationship problems mentioned here do not appear in all cases of CT in the Netherlands. The majority of cases functions without problem, even if a small minority of problems is indeed responsible for quite some media and political attention. This may then, perhaps unduly, influence the general opinion on the current success of CT.

One main point is a the call for more 'relational contracting'. Experts stress the need for agreement on process instead of attempting to write down complete contracts.

Relational contracting is about trust and partnership, it is more demanding for the contracting parties and one has to remember that trust is the result of repeated experience.

1 Introduction

1.1 The Dutch public transport reform

The Dutch public transport regime was revolutionized by the introduction of a competitive tendering regime in 2001. Since then, the Dutch public transport legislation requires passenger transport authorities to determine their public transport policy goals, to determine concession areas and gradually to organize competitive tendering procedures to award these concessions in exclusivity to operators for periods that can currently extend to up to 8 years in the bus sector and 15 years in the railway sector.

The former public transport legislation was based upon the principle of market initiative, whereby transport operators were supposed to behave as entrepreneurs and request authorizations to operate routes at an appropriate municipal or national government instance. This regime had, however, evolved towards public monopoly in practice, as public transport had ceased to be profitable in its own right in the 1960s and all operators except for some minor exceptions were publicly owned, either by municipalities or by the national government. Various forms of subsidization were used in the course of time. These evolved from simple deficit compensation towards more incentivising forms of subsidization at the end of the period.

The new legislation from 2001 came with the institutionalization of the power of the 12 Provinces and 7 urban area governments as public transport authorities, replacing the role played hitherto by central government as regulator of the public transport services outside specific urban areas. The provincial authorities had until then had no involvement in regional public transport and had to start to develop their policies and intervention in this sector. See, e.g., van de Velde and Leijenaar (2001) for more details on this transition. This new regime also changed fundamentally the market organization principle as it gave these authorities the monopoly right to provide public transport services. But this right came with the legal obligation to use competitive tendering to select operators. This obligation was introduced gradually and was only generalized to all public transport after an official (positive) evaluation of its first effects. At the beginning of 2007 government finally adopted the necessary measures to force the universal application of competitive tendering in Dutch public transport. This obligation is not, however, applicable to the concession for the national railway network.

Note also that the major urban areas (Amsterdam, Rotterdam, The Hague and Utrecht) received a preferential treatment by being allowed to postpone the compulsory usage of

competitive tendering (CT) as far as the concessions currently held by municipal operators in their core cities were concerned. The current plans are to use CT in Amsterdam in 2012 for the whole of the services, and in 2009 for bus and 2017 for trams in Rotterdam and The Hague. Whether this will actually be enforced remains, however, to be seen as Parliament started a discussion in June 2007 to abolish the obligation to use CT in those areas, very much against the advice of the Ministry. This discussion was triggered by the recent adoption by the European Parliament of the long awaited Regulation on Public Service Obligations in public transport, which entitles passenger transport authorities with the right of self-production.

1.2 Particularities of the Dutch regime

Differently from many CT regimes introduced in other parts of Europe, the Dutch regime aims at stimulating innovation in service design in public transport. To this effect, the legislator aimed with the new passenger transport legislation from 2001 to give operators the power to (re-)design transport services (routes, timetables, fares, vehicles, etc.) during competitive tendering and/or during the contract period. This topic will be the main issue of this paper after this general introduction.

In terms of procedure, a particularity of the Dutch regime is that the Ministry chose for a rather strict tendering procedure which prevents all forms of negotiation as part of regular procedures. Contrary to France which bases its tendering regime in public transport 'concessions' on the necessity to have open negotiation, the Dutch regime is thus based on rather 'mathematical' multi-criteria evaluation procedures.

Another essential particularity of the Dutch regime is its financing. Differently to many other parts of Europe, Dutch municipalities and provinces hardly have any own taxation powers. As far as public transport is concerned, the financial means are composed of transfers from central government which, until recently, could be spent exclusively on public transport. A recent legal change allows them to re-allocate monies for passenger transport services and (smaller) infrastructure investments in transport sectors. This central financing of public transport subsidies lead to a CT practice focusing on maximizing supply and quality for the existing budget, contrary to the Scandinavian practice of minimizing costs for the level of services requested.

1.3 Results so far

The introduction of CT in Dutch public transport was officially reviewed in studies commissioned by the Ministry of Transport (Hermans and Stoelinga, 2003). Until then, efficiency had indeed been improved, however growth of ridership could not be observed. Note that subsidy cuts imposed by central government during the same period blurred the observations. These studies and additional results led the government to enact the generalization of compulsory CT for the whole country in 2007. A shortcoming of the studies conducted at that time, is that they probably came too early to study the most interesting cases of CT giving service design freedom to the operators. Those only came later to fruition. Furthermore, they hardly focused on service design in the context of CT. In the meantime most of Dutch public transport (excluding the core of the four largest agglomerations) has been submitted to CT or will be tendered in the next year or so. This has led to a large reshuffle on the side of the suppliers. The main former player (VSN, as national bus company) has sold off its northern area to Arriva and its southern area to Veolia. The remainder became to be known as Connexxion. This rather clear geographical division soon disappeared with the generalization of CT as all three main operators are currently active throughout the whole country. The large cities remain the exceptions, though. Differently from many other countries, small operators are not present (with the exception, however, of one rather small case).

2 Competitive tendering and service design

2.1 The Legislator's dream and current practices

As indicated above, one of the fundamental aims of the Dutch legislator with the enactment of the Passenger Transport Act in 2001, was to improve the attractiveness of public transport, using CT as a means to generate innovation or at least improvement in service design (see van de Velde and Leijenaar, 2001, for a longer description). While stimulating that aim, the law gave the passenger transport authorities substantial freedom in their concessioning practices, leaving the door open to 'Scandinavian style' CT, i.e. fully-specified services leaving no design freedom to the operators.

2.2 Overview of evolving practices

The allocation of service design power (i.e. the 'tactical level' in the terminology introduced by van de Velde, 1999) between transport authority and transport operator

evolved. With now about 6 years of experience with CT, interesting developments can indeed be observed and opposite tendencies can be encountered.

2.3 Earlier cases

Earlier papers signaled the tendencies mentioned above (van de Velde and Pruijmboom, 2005; van de Velde et al., 2005; van de Velde et al., 2006). In these earlier papers, we presented four cases of competitive tendering that we believed were illustrative of the divergent evolutions that could be observed in Dutch public transport. Two of the four cases represented an increase of service design powers for the operators. These were the cases North-Holland and South-Holland which, however, diverged substantially in their implementation. The two other cases represented a decrease of service design powers for the operators. These were the cases of North-Brabant and Groningen-Drenthe with, here too, divergent implementations.

We will now add a brief description of additional cases (the tendering of regional/suburban bus concessions around Amsterdam) and add some information on the problematic competitive tendering procedures in the Province of North Brabant before moving to a more general analysis of the current situation.

2.3.1 SRA (Stadsregio Amsterdam): Zaanstreek, Waterland and Amstelland-Meerlanden

During the last two years, the City Region of Amsterdam organized three rather successful competitive tendering procedures for the three regional/suburban bus concessions around the city of Amsterdam. Public transport in the central urban area is still provided by the historic municipal operator.

The results were as such:

- The Zaanstreek concession (2004-2010) provided 30% more supply (in bus-hours) for a 10% lower budget, while the operator promised a revenue growth of more than 25%.
- The Waterland concession (2005-2011) provided 50% more supply (in bus-hours) for a 10% lower budget, while the operator promised a revenue growth of more than 35%.
- The Amstelland-Meerlanden concession (2007-2015) provided 60% more supply (in bus-hours) for a 5% lower budget, while the operator promised a revenue growth of more than 50%.

A particularity of the approach of the Amsterdam City Region is the usage of very incentivising contracts without lump-sums. The full amount of payment from the authority to the operator is variable and entirely dependent upon the realized ridership. The amount of compensation per passenger-km is determined through the bidding by dividing the available budget (pre-determined) by the promised passenger ridership for each year. The realized number of passenger-km then determined the actual subsidisation for each year of the concession. The contracted service supply level has to be realized.

In the Zaanstreek and Waterland areas, the operator only received a functional definition of the services to provide in the CT procedure. Interestingly, in the third concession in time, services were largely pre-determined by the authority. One reason for this was the complexity of the interaction with local authorities, and their various wishes. And also the realization that even a functional definition of services sometimes boils down to a set of constraints that is almost similar to full specification.

In the meantime, the Waterland concession won by Arriva is reported to have generated interesting behaviour by the operator as this operator even started to provide new routes upon its own initiative and thus without need for additional payments. The third concession will start operation in December 2007.

2.3.2 North Brabant: official evaluation

In addition what was mentioned in the earlier paper (van de Velde and Pruijmboom, 2005), the series of problems encountered in the Province of North Brabant in public transport tendering has now led to an official provincial evaluation enquiry. Due to the problems that appeared in the CT procedure, the elected politicians of the Province decided to create a research committee to analyse the facts with the 2005 and the 2006 CT. Besides providing information, the aim of the enquiry was also to prevent similar mistakes from happening again. Here are only a few observations collected from that report (Provincie Noord-Brabant, 2007):

- The ambitions of the Provincial Government and its civil servants were too high in several respects. In time: half a year to prepare the CT, three month to carry it out and six month lead time before implementation. In space: simultaneous CT of all public transport under the responsibility of the Province. In design: the authority would provide a detailed programme of requirements of the services to produce. In legal and procedural terms: attempting to work exactly according to the legal requirements. By

sticking strictly to these aims, the Province had also eliminated for itself any space it had for adaptation during the procedure.

- Interestingly, the report concludes that several aspects play a role when attempting to reach agreements with other parties. Besides content (realising policy aims) and finance (reasonable price), the ‘relationship factor’ also plays an important role (is the nature of the contact between the parties such that adequate business can be realised?) The enquiry concluded that the relationship between authority and operator seemed to be characterised by distrust, ‘playing games’ with each other, opportunistic behaviour by the operator, etc. In reaction to this, the Province adopted a rather formal stance and legal aspects started to dominate the contacts. The opinions of the operator were, e.g., considered to be of no relevance for the preparation of the CT such as to prevent discrimination. Consultation documents for the first tendering and preparation documents for the second tendering were sent to many actors, but not to the operator. Signals given by the incumbent that the evaluation model included in the first tendering could be manipulated were set aside on the basis of formal grounds. Earlier on, when the Province decided on 23 March 2004 not to make use of the possible prolongation of the existing concessions but to start a new CT procedure for services starting on 1 January 2006, the incumbent (BBA) protested against this decision. This was declared partially founded on 14 September 2004 as the Province did not discuss this decision with the incumbent as contractually required, as the concession targets had actually been amended in common agreement and as unforeseen changes had taken place (budget cuts by central government, unachievable assumptions in the concession and intermediate changes in the policy aims of the Province).
- The report stresses that the Province all too often took the strictest possible interpretation of legal advice because of a fear for legal procedures. The committee describes this behaviour as not adequate as distrust cannot be the basis of good business. One conclusion was that the absence of a sufficiently clear legal framework (especially in procedural terms) largely contributed to a risk averse behaviour by the authority, to a formalisation of relationship and on a greater distance between operator and authority. In combination with the authority’s desire to reach clear results quickly, avoiding further legal procedures, this led to even more procedural strictness and stiffness.

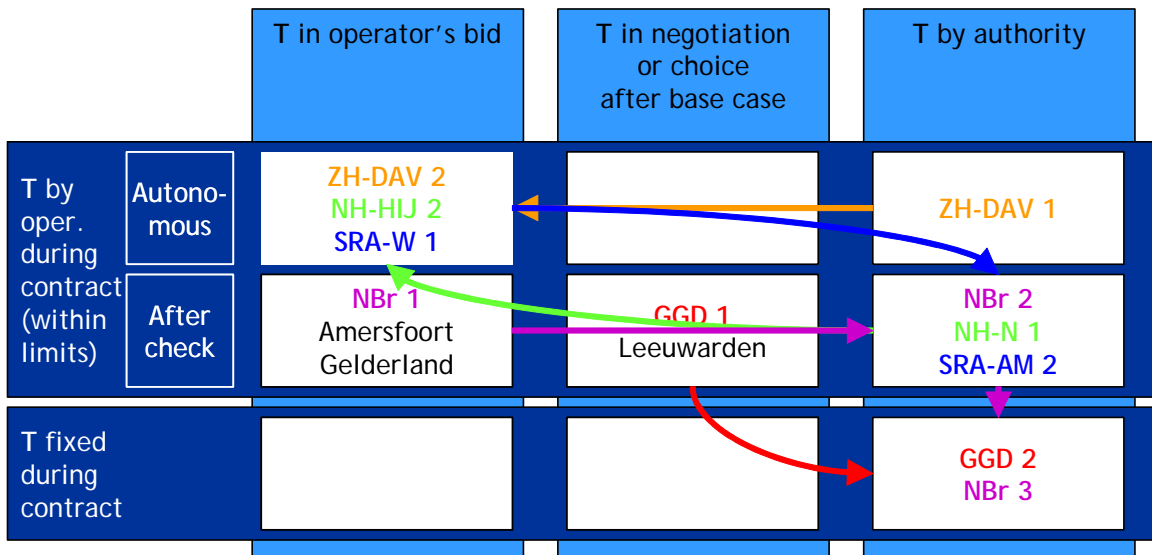
- One of the main advices of the committee is to reconsider the existing public transport legislation as framework for CT in public transport. A main problem, according to the committee, is the unlucky coupling of public law instruments within the law where the authority uses unilateral decisions and subsidy payments to realise its policy aims, with the attempt to make use of private law mechanisms with market players. Behind this, the committee asked the question whether alternatives could be found to realise the steering role of the Province without having to determine so many things contractually. Finally, the committee concludes that if the public law construction has, for some reason, to be maintained, that this should be considerably shortened and simplified. The current procedure is now found to be determined by a complex pile-up of all too many laws and regulations that overlap each other but do not always coincide.

2.3.3 *Summary of evolutions*

We can present the evolutions that we have studies schematically (see below), using a graph developed earlier (Preston and van de Velde, 2002) to categorize the main possible allocations of the tactical level between operator and authority. The particularity of this graph is that it distinguishes between two periods:

- The three columns indicate the localization of the tactical level (T) during the bidding phase (in the bid, in negotiations or pre-determined by the authority);
- The three rows indicate the localization of the tactical during the contractual period: on the side of the authority (fixed for the operator), or on the side of the operator but with or without prior check by the authority.

The numbering and corresponding arrows illustrate the changes that have taken place in the successive rounds of competitive tendering.



Legend:

- ZH-DAV: South Holland – Drechtsteden-Alblasserwaard-Vijfherenland
- NH-N: North Holland – Noord
- NH-HIJ: North Holland – Haarlijn/IJmond
- NBr: North Brabant
- GGD: Groningen-Groningen-Drenthe
- SRA-W: City Region Amsterdam – Waterland
- SRA-AM: City Region Amsterdam – Amstel- en Meerlanden

As can be seen in the graph above, quite opposite evolutions can currently be observed. While some authorities move from bottom-right towards top-left, other make exactly the opposite movement.

The experience in North Brabant indicates many similarities with what happens in concession areas where the authority had already decided to specify rigidly the tactical level, such as in the GGD-area: the authority is not satisfied with the performance of the incumbent, this leads to a worsening of the relationship with the operator and consequently to a rigid definition of the tactical level by the authority at the next tendering round.

This being said, a closer look at our sample of cases also reveals that the tendency of some authorities to increase the level of constructive specification of the tenders at the expense of functional tenders must be somewhat nuanced. What can be observed in practice is that an increasing level of specification in terms of routing, frequency and vehicle (as seen

in the case of the Amsterdam City Region), does not necessarily entail the same level of specification in term of commercial freedom (communication, information and fares).

3 Analysis

Let us now look at the general experience of CT in the Netherlands at a more general level by referring to a number of studies that, directly or indirectly, analyse the current functioning of competitive tendering in relation to the tactical level.

3.1 Opinions on the use made by operators of their design freedom

A report published by a research centre co-funded by national and regional authorities contains a number of interesting interviews and citations from various actors involved in public transport tendering, both on the side of the authorities and on the side of the operator. This report (KPVV, 2006) provides a few examples of frustrations or punctual experience that could, in the longer run, influence choices of authorities in their localisation of the tactical powers:

- In one example budget cuts imposed by central government proved to reduce the space available for policy making and for the tactical level by the operators. Referring to an operator, the report mentioned the problem of budget cuts, leading to the need to suppress some services, but local politicians requesting to upkeep the social routes. In combination with the existing incentivising contract, such new constraints make the realisation of the contractual goals illusory as resources have then to spend to a higher proportion on those lines than expected, and not on the most successful lines that could easily generate the revenue growth promised and expected from the operator.
- In another example the operator proved to make only limited use of the tactical freedom given. As a regional civil servant mentioned, operators often seem not to dare to take initiatives going beyond marginal changes to the existing services.
- In a third example there proved to be still substantial influence of politicians on the transport product. As a local civil servant mentioned, even if the operators have been given the freedom to redevelop services, the public often continues to see the municipality as the responsible organisation. Even if it is made clear to the passenger that he should take contact with the operator, when the operator does not respond quickly enough to complains, the passenger is likely to take contact with local politicians or the media and through this generate political intervention. Keeping

distances, as the contract foresees, proves to be difficult in this case.

3.2 Expert evaluation of the current functioning

An expert-meeting recently organized by the Ministry of Transport aimed identifying possibilities for improvements in the quality of the tendering process in public transport. The findings of this meeting (KPVV and inno-V, 2007) can be seen as complements to the advice on concession management that was produced at the end of 2006 (Lutje Schipholt et al., 2006). An initial remark should be made: operators were very active in the meeting and seemed to worry about other things than what authorities are worried about in the current functioning of the tendering regime. Here are a few of the points that came out of that meeting:

- The cooperative spirit formerly present in the sector has been replaced by a more aggressive form of relation. Although relations could be even more ‘business-like’, concession texts should not be too restrictive: business-like should not mean ‘stiff’. Furthermore, ‘business-like’ should work both ways, although authorities do not always behave like this. Even so, making things operational can turn out to be difficult as one always forgets to organise ‘something’ and that is exactly where things will go wrong. It is then dangerous when authorities start to interpret the norm in the contract as the ‘truth’. The basis must be ‘trust’. A business-like set-up is OK as long as this does not stand in the way of the relation and of flexibility. Less energy should be spent in the codification of all eventualities in contract terms. It is much more important to describe the procedures that should be followed when circumstances change.
- Several recommendations were made, pertaining to the implementation of concessions submitted to CT. These recommendations are a direct result of recent problems where authorities had manoeuvred themselves and their operators into by imposing too short lead times between concession award and service start. The North Brabant case is perhaps the most well known, but problems had also appeared earlier at the first implementation of the DAV-concessions in South-Holland. The large size of some of the concessions let and their resulted into too many concessions being let at the same time. Problems with the rolling stock also appeared and, more importantly, implementation is now all too often hampered by court cases initiated by losing bidders. The experts also suggested organising rolling stock leasing through the tendering authorities.

- Another problem appeared in relation to timing and one of the ideas was to avoid forcing the operators to realise a ‘double big bang’ which consists of having too many CT-procedures at the same time and requesting from the operators to implement all innovations right at the start of the concession. The advice was to allow them to start operations with the ‘old’ timetable.
- Some of the problems mentioned related to the nature of the authorities procedures. The experts suggested that authorities will have to realise that their meeting and decision cycles may be too slow and that authorities are too unaware of the consequences of this.
- Experts stressed that there has to be a good fit between the awarding criteria and the general ‘atmosphere’ of the ToR, which itself should clearly describe the goals to be achieved. As far as the ToR and the evaluation of bids are concerned, a clear distinction should be made between obligations and wishes. Also, authorities should attempt to provide as much transparency as possible as to the weighing of criteria in the bid valuation. Yet, an essential challenge is to prevent that bidders ‘pre-calculate’ the risk fines and penalties in their bidding. The meeting also recommended that those persons who value the qualitative part of bids have no information on the quantitative part of the bids.
- Another problem related to authorities is that these seem to have too little knowledge on the cost consequences of many of their choices, obligations and wishes in the context of tendering. Furthermore, authorities should refrain from wanting all at once. They would be better advised to keep some budget aside to amend or order additional things later during the contract. For this purpose, flexibility should be allowed during the contract period, but it requires clear calculation. The ToR should provide sufficient space to allow for this to take place.

4 Conclusions

4.1 Central planning or functional specifications for the future of Dutch public transport?

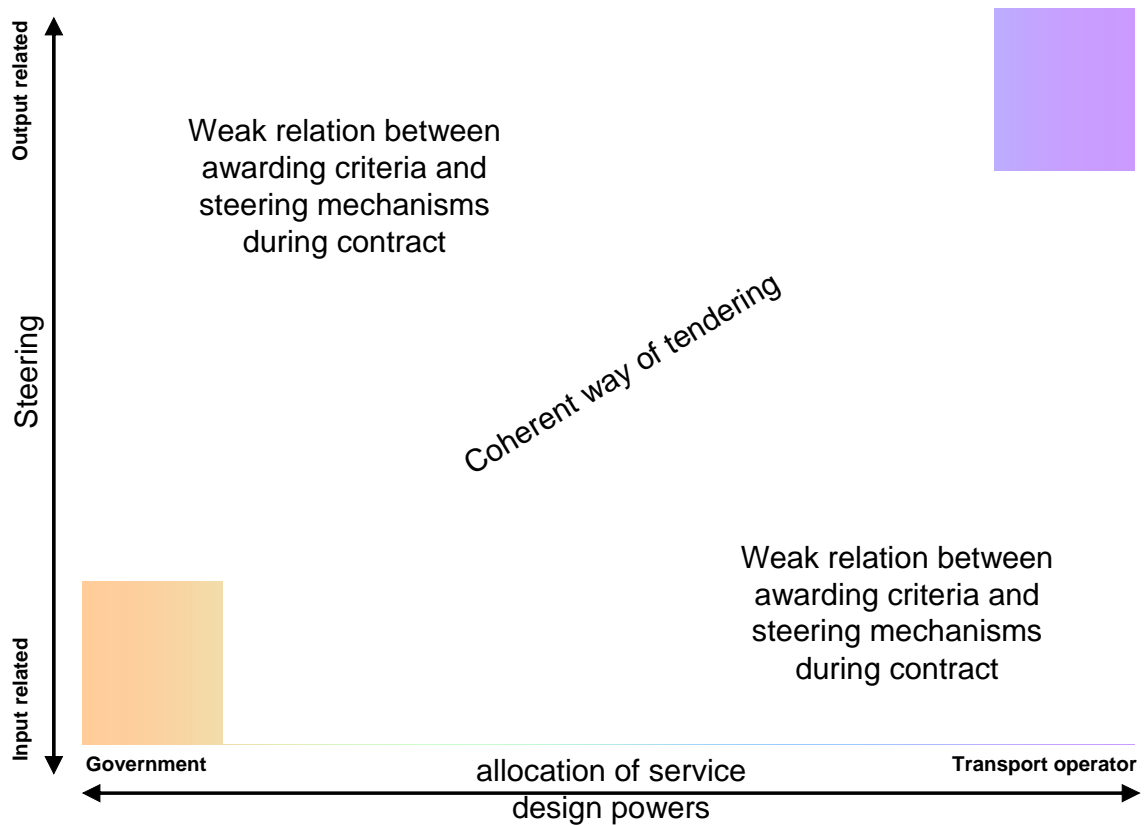
In confirmation of the conclusion of a former paper on this topic (van de Velde et al., 2006), we can still observe a variety of configurations within the institutional setting both at the governance level and at the contractual level. There is also some additional

confirmation of the appearance of the tactical level as a separate or half-separate institution.

Some transport authorities chose strategies that gave substantial service redesign freedom to their operators in a first contracting round, either during the contracting stage and/or during contract realization, this in conformity with the aims of the new legislation. Later some of these authorities moved to a completely opposite stance by keeping almost all service design powers in-house. As observed in the cases presented, there are roughly speaking two extreme models at the moment in the Dutch tendering practice:

- Substantial freedom for the operator: trust on the creativity of the operator, service design on the side of the operator, functional tendering, revenue risk for the operator, award based on the quality of the plans, steering through realised output usually with a rather high bonus/penalty system, role of consumers' organisations directed at judging the plans of the operators and at evaluating the quality during the concession. Examples: Rijn en Bollenstreek-Midden-Holland, Drechtsteden-Alblasserwaard-Vijfherenland, Limburg Zuid en Midden, Haarlem-IJmond en Fryslân.
- Service design by the authority: keep the determination of the quality level on the side of the authority, service design by the authority, detailed service requirements, guarantee of minimum service, revenue risk shared between actors, award on quantities such as price and service hours, evaluation based on inputs, role of consumers' organisations directed at the authority during the concession period. Examples are: Almere Stad, IJsselmond, Zeeland; and even more so in North Brabant and Groningen, Drenthe (GGD) and Haaglanden where service design is concentrated on the side of the authority.

The following graph gives an illustration of what we consider to be a good balance between service design and steering within the concession:



Indeed many other aspects have to be looked into when considering the relation between authority and operator, but an appropriate equilibrium between steering instruments is of utmost importance: obligations, award criteria, bonuses and penalties, etc. When few obligations are formulated, the contract will need to contain sufficient incentives to stimulate the operator to provide market-led services. But such incentives will indeed make little sense when the authority has pre-determined the services to supply. Both extreme cases are feasible, and well as intermediate ones, and the most important thing is to realise a good equilibrium between the items mentioned. Failing to do so will severely increase the chances for failures.

4.2 Relationship problems

Despite the advice above, time pressure and the legal problems that appeared during earlier CT-procedures have led some authorities to adopt a more formal and distant relation between operator and authority during recent years. This then sometimes generated a climate of distrust, penalties and the tendency for those authorities to specify more rigidly the tactical level.

Note, however, that the relationship problems mentioned here do not appear in all cases of CT in the Netherlands. The majority of cases functions without problem, even if a small

minority of problems is indeed responsible for quite some media and political attention. This may then, perhaps unduly, influence the general opinion on the current success of CT. One main point comes out of the opinions of the experts cited in this paper. And that is a very clear call for more 'relational contracting'. The experts stressed the need for agreement on process instead of attempting to write down complete contracts. This is indeed a very well known theoretical debate, and it is interesting to see it appear so clearly in this context. Relational contracting is about trust and partnership, it is more demanding for the contracting parties and one has to remember that trust is the result of repeated experience.

4.3 Further research work

The question then is whether the current legal regime stands in the way of the development of such trusting relationships. Is it only a question of learning the new roles by the actors, or are more fundamental changes required? Will the business world prove to be compatible with the spirit of public administration?

With a few years of competitive tendering and contract realization experience in the Netherlands, it now becomes possible to review what use operators made hitherto of the contractual freedom contracted to them. Further research will do this in a qualitative and quantitative way for the selected and some additional tendered concessions, analyzing the evolution of services supplied and the reasons behind the service changes observed (authority-initiated or operator-initiated). Where data is available, the authority's strategies will be combined with realized performances (such as passenger growth and efficiency gains) to come to an overall conclusion of the effect of the various strategies.

In parallel to these observations, we will further categorize the reasons that have led transport authorities to modify the allocation of service design power between operator and authority in successive tendering rounds. This information will result from structured interviews that are currently being held to cover a number of interesting case across the Netherlands.

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