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Chapter 17

NETHERLANDS

Bregje Korthals Altes and Samuel Vermeulen¹

I INTRODUCTION

The key procurement legislation – which is all based on the European Union Procurement Directives – applicable in the Netherlands is:

- a* the Public Procurement Act (PPA);
- b* the Public Procurement Decree;
- c* the Works Procurement Regulations 2012;
- d* the Procurement Regulations for the Utilities Sectors 2013;
- e* the Proportionality Guide.

The PPA applies to all national procurement procedures (i.e., both those that are below the EU thresholds and those that meet or above the thresholds). The PPA distinguishes between different types of procedures and sectors; its internal structure consists of four parts that are applicable depending on the type and value of the procurement procedure:

- a* Part 1 contains general provisions that are applicable to all procurement procedures that fall under the scope of the PPA;
- b* Part 2 applies only to procurement procedures that meet the EU thresholds set by Directive 20014/24/EU;
- c* Part 3 is only applicable to procurement by entities operating in the water, energy, transport and postal services sectors; and
- d* Part 4 entails some final provisions.

A number of measures are further regulated in the Public Procurement Decree. These concern, *inter alia*, the application of the principle of proportionality by means of a

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mandatory Proportionality Guide,² the mandatory application of the Works Procurement Regulations 2012 for works tenders below the EU thresholds,³ and procedural rules regarding the submission of documents by bidding companies.

The Proportionality Guide intends to ensure that all requirements imposed by a contracting authority are proportionate to the object and scope of the public contract. Accordingly, the application of the Guide should strengthen the position of small and medium-sized enterprises during tender procedures. Contracting authorities may only deviate from the detailed provisions on proportionality if this is properly motivated in the tender documents, and contracting entities operating in the water, energy, transport and postal services sectors in principle abide by this rule as well.

In addition to these general public procurement regulations, Dutch law provides for a number of sector-specific regulations. Procurement regulations are, for example, included in the Passenger Transport Act 2000.

Dutch public procurement law recognises the general principles of public procurement law (non-discrimination, transparency and proportionality) and the general principles of Dutch civil law (including pre-contractual good faith).

II YEAR IN REVIEW

The key developments for Dutch public procurement law during the past year have been the following.

Health insurers are no longer considered public entities because they provide services (although for the general good) that are of a commercial nature.⁴ Additionally, it has proven difficult for tenderers to successfully argue that contracts have been unnecessarily clustered.⁵ A tenderer should be very concrete in explaining why a tendered contract actually consists of two separate contracts. A contracting authority or entity can nevertheless justify the clustering of contracts by evidencing that splitting them up would have a negative quality effect.⁶ Another interesting development is the prejudicial question asked by the Supreme Court to the European Court of Justice regarding whether a mandatory proportionality test in a decision to exclude a tenderer on the basis of an applicable ground for exclusion would be in violation of EU law. The European Court of Justice will also have to answer whether it is sufficient for a court to marginally review the proportionality decision of the contracting authority or entity or whether a full review is required.⁷ There have also been plenty of cases involving invalid bids, award criteria and the motivation of award decisions.

2 Clause 10(1) Public Procurement Decree.

3 Clause 11(1) Public Procurement Decree.

4 Court of Appeal Den Bosch, 12 May 2015 and Court of Appeal The Hague, 15 December 2015.

5 Advice 125 and 183 of the National Public Procurement Expert Commission, 2 February 2015.

6 Court of Appeal The Hague, 9 June 2015.

7 Supreme Court, 27 March 2015.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

Most public sector entities are governed by Chapter II of the PPA, and many are specifically listed in the PPA (e.g., government departments, regional or local authorities). Other entities are regulated on the basis that they are ‘bodies governed by public law’ because they are established for the purpose of meeting needs in the general interest, not having an industrial or commercial character, that have legal personality and are dominantly financed by the state, and are subject to state control or management supervision.

Chapter III of the PPA applies to designated activities carried out by contracting authorities and to contracting entities operating in the water, energy, transport and postal services sectors.

ii Regulated contracts

Generally, contracts for the construction of works, supply of goods and provision of services awarded by the contracting authorities and contracting entities referred to above are subject to the procurement regulations. The financial thresholds are set in the EU Procurement Directives.

Below-threshold contracts are not normally subject to the procurement regulations, unless there is a certain cross-border interest. The PPA, however, contains limited provisions for below-threshold contracts that also apply to voluntary tender procedures (see Section I, *supra*). In addition, works contracts – and contracts for services and goods related to works contracts – below the EU thresholds are subject to the Works Procurement Regulations 2012.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

Framework agreements are extensively used. Many are multi-supplier frameworks, typically involving a mini-competition among all framework panellists at the call-off stage. Single-supplier frameworks are also common. Framework agreements are often established by one authority on behalf of itself and a (frequently very large) number of other authorities. Dynamic purchasing systems are not widely used at present. Contracting entities operating in the water, energy, transport and postal services sectors widely use both framework agreements and qualification systems to reduce the burden of procurement processes, often establishing single-supplier framework agreements for a certain period (e.g., five years).

ii Joint ventures (JVs)

Public-public JVs are common. They have typically relied on the *Teckal* exception or the *Hamburg Waste* exception, which have not been codified in the PPA. An increasing number of large infrastructure projects are realised on the basis of a public-private partnerships. The government has drafted a template contract for the design, building, financing, maintenance and (sometimes also) operation (DBFM(O)) of infrastructure projects. The government has also standardised the tender guidelines in relation to such projects. The use of these standards has increased significantly, and DBFM(O) contracts have been negotiated for various road, tunnel and tram infrastructure projects in the Netherlands over the past few years.

V THE BIDDING PROCESS

i Notice

Above-threshold contracts must be advertised in the Official Journal of the EU (OJEU).⁸ Where a contracting authority or entity sends a contract notice to the EU Publications Office, the PPA also requires it to publish details on the government portal (TenderNed).⁹

To overcome the risk of the contract being declared ineffective because it was not properly advertised, voluntary *ex ante* transparency notices are used where authorities directly award a contract without a competitive process.

ii Procedures

For above-threshold contracts, the procurement regulations generally require use of one of the prescribed procedures (i.e., open, restricted, competitive dialogue or negotiated procedure). The PPA has implemented the requirements introduced by the New Public Sector Directive on running the new innovation partnership procedure. The PPA implements the new light touch regime introduced by the New Public Sector Directive for the award of contracts for health, social, education and other specific services.

Subject to compliance with certain mandatory requirements (e.g., principles of transparency and equal treatment), the PPA provides for contracting authorities and entities to have significant flexibility in determining the procedures to be applied.

iii Amending bids

In a number of court cases, tenderers have sought to challenge the authority's refusal to allow them to correct defects in, or omissions from, their bids. In our experience, authorities take different approaches to this issue. By contrast, it is fairly common for authorities to seek clarification of bids. Authorities should ensure that clarification does not result in amendments to bids and that tenderers are treated equally.

VI ELIGIBILITY

i Qualification to bid

The PPA replicates the grounds for assessing tenderers' fitness to contract set out in the relevant EU Procurement Directives.

ii Conflicts of interest

The PPA has implemented the requirements introduced by the New Public Sector Directive to require authorities to take appropriate effective measures to prevent, identify and remedy conflicts of interest.¹⁰ Economic operators may be excluded from participation in a procurement procedure where a conflict of interest cannot be effectively remedied by other, less intrusive, means.

8 Clause 4.13(1)(a) PPA.

9 Clause 4.13(2) PPA.

10 Clause 1.10(b) PPA.

iii Foreign suppliers

Foreign suppliers do not have to set up a local branch or subsidiary, or have local tax residence to do business with public authorities in the Netherlands.

VII AWARD

i Evaluating tenders

Most contracts are awarded using award criteria implementing a blend of quality and price. Approaches to setting award criteria vary. Many authorities use a very detailed marking scheme, with each small element of the project receiving a predefined mark (e.g., 0.5 per cent for proposals on staffing levels). Other authorities take a much broader approach, with no sub-criteria and a global figure for each criterion of, say, 20 or 25 per cent.

Under the PPA, authorities must disclose whether they will award the contract based on the lowest price or the most economically advantageous tender criterion from the date of publication of the notice in the OJEU. This allows tenderers to understand what is important to the authority and to decide whether to participate accordingly. If the open procedure is used, the authorities must also disclose the marking criteria from the date of publication of the notice in the OJEU. For all other procedures, authorities must disclose the marking criteria at the latest when issuing the contract documents (e.g., in the invitation to tender).¹¹

ii National interest and public policy considerations

In principle, domestic suppliers cannot be favoured for reasons of public interest. Social and environmental considerations can be taken into account. Additionally, as mentioned in Section I, *supra*, the mandatory Proportionality Guide requires authorities to strengthen the position of small- and medium-sized enterprises by only allowing the authorities to impose requirements that are proportionate to the object and scope of the public contract.

VIII INFORMATION FLOW

During the procurement process, authorities must ensure that they give sufficient information to tenderers. Where tenderers do not consider that they have been supplied with adequate information, it is generally recommended that they make formal requests to the authority as soon as possible after they receive the invitation to tender. The *Grossman* jurisprudence of the European Court of Justice is strictly applied in the Netherlands. Authorities may withhold information from tenderers on a number of grounds such as the public interest, the legitimate commercial interest of any person or possible prejudice to fair competition between economic operators.

Under the procurement regulations, authorities are required to notify tenderers and supply certain information when they make an award decision. They must then 'stand still' for a minimum of 20 calendar days before signing the contract.¹² This period allows unsuccessful tenderers time to bring a legal challenge to prevent the contract award if they consider that the award decision is unlawful, provided that the tenderers are otherwise within

11 Clause 2.115 PPA.

12 Clause 2.127 PPA.

the limitation period for procurement claims. The standstill requirement often proves to be onerous for authorities, which must supply scores and a narrative of the characteristics and relative advantages of the winning bid to each unsuccessful bidder. Many authorities consider that best practice is to give fulsome details of their reasons in the standstill notice so as to be seen to be transparent, to flush out any complaints as soon as possible, to be sure that the time for bringing a challenge in the courts is running on any complaints, and to reduce the risk of delay where a bidder asks for more information and claims that the standstill notice is defective.

IX CHALLENGING AWARDS

Civil courts generally decide on public procurement disputes. However, sector-specific legislation can provide that the tender procedure is subject to administrative law. Tender documents may also provide that disputes must be resolved by way of arbitration, although this process is no longer widely made use of.

i Procedures

The vast majority of all public procurement cases are dealt with in summary proceedings. If a claimant initiates summary proceedings within 20 days after the notification of the award decision, the contracting authority or entity cannot enter into the contract until the request for provisional measures is decided on. The provisional measures obtained in these proceedings often finally resolve the dispute, as an appeal does not suspend the awarding of the contract. The same applies for proceedings on the merits.

The *Grossman* jurisprudence of the European Court of Justice is strictly applied in the Netherlands. Tenderers must consequently use all available options to request clarifications or notify the contracting authority or entity of any irregularities. In cases where the contracting authority or entity does not adequately respond, tenderers must initiate summary proceedings to prevent being estopped to invoke this at a later stage.

Contracting authorities and entities are encouraged to set up informal review commissions that can address complaints during an early stage of the tender procedure in order to avoid court proceedings. If no internal review commission is available, or if it simply does not respond to the complaint, tenderers can also submit a complaint to the National Public Procurement Expert Commission. These procedures are quite informal, do not suspend an ongoing tender procedure and are not legally binding.

ii Grounds for challenge

Challenges may be brought on the following legal grounds: under the provisions of the PPA and the Public Procurement Decree; under the principles of the TFEU (principles of transparency, non-discrimination, equal treatment, free competition and proportionality); and under the terms of the tender documents.

iii Remedies

The remedies that can be obtained in summary proceedings are diverse, and include orders to:

- a* suspend an ongoing tender procedure;
- b* tender or retender a contract;

- c* allow a tenderer to take part in the tender procedure; or
- d* award a contract to a specific tenderer, provided that the contracting authority or entity still wants to award the contract.

Once the tender procedure has resulted in the conclusion of a contract, the PPA provides legal grounds on which third parties can claim the annulment of the contract.¹³ These non-exhaustive grounds include the violation of certain essential public procurement rules such as publication requirements and the obligation to apply the mandatory 20-day standstill period.¹⁴ The claim for annulment must be made within 30 calendar days after notification of the conclusion of the contract, or within six months after the conclusion of the contract if no notification has taken place.

In addition to provisional measures or the annulment of a contract, tenderers can also claim damages caused by a breach of the public procurement rules. Damages can include tender costs, and also – under certain circumstances – lost profits.

X OUTLOOK

We are awaiting the implementation of the New EU Directives on public procurement in the PPA. Although these Directives should have been implemented on 18 April 2016 at the latest, amendments to the PPA in this regard are only expected to come into effect on 1 July 2016. In the meantime, the PPA will have to be interpreted in conformity with the New EU Directives.

The most important amendments include:

- a* boosting sustainability and innovation;
- b* the increased flexibility of procedures;
- c* the lowering of administrative burdens;
- d* the establishment of a framework for public-public partnerships; and
- e* the provision of rules for substantial changes.

A new award criterion will also be introduced: lowest costs based on cost effectiveness. This allows contracting authorities and contracting entities to include costs related to sustainability, such as recycling and maintenance costs, in awarding contracts. Another amendment is the motivation requirement for awarding contracts based on the lowest price or on the lowest costs. The Minister of Economic Affairs will now have the authority to designate certain categories of contracting authorities or contracts for which it is forbidden to award or be awarded based on the lowest price or lowest costs.

In addition, the Uniform European Tender Document will replace the Dutch *Eigen Verklaring* (self declaration) model despite initial objections by the government. Finally, due to a parliamentary amendment to the government's legislative proposal, the obligation to apply the Proportionality Guide has now also been extended to contracting entities operating in the water, energy, transport and postal services sectors.

13 Clause 4.15 PPA.

14 Court of Appeal Den Bosch, 7 February 2015.

Appendix 1

ABOUT THE AUTHORS

BREGJE KORTHALS ALTES

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Bregje Korthals Altes specialises in public procurement law, and has argued many cases before Dutch courts as well as the European Court of Justice. While at De Brauw, she has acted as interim legal counsel for Schiphol and senior lawyer for the Ministry of Foreign Affairs, focusing on procurement in both capacities. She also has significant experience in international commercial arbitration, with a particular emphasis on sectors such as energy and natural resources, healthcare, telecommunications and technology. In addition to her practice, Bregje regularly lectures on public procurement at the University of Amsterdam.

SAMUEL VERMEULEN

De Brauw Blackstone Westbroek

Samuel Vermeulen specialises in public procurement and construction law. He also has significant experience in international commercial arbitration. He has represented states and large corporates before the Dutch courts and various arbitration institutes. He holds degrees from the Radboud University Nijmegen (LLB and MA) and the University of Cambridge (LLM). Before joining De Brauw, Samuel worked in the cabinet of European Commissioner Neelie Kroes.

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