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This journal is published by APMEP – Portuguese Society of Public Markets(www.apmep.pt) and is co-supported by COMEGI (Research center on organizations, markets, and industrial management) of Universidade Lusíada, and FCT (Foundation of Science and Technology), Portugal

EUROPEAN JOURNAL OF PUBLIC PROCUREMENT MARKETS

www.eupublicmarkets.com

Title:

European Journal of Public Procurement Markets - 1st Issue (October 2018)

Publisher:

APMEP – Portuguese Society of Public Markets

Chief-Editors:

Luís Valadares Tavares and Gustavo Piga

ISSN:

2184-3813

Date:

10.2018

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ON THE FIRST ISSUE OF THE EUROPEAN JOURNAL Of PUBLIC PROCUREMENT MARKETS

Launching a new scientific journal requires a word of explanation on its *raison d´être* and objectives and in this case both are quite simple and clear to share with our new readers.

Modern economies have evolved from the paradigm of Industrial Society, commonly accepted until the fifties, to a Market-based Society which is now served by the conspicuous innovations of the Digital age. The traditional field of Economics on Industrial Economics has been progressively paralleled by the study of the most important markets, such as Food and Beverages, Transportation, Commodities such as Cotton or Cocoa, ICT, Security, Insurance, Banking, Tourism, Education or Health.

Nowadays, public markets are one of the most relevant *loci* of exchange, as Governments expenditure is steadily increasing and a higher percentage of it is allocated to the acquisition of goods, services and public works, the so called "public procurement", which accounts for more than 18% of the European Union GDP.

Public markets are not just important in economic value. The diversity of public authorities implies that the public sector ends up acquiring virtually any good, service or construction, affecting the dynamics of those markets, also because of the social, environmental and employment relevant impact, as it is well known since the classical studies of Keynes or Baumol.

All of the above implies that any contract of public procurement has always a twofold objective: fulfilling the direct needs of the public contracting authority but also generating externalities that must be aligned to the public policies to be pursued at the national and European Union level (e. g. the EU 2020 Agenda). Obviously, this latter objective gains higher importance during hard times due to financial crises or the postponing of public objectives as it has been the case of Europe since the crisis of 2008 and the increase of internal tensions within EU. So, not surprisingly, the new EU Directives on Public Procurement - rather than on the coordination of processes for the acquisition of goods, services and works as it was the case for the previous Directives - are quite clear about their new scope, the functioning of public markets, and their objectives, aligning public procurement with the EU2020 roadmap.

To analyze critically and empirically these new challenges it is by now obvious one needs the contribution of scholars from a wide range of disciplines – among them Economics, Public and Competition Law, Public Management, ICT, Decision and Social Sciences. To develop such an interdisciplinary approach, together with the understanding and the improvement of the functioning of public markets, this journal is launched. Obviously, several existing journals in relevant areas such as Public Law or Public Economics can give useful contributions to such challenges, but the EUROPEAN JOURNAL OF PUBLIC PROCUREMENT MARKETS is the very first European and interdisciplinary journal embracing the wide range of disciplines and issues that have to be considered to achieve the presented objectives.

We believe that the focus and the merit of the papers selected for this first issue, after careful revision, are a good illustration of the nature of this new journal.

Enjoy the reading and consider the JOURNAL for the publication of your future procurement research!

Chief Editors

Luís Valadares Tavares, University of Lisbon, Lisbon.

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RESEARCH AND POLICY PAPERS

Transposition of the EU Public Procurement Directives 2014 in Austria

Bernt Elsner Ruth Bittner

Abstract:

The EU public procurement directives 2014 further advance the European Commission's ambitions to regulate most public procurement at the EU-wide level. The Directives already set out a fairly concrete legal framework for national parliaments regarding public procurement procedures for work, supply and service contracts above the EU-thresholds. The Austrian parliament decided to implement these directives mostly word for word, but at the same time tried to preserve most of the historical developments to the public procurement law that were specific to Austria. In addition to that, the Austrian legislature responded to recent ECJ case law that was established after the EU Directives were published.

The new public procurement code creates legal certainty for both contracting authorities and contractors in several different aspects. However, the interpretation of some provisions will be subject to case law, especially regarding contractual cooperation between contracting authorities.

Concerning contracts not fully regulated by the Directives – such as concessions as well as social and other specific services – the Austrian legislature opted not to regulate them further and leave some flexibility to the contracting authorities.

Keywords:

Austrian public procurement code, changes to contracts, central purchasing bodies, cooperation between contracting authorities, division into lots, e-procurement, ESPD, inhouse exclusion, innovative procurement, MEAT-principle, passenger transport services, public procurement directives 2014, remedies

1. Introduction

The EU public procurement directives 2014[1] (hereafter the "Directives") further advance the European Commission's ambitions to regulate most public procurement at the EU-wide level. New procurement procedures have been introduced, existing rules have been amended, and procurement has been brought under the jurisdiction of the European Court of Justice (ECJ).

The Directives already establish a concrete legal framework for national parliaments regarding public procurement procedures above certain thresholds. Nevertheless, some latitude still remains to account for national specifics.

2. Background and structure of Austrian public procurement law

In Austria, public procurement law is regulated at both the federal and provincial level. The public procurement procedure itself is only regulated at the federal level. The nine Austrian provinces are only empowered to regulate legal review procedures. When doing so, however, they follow the federal law – apart from a few small peculiarities. Therefore, when we discuss remedies, in Section 10, we only discuss the federal provisions.

[1] Dir 2014/23/EU; Dir 2014/24/EU; Dir 2014/25/EU.

The "new" public procurement law, which implements the Directives, came into force on August 21st, 2018.[2] Previously, procurement was regulated by the public procurement code (BVergG 2006) and the public procurement code for security and defense contracts (BVergGVS), which were both operational at the federal level. Now the relevant provisions are split between the public procurement code (BVergG 2018), the public procurement code for concessions (BVergGK 2018), and the old BVergGVS, which remains unchanged.

3. Cooperation between contracting authorities

The new public procurement code gives contracting authorities across Europe much greater legal certainty about the types of cooperation within the public sector that are excluded from public procurement law. It clarifies the conditions under which contracting authorities can conclude contracts with each other without having to comply with the requirements of public procurement law. Until the introduction of the EU Directives, this question had been dealt with according to case-law judgments from the European Court of Justice (ECJ) because the conditions for exemption from procurement law in this regard had not been regulated at the EU-level. In Austria, the previous public procurement code already included a provision regarding so-called "in-house exclusion" that dealt with this problem.[3]

The new Austrian public procurement code strictly follows the Directives in the matter of exclusion grounds for cooperation between contracting authorities. Such exclusion grounds can be divided into two categories:

3.1 In-house exclusion and institutional cooperation

The ECJ already substantially clarified the conditions necessary for a contracting authority to award a contract (regardless of its value) directly to a legal entity under its control. The conditions for exclusion were satisfied if the contracting authority had an influence on the contractor similar to that on its own departments and the contractor's main activities were performed for the contracting authority that controlled it.[4]

In addition, a contracting authority was also entitled to award a contract directly to a contractor, even if the contracting authority itself did not have sole control over the contractor, as long as all the shares of the contractor were exclusively held by public authorities.[5] Waste and wastewater associations in Austria often fulfilled this ground for exclusion.

According to the previously applicable case law, the main criterion for this ground to be fulfilled was that no private shareholder (natural person or corporate entity) held any shares in the contractor.[6] As soon as a private shareholder held even a minor share, this exclusion no longer applied. This criterion has been softened in the new public procurement code, according to which statutory direct private equity investments without decisive influence on the controlled legal entity no longer stand in the way of an in-house award.[7]

The requirement that the contractor's main activities have to be carried out for the controlling authorities is now specified by a precise value limit: from now on, up to 20% of the contractor's total turnover may be assigned to other entities without losing the in-house privilege.[8]

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[2] Published in the official law gazette on August 20th, 2018 (BGBl I Nr 65/2018).

[3] Art 10 lit 7 BVergG 2006.

[4] ECJ 18.11.1999, C-107/98, *Teckal*; 13.10.2005, C-458/03, *Parking Brixen*; 19.4.2007, C-295/05, *Asemfo*.

[5] ECJ 11.5.2006, C-340/04, *Carbotermo*; 13.11.2008, C-324/07, *Coditel Brabant*; 29.11.2012, C-182/11, *Econord*.

[6] ECJ 11.1.2005, C-26/03, *Stadt Halle und RPL Lochau*; Even, if the private person was a non-profit organization: 19.6.2014, C-574/12, *Centro Hospitalar*.

[7] Art 10 Par 1 Sec 3 lit c BVergG 2018.

[8] Art 10 Par 1 Sec 1 lit b und Sec 3 lit b BVergG 2018.

3.2 Contractual cooperation

Recognized by the judiciary but unregulated by law until now, several contracting authorities may cooperate on a contractual basis without interposing a jointly controlled entity.[9] For example, one municipality may be contracted to take care of snow removal in another municipality if it owns its own snow-clearing vehicles.

The limits and conditions for the fulfillment of this exclusion ground had never been satisfactorily clarified by case-law. According to the new public procurement code this exclusion ground is fulfilled if:

- the aim of the cooperation between the participating contracting authorities is to deliver the public services they are charged with and to achieve common objectives;
- the authorities enter into the cooperative contract solely out of consideration for the public interest; and
- the participating contracting authorities may not account for more than 20 % of the total (domestic) market in the activities covered by the cooperation.[10]

These criteria are helpful guidelines and provide a certain amount of orientation. However, they are still quite unclear, and some uncertainty about their scope remains.

4. Award of Concessions

As the media storm of 2013 testifies, many Austrians were deeply concerned that the imminent EU public procurement legislation would force the privatization of the drinking water supply. The previous public procurement act only regulated works- and service-concessions in a rudimentary way. It only set out minimum requirements for service-concessions – for instance, legal remedies granted by public procurement law were not applicable. Moreover, service-concessions did not fall under the scope of the preceding EU public procurement directives of 2004 at all. For whatever reason, service-concessions were considered to be of secondary importance relative to works-concessions.

The new public procurement code follows the EU Directives by regulating work- and service-concessions uniformly. However, instead of the detailed requirements for the award of contracts, less strict requirements apply. Firstly, the threshold before service concessions must be put out to tender across Europe is also significantly higher than for service contracts (5,548 million euros). And secondly, although a notice for concessions that exceed this threshold must be published, there is no formal award procedure (such as an open procedure, restricted procedure or competitive procedure with negotiations). National legislatures are given ample scope in this regard.

The Austrian legislature decided not to introduce further provisions regarding concessions and limited itself to implementing the provisions of the Directives. Concessions below certain thresholds in particular remain mostly unregulated. For example, the publication of an award notice is not mandatory if there is no clear cross-border interest.[11] Thus, the changes for contracting authorities when awarding a concession are quite small. The biggest change concerns remedies. Previously, the award of service-concessions did not fall under the scope of remedies provided by public procurement law: any irregularities had to be brought before civil courts. In the future, decisions regarding the award of service-concessions – as of work-concessions – can be challenged before administrative

[9] ECJ 9.6.2009, C-480/06, *Stadtreinigung Hamburg*; 19.12.2012, C-159/11, *Lecce;* 16.5.2013, C-564/11, *Lombardia;* 13.6.2013, C-386/11, *Piepenbrock.*

[10] Art 10 Par 3 BVergG 2018.

[11] Art 22 Par 3 BVergGK 2018.

courts, which has numerous benefits for applicants (especially the short duration of proceedings).[12] Thus, we expect the number of court decisions regarding service-concessions to rise.

Service concessions for the supply of drinking water, however, do not fall under the scope of the directives or the public procurement act. Even if they did, the public procurement act would not oblige contracting authorities to privatize the drinking water supply but only regulates the procedure to do so, if contracting authorities decide to do so. Thus, there is no danger – and has never been – of the Austrian government being forced to privatize the drinking water supply.

5. Uniform rules for the award of services

Another field of public procurement law, which has reputedly been harmonized by the Directives, is the award of service contracts. Until now, service contracts were divided into "Annex A" and "Annex B" services. While Annex A-services were subject to the full scope of public procurement law, significantly fewer rules applied to the award of Annex B-services. Annex B-services did not have to be awarded based on a formal award procedure and even publishing an award notice was not always compulsory.[13]

The Directives do not distinguish between Annex A and Annex B services. But not all services will be subject to the full scope of the directive in the future. Many of the services categorized as Annex B are now assigned to the "social and other specific services"-category.[14] Simplified rules will continue to apply to such services. Whilst "normal" service contracts worth more than EUR 221,000 usually require an EU-wide tender notice to be published, authorities only need to publish an EU-wide award notice about these special services when their value exceeds EUR 750,000.[15]

Further, special services need not be awarded within the standardized procedure laid down in the public procurement code. The contracting authority is given a relatively free hand to design the award procedure themselves. The Austrian legislature has also extended the ability to award such contracts directly. While "normal" services may be awarded directly up to an order value of EUR 50,000, the limit for special services has been doubled to EUR 100,000.[16] Thus, the two-tier division of services has not been abolished, just redesigned.

6. Passenger transport services

The new public procurement code gives special treatment to the award of passenger transport services by rail and by road. Contracting authorities may use simplified procedures awarding these services. The provisions laid down in the code for passenger transport are similar to those concerning social and other specific services.[17] However, remedies based on public procurement law will not be applicable to those procurement procedures from now on.[18] This is a major drawback for those seeking effective remedies.

7. E-procurement

Small contracting authorities, especially municipalities, have viewed the upcoming mandatory use of electronic means of communication ("e-procurement") with some mistrust. The public procurement code requires – in line with the Directives – that electronic means must only be used for the essential elements of a procurement procedure, such as noticing and tender submission.[19]

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[12] Art 78 BVergGK 2018.
[13] Art 141 Par 4 BVergG 2006.
[14] Art 74 Dir 2014/24/EU and Annex XIV thereto.
[15] Art 12 BVergG 2018.
[16] Art 151 BVergG 2018.
[17] Art 151 BVergG 2018.
[18] Art 151 BVergG 2018.
[19] Art 48 BVergG 2018.

Currently the public procurement code does not require public authorities to conduct all communication electronically. Contracting authorities do not necessarily have to use e-procurement platforms for the award of contracts.

Moreover, there is no requirement for the award of concessions to be handled via e-procurement and other contracts only require the use of e-procurement if their value exceeds the thresholds of the public procurement directives.[20] Of course, it's already common practice to handle procurement procedures electronically for contracts above the thresholds. Two of the largest contracting authorities in Austria in particular have developed a shared e-procurement platform and have been using it for most of their award procedures for four years. Since the mandatory use of e-procurement only applies to contracts above the thresholds, small communities will hardly be affected by this requirement.

The law contains detailed provisions to ensure the equal treatment of tenderers and the security of data transmission.[21] Exceptions are also foreseen, especially for cases where electronic means are hardly practical – for example, if large-format printers are needed or if plans or models have to be submitted, as is likely to be the case for architectural competitions. An exception is also made in those cases where data security cannot be guaranteed. We assume that this exception might be fulfilled in cases where cyber-attacks pose a threat.

The Austrian parliament has taken the chance to postpone the implementation of this requirement until 18 October 2018 except for central purchasing bodies. In Austria, one important central purchasing body has been established, the Bundesbeschaffung GmbH (BBG). This central purchasing body is often used by contracting authorities.

One of the main questions concerning e-procurement is whether the government will decide either that each contracting authority will have to use one centralized e-procurement platform or that each respective authority can decide for itself. Three main e-procurement platform operators have already established themselves. We doubt, therefore, that the government will opt for a centralized procurement platform.

8. Changes regarding procurement procedures

8.1 Competitive procedure with negotiations, innovation partnership

Initially, the European Commission planned to move away from standardized, mandatory procurement procedures and wanted to introduce a "toolbox" concept. However, this idea has been scrapped and the Directives present a final catalog of standardized procedural types. Nevertheless, the new procurement code introduces changes to procurement procedures: it now facilitates access to the negotiated procedure with prior notice and to the competitive dialogue in order to give contracting authorities more flexibility. [22] Choosing the negotiated procedure or the competitive dialogue gives contracting authorities further the possibility to react to innovative proposals made by bidders, pick them up and adjust them within a certain range. Even though the competitive dialogue has not been used often in the past, there is a chance that its popularity among contracting authorities will rise in the future due to these amendments.

The public procurement act also establishes a new procedure, the innovation partnership. The innovation partnership is designed to enable contracting authorities to tender research and development services, and then subsequently to acquire the resulting product or service.[23]

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[20] Art 48 BVergG 2018.
[21] Art 48 BVergG 2018.
[22] Art 34-37 BVergG 2018.
[23] Art 41 BVergG 2018.

Although the services covered by this procedure are complex, the relevant provision of the Directives has been implemented. The Austrian legislation deviates from the Directives on this point and structures the public procurement act in a more user-friendly way. The aim of the innovation partnership is to select a private partner with whom to develop an innovative product, construction or service, which will ultimately be acquired by the client.[24] In structuring the procurement process, the procuring entity is given a lot of flexibility. The coming years will show whether this procurement procedure will be used by contracting authorities.

8.2 Preliminary market consultations, prior involvement of candidates

In order to ensure the equal treatment of tenderers, the award-related activities of the contracting authority prior to the launch of the procurement procedure play an important role. This applies to market surveys on the client side as well as preliminary work by individual companies. As a result of transposing the Directives, the public procurement code expressly determines the conditions for the market research carried out in preparation for a procurement procedure for the first time.

If a company has been involved in preparing an award procedure or has advised the contracting authority, it must be excluded from the procurement competition unless it can prove that its involvement would not distort competition. In order to avoid distorting competition, the legislation compels the authority to comprehensively disclose all relevant information to all bidders.[25]

The legislation provides helpful guidelines and orientation for contracting authorities as well as private companies.[26]

8.3 Prior information notices, division into lots

Generally speaking, a procurement procedure must be initiated by publishing a prior notice about the contract to be awarded. Apart from that, contracts can be awarded directly, if their value is below EUR 100,000.[27] So far, this has mostly been done by means of an award notice for each procurement procedure. From now on, contracting authorities may initiate a tender procedure by publishing a summarized prior information notice, which replaces the contract award notice. By choosing the summarized prior information notice, contracting authorities can bundle planned purchases within one publication notice. However, central contracting authorities are not allowed to use the summarized prior information notices. Moreover, the prior information notice may only be used for certain types of procedure, namely, the restricted and the competitive procedure with negotiation.[28] If the prior information notice indicates that the award of the contract will take place without either subsequent publication or inviting companies to express their interest, then a separate contract award notice need not be published.

According to the public procurement act, contracts above the EU-thresholds shall be divided into lots in order to make it easier for small and medium sized enterprises (SME) to participate in such larger procurement procedures. However, the law does not state an obligation to do so; contracting authorities who decide not to divide a contract into lots are only obliged to give reasons for their decision in the documentation of the procedure or in the procurement documents themselves.[29] Austria has a lot of SMEs and their competence and skills are widely acknowledged also among contracting authorities. Thus, it is common practice for contracting authorities to divide contracts

[24] Art 118-121 BVergG 2018.
[25] Art 25 BVergG 2018.
[26] Art 24-25 BVergG 2018.
[27] Art 46 BVergG 2018 limits a direct award to contracts below EUR 50,000. However, the Austrian government is entitled by Art 19 BVergG 2018 to increase this threshold. This has been done by a regulation, which will be in force until December 31st 2020.
[28] Art 57 BVergG 2018.
[29] Art 28 Par 6 BVergG 2018.

into lots (wherever feasible) and for companies to bundle forces with other companies by participating as a consortium or as subcontractor.

8.4 ESPD, "self-cleaning"

According to the Directives, the European Single Procurement Document ("ESPD") will provide substantial relief for companies involved in cross-border applications. A company can fill out and submit the ESPD to confirm its suitability as a first step. The contracting authority is only obliged to verify the information given in the ESPD for the bidder they presume to be the best. This will save a considerable amount of examination time for the procuring entity and preparation time for the bidder. In Austria, however, the use of the ESPD is only mandatory for procurement procedures handling contracts above certain thresholds.[30]

Some have raised concerns about the user-friendliness of the ESPD. It is debatable whether it will be widely recognized or prove itself as helpful for bidders as it will for contracting authorities.

Following an Austrian Constitutional Court decision from 2002, a provision that allows a bidder to prove their suitability regardless of having fulfilled an exclusion ground (so called "self-cleaning"), has been introduced in the Austrian public procurement code.[31] Art 57 Par 6 Dir 2014/24/EU resembles this provision to a large extent. However, there is a small change in the wording, which might lead to significant changes (and challenges) in practice.

Previously, the public procurement code listed example criteria that might be fulfilled in order to prove one's suitability. Those examples were regarded as alternatives that did not all have to be fulfilled and were linked by "or".

By contrast, the Directives – and thus the new public procurement code – lists the same criteria, but connects them with "and". Consequently, if a bidder now wants to successfully prove itself "clean", it has to prove that it has taken *all* the measures named in the public procurement code. This means

i. paying or undertaking to pay compensation for any damage caused by criminal offence or misconduct,

ii. clarifying the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities, and

iii. taking the concrete technical, organizational *and* personnel measures that are appropriate to prevent further criminal offences or misconduct.[32]

Case Law will show how this provision is to be understood.

8.5 Time limits, opening of tenders

From now on, procurement procedures should take less time. In order to ensure this, the minimum periods to be granted by the procuring entity were considerably cut. For example the minimum time limit for the receipt of tenders within an open procedure is 30 days from the date on which the contract notice is sent.[33] The minimum time limit for receipt of requests to participate within a restricted procedure is 30 days from the date on which the contract notice is sent.[34] Nevertheless, the contracting authorities will also be interested in providing companies with sufficient time to prepare a well-worked-out offer in order to avoid problems.

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[30] Art 80 Par 2 BVergG 2018.
[31] Art 73 BVergG 2006.
[32] Art 83 BVergG 2018.
[33] Art 71 BVergG 2018.
[34] Art 70 BVergG 2018.

Previously, one of the main pillars of a procurement procedure from the bidder's viewpoint was the public opening of tenders. Within the transparent and fixed procedure, it was mandatory to open the tender in the presence of the bidders and to read out their essential contents, especially the prices offered by every bidder.[35] The obligation to do this in front of the bidders has been withdrawn from the public procurement code. Given that electronic security measures must be used to prevent the premature or unauthorized opening of offers, withdrawing this obligation seems reasonable. A protocol regarding the opening of bids must be drawn up and sent to all tenderers to maintain transparency with regard to the prices offered.[36] However, without a public opening of tenders, bidders lose their chance to draw the procuring entity's attention to certain aspects of other bids that might influence the outcome of the procedure (e.g. the obvious lack of supplements).

8.6 Changes regarding the MEAT-principle

A previous change in public procurement procedure making the MEAT-principle ("most economically advantageous tender") mandatory in certain cases attracted a huge amount of publicity because it ensured the quality of the services or goods awarded. However, the scope of this provision was unclear, which limited its use.[37] The new public procurement code defines such cases in a new and clearer way.

The application of the MEAT-principle is now mandatory in the following cases:

- if services are awarded within a competitive procedure with negotiations,
- if the services (their main parts) are described in a functional way,
- for works contracts with a value of more than EUR 1 million,
- for cleaning and security services,
- when awarded within a competitive dialogue or an innovation partnership.[38]

It is no longer explicitly stipulated by law that the MEAT-principle has to be applied if variants are allowed. Thus, as a general rule bidder are entitled to submit such tenders in procurement procedures. However, even though they meet the minimum qualitative requirements, variants often offer a qualitatively different technical solution that can only be reasonably assessed by using appropriate quality criteria in order to wage offers with different level of quality. We assume that in the case that variants are possible, the MEAT-principle has to be applied although not explicitly set out in the public procurement act.

The adjustments in the new public procurement code are not only clearly worded, but the content is also easily comprehensible.

9. Changes to contracts during their term

Of great practical importance is the question of whether lawfully awarded contracts can still be modified during their term. Changes to contractual obligations might be required, for example, because the actual soil conditions deviate from the assumed quality, or because the contractor declares bankruptcy (as the large construction company Alpine did some years ago). There are a number of cases in which amendments to the contract are necessary during their term. The relevant principles developed by ECJ were previously not codified, but it was understood that any changes in the contract after its award, for whatever reason, were only possible within limits.

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[35] Art 118 BVergG 2018.
[36] Art 133 BVergG 2018.
[37] Art 79 BVergG 2006.
[38] Art 91 BVergG 2018.

The new public procurement code sets out the criteria for lawful changes to contracts during their term in line with the Directives.[39] However, the Austrian legislature has also incorporated the rulings made by the ECJ in the time since the directives were finalized. This especially concerns the judgment on *Finn Frogne*, which dealt with the question of whether a reduction of the contract's volume constitutes a substantial change and, therefore, cannot be made.

The public procurement act clarifies that not only the extension but also the reduction of a contract is unlawful if the volume of the contract is altered substantially. [40]

10. Remedies

The time limits for applying for review were previously different (shorter) for contracts below the EU-thresholds in Austria.[41] The public procurement code now unifies the time limits so that regardless of the contract's value, the time limits set out in Dir 89/665/EEC apply.[42]

A significant change has also been made concerning the time limits for initiating a review procedure to investigate the ineffectiveness of an awarded contract (Art 2d Dir 89/665/EEC). The time limit for initiating such a review procedure was previously limited to six months after the conclusion of the contract, whether or not it had been possible for the applicant to have been informed about the conclusion of the contract.[43] Since a successful review was required to gain compensation for damages, the ECJ held this time limit to be unlawful.

According to the new public procurement code, there is no general time limit for applying for such a review procedure after the conclusion of the contract.[44] But if the application is filed more than six months after the conclusion of the contract, the review body can no longer declare the contract to be ineffective; it can only impose a fine on the contracting authority and/or declare that the award was unlawful.[45] The current rules still lead to significant uncertainties for contracting authorities because fines of up to 20 % of the contract's value might be imposed without any general time limit.

11. Summary

The new public procurement code creates legal certainty for both contracting authorities and contractors in several different aspects. However, the interpretation of some provisions will be subject to case law, especially regarding contractual cooperation between contracting authorities.

Some provisions of the Directives were restructured by the Austrian legislature, for example the newly introduced procurement procedure for innovation partnerships. Whether the idea of improving the readability and comprehensibility of this provision will lead to its increased use is open to question.

The Austrian legislature also responded to recent ECJ case law that was established after the EU Directives were published. For example, the question of whether a contract's volume may be lawfully reduced during its term is not addressed by the Directives. The Austrian legislator however has – in light of the ECJ's ruling on *Finn Frogne* – clarified that significant reductions or extensions of a contract are not allowed by public procurement law.

[39] Art 365 BVergG 2018.
[40] Art 365 Par 2 BVergG 2018.
[41] Art 321 BVergG 2006.
[42] Art 343 BVergG 2006.
[43] Art 332 BVergG 2018.
[44] Art 354 BVergG 2018.
[45] Art 356 BVergG 2018.

Concerning contracts not fully regulated by the Directives – such as concessions as well as social and other specific services – the Austrian legislature opted not to regulate them further and leave some flexibility to the contracting authorities.

To summarize, the Directives already set out a fairly concrete legal framework for national parliaments regarding public procurement procedures for work, supply and service contracts above certain thresholds. The Austrian parliament decided to implement these directives mostly word for word, but at the same time tried to preserve most of the historical developments to the public procurement law that were specific to Austria.

Transposition of the 2014 European Directives on public procurement by France

Kawthar Ben Khelil

Abstract

The French public procurement code should be published in the next weeks[1]. This project initiated by the French Government gave rise to a public consultation between 23 April and 29 May 2018; it is aimed at grouping together, without any amendments to current rules, all existing provisions relating to public procurement law (all contracts qualifying as public contracts and concessions), according to a consistent plan[2], in order to make the relevant legal framework clearer and more accessible.

As of this day however, French rules relating to the conclusion and performance of public procurement contracts are contained in ordinance (*ordonnance*) n° 2015-899 of 23 July 2015 relating to public contracts (hereinafter referred to as the "Ordinance") and its implementation decree (*décret*), n° 2016-360[3], of 25 March 2016[4] (hereinafter referred to as the "Decree"), that have implemented into domestic law the new European directives on public procurement[5]. They entered into force on 1 April 2016.

This contribution is aimed at providing an overall presentation of the significant changes resulting from the implementation into French law of EU Directives 2014/24 and 2014/25 without claiming to be exhaustive.

Keywords:

Single legal framework; easier access to public procurement; simplification of available tender procedures; E-procurement

1. A simplified legal framework in relation to public contracts

1.1. A single legal instrument for all French contracting authorities

Under French domestic law, until the entry into force of the Ordinance, contracting authorities used to be subject either to the *code des marchés publics* (central government entities, a few central public institutions, public local entities, public hospitals…) or to ordinance n° 2005-649 of 6 June 2005 regarding public and private entities which are not governed by the *code des marchés publics* (other central public institutions, public national companies).

Also, public-private partnership contracts (PPPs) previously referred to as "*contrats de partenariat*" – and now referred to as "*marchés de partenariat*" – were governed by ordinance n° 2004-559 of 17 June 2004.

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[1] This code shall be adopted within 24 months as of the publication of Act n° 2016-1691 of 9 December 2016 relating to transparency, the fight against corruption and the modernization of economic life (cf. article 38 of this Act).

[2] Composed of three parts: definitions and scope, public contracts, concessions.

[3] This Decree applies to all procurement contracts, except for procurements contracts in relation to defence and security referred to in article 6 of the Ordinance (see decree n° 2016-361 of 25 March 2016 relating to procurement contracts on defence and security).

[4] Whereas French concession contracts are governed by order n° 2016-65 of 29 January 2016 and its implementation decree, n° 2016-86, of 1 February 2016. These legislative and regulatory provisions have transposed into French law Directive 2014/23/EU on the award of concession contracts.

[5] Directives 2014/24/UE of 26 February 2014 on public procurement and repealing Directive 2004/18/EC and 2014/25/UE of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

In addition, framework agreements (*accords-cadres*) are defined as a category of public contracts with one or more economic operators the purpose of which is to establish the terms relating to order forms (*bons de commande*) to be issued or the terms governing the subsequent public contracts to be concluded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged (Ordinance, article 4). Public contracts with order forms (*marchés à bons de commande*) have therefore become a sub-category of framework agreements as opposed to a different type of public contract.

All public contracts – including *marchés de partenariat*[6] – executed by any French contracting authorities – and contracting entities – are now governed by only one legal instrument under French law: the Ordinance, together with the Decree.

1.2. Any procurement contract concluded by a French public entity is governed by French administrative law

Pursuant to article 3 of the Ordinance, procurement contracts executed by French public entities are governed by French administrative law, which entails a certain number of specific rules which depart from common rules (*exorbitantes du droit commun*) and general principles related to administrative contracts resulting mainly from French administrative case law, whether or not expressly provided for by the contract, among which:

- right for the public entity to modify unilaterally the contract, subject to indemnification of the contractor (CE, 11 March 1910, *Compagnie générale française des tramways*, n° 16178: *Rec.*, p. 216);
- right of unilateral termination by the public entity, for grounds of public interest, even failing an express clause in this respect (CE, Ass., 2 May 1958*, Distillerie de Magnac-Laval*, n° 32401-32402-32507-34562: *Rec.*, p. 246) or for breach by the economic operator;
- prohibition, in principle, for the contractor to invoke the *exception d'inexécution*, *i.e.* the defence consisting in ceasing to perform the contract on the ground that the other party has breached its contractual obligations (CE, 7 January 1976, *Ville d'Amiens*, n° 92888: *Rec.*, p. 11)[7].

This also results in French administrative courts having jurisdiction over any claims filed by the parties or third parties to a public contract in relation to the conclusion, interpretation or performance of such contract, whereas there used to be a distribution between French administrative and judicial courts under the previous rules.

2. An easier access to public contracts

2.1. Division into lots

Under article 32 of the Ordinance, public contracts – except for global public contracts mentioned in section 4 of the Ordinance – must in principle be divided into lots unless their subject-matter does not enable separate performances to be identified. Contracting authorities can nevertheless decide not to divide a public contract into lots; they must in this hypothesis indicate the main

[6] Ordinance, article 4.

[7] It is to be noted that the contractor may, however, now have the right to terminate unilaterally a public contract in the event that the contracting authority has breached its contractual obligations, provided that (i) the contract is not related to the very operation of a public service and (ii) the conditions for such a unilateral termination are provided for by the contract (CE, 8 October 2014, *Société Grenke location*, n° 370644). The contractor's right to terminate the contract, which is therefore limited to a certain kind of contracts, is also strictly regulated: first, the contractor cannot terminate the contract without having first enabled the contracting authority to oppose the termination for grounds connected with the public interest (*e.g.* requirements of the public service); secondly, where grounds connected with the public interest are raised by the contracting authority, the contractor shall continue to perform the contract; otherwise the contract could be terminated exclusively against the contractor, which shall bear the costs incurred. The grounds of public interest can nevertheless be challenged before an administrative court in order to obtain the judicial termination of the contract.

reasons for their choice (in the procurement documents or the individual report in relation to contracts the value of which is above European thresholds).

Regarding public contracts divided into lots, the contracting authority's right to limit either the number of lots for which the same economic operator may submit a tender or the number of lots which may be awarded to the same tenderer is also introduced into article 32 of the Ordinance, in line with the previous domestic case law (CE, 20 February 2013, *Société Laboratoire Biomnis*, n° 363656)[8].

2.2. European Single Procurement Document

According to the 2014 EU Directives[9], contracting authorities must accept the European Single Procurement Document ("ESPD") at the time of submission of requests to participate or submission of tenders.

This document consists of an updated self-declaration as a preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the economic operator is not in one of the situations in which it must or may be excluded; it meets the selection criteria set out by the contracting authority as to economic and financial standing or technical and professional ability; where applicable, it fulfils the objective rules and criteria that have been set out in relation to the reduction of the number of otherwise qualified candidates to be invited to participate. The ESPD which has already been used in a previous procurement procedure may be reused by the economic operator if it confirms that the information contained therein continues to be correct. The contracting authority is obliged to verify the correctness of the information given in the ESPD only regarding the presumptive best bidder.

The use of this document should therefore result in considerable simplification for the benefit of both economic operators and contracting authorities: it should provide substantial relief for companies regarding cross-border applications and small and medium-sized enterprises; in addition, this should allow contracting authorities to save time during the tender process.

Nevertheless, in practice, it is to our knowledge not widely used as of this day.

2.3 Right to invite tenderers to regularize an irregular tender

Even though irregular tenders submitted within the framework of open or restricted procedures or procedures without negotiation must be eliminated, contracting authorities may invite tenderers to regularize their tenders provided that they are not abnormally low[10].

This should allow tenders with minor irregularities to be regularized instead of being automatically eliminated.

3. Operations excluded from the scope of the Ordinance

3.1 Specific exclusions for service contracts

New specific exclusions have been inserted into article 14 of the Ordinance, regarding service contracts, notably:

- public passenger transport services by rail or metro (considering specific rules in this field[11]),

[8] Cf. also Decree, article 12.

[9] Cf. Directive 2014/24/EU, article 59.

[10] Decree, article 59.

[11] Regulation (EC) n° 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) n° 1191/69 and n° 1107/70.

- loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments,
- specific service contracts (firefighting and rescue services, emergency services, nuclear security, ambulance except for services consisting exclusively in the transport of patients) awarded to a non-profit-making legal entity.

3.2 "In house" exclusion

Exclusions in relation to cooperation between contracting authorities are also implemented into French law by the Ordinance: the conditions under which contracting authorities may conclude contracts with each other without being held to comply with the requirements of public procurement law are set forth within.

In particular, pursuant to the "in house" theory created by the European Court of Justice's case law, the criteria for a contracting authority to award a contract directly to a legal entity they control have been broadly transcribed in the EU directives and French law[12].

The notion of "control similar to that exercised over its own departments" is defined as the situation where the contracting authority exercises a decisive influence over both the strategic objectives and significant decisions of the controlled entity[13].

The "in house" exception can now be cascaded as another contracting authority may come in between the controlling authority and the controlled entity, either itself in an "in house" situation or laterally (between procurers controlled by the same contracting authority).

Additionally, the "in house" situation can result from a control exercised jointly by several contracting authorities[14].

Whereas the *code des marchés publics* required that the essential part of the controlled entity's activity be exercised for the controlling authority, this criterion is not quantified, in line with the provisions of the EU Directives: more than 80% of the activities of the controlled legal entity must be carried out in the performance of tasks it has been entrusted by the controlling contracting authority or by other legal entities controlled by that contracting authority.

Private capital participation in the controlled legal person is henceforth allowed[15], whether indirectly or directly; in the latter case however, the participation must be non-controlling and non-blocking, required by national legislative provisions in conformity with the Treaties and not exert a decisive influence on the controlled legal entity.

Furthermore, "in house" relations do not necessarily apply downward only: public contracts concluded by the controlled legal entity with the controlling contracting authority also benefit from this exception.

3.3 Contractual cooperation between contracting authorities

According to article 18 of the Ordinance, contracting authorities may conclude contracts without having to apply the Ordinance and Decree provided that:

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[12] Ordinance, article 17.

[13] For an example in the European case law: ECJ, 19 April 2007, *Parking Brixen GmbH, Gemeinde Brixen, Stadtwerke Brixen AG*, C-458/03.

[14] The condition of joint control is fulfilled not only where the contracting authorities hold capital in the entity but also play a role in its managing bodies, but the Ordinance allows the participation in the managing bodies to be indirect for several or all of the contracting authorities considered, which makes this condition more flexible than in the previous case law (ECJ, 29 November 2012, *Econord SpA*, C-182/11, et CE, 6 November 2013, n° 365079).

[15] Whereas it was formerly excluded by case law: ECJ, 11 January 2005, *Stadt Halle, RPL Recyclingpark Lochau GmbH*, C-26/03.

- the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving objectives they have in common
- the cooperation is driven solely by considerations relating to the public interest, and
- the contracting authorities perform on the open market less than 20 % of the activities covered by the cooperation.

These criteria would deserve to be clarified by case law.

4. Publication thresholds

European thresholds[16] are currently as follows:

- regarding supply and services contracts:
    - in respect to contracting authorities: € 144,000 for central government authorities and central public institutions, or € 221,000 as regards public local entities;
    - in relation to contracting entities: € 443,000, and
- as regards public works contracts: € 5,548,000[17].

Above European thresholds, one of the following tender procedures must be used:

- an *appel d'offres* (either open or restricted procedure) in principle,
- a competitive procedure with negotiation (contracting authorities) or a negotiated procedure with prior publication (contracting entities),
- a competitive dialogue[18].

A contract notice must be published in the Official Journal of the European Union.

For contracts whose estimated value is below the European thresholds, the conditions for the publication and competition processes can be freely determined (*procédure adaptée*) by the contracting authority, provided that they are adapted to the object and specificities of the contract, the number and location of the economic operators likely to be interested in the contract, and the circumstances of the contract to be concluded (Decree, article 27). Contracting authorities may also resort to the procedure referred to as "*adaptée*" for contracts for social and other specific services, regardless of their value (Decree, article 28).

The Ordinance and Decree provide for intermediary thresholds in addition to those resulting from European directives:

- contracts below € 25,000 may be concluded without prior publication (Decree, article 30-I-8°). The contracting authority must nevertheless choose a relevant offer, make good use of public money and refrain from systematically contracting with the same economic operator when the contracting authority's needs may be met by several other operators.
- For contracts that are (i) executed by the French Government, public national institutions that do not have an industrial and commercial nature, public local entities and institutions, and (ii) worth between € 90,000 and the above-mentioned European thresholds, a contract notice has to be published either in the *Bulletin Officiel des Annonces des Marchés Publics* (BOAMP) or in a newspaper authorized to publish legal announcements. The contracting authority must appreciate whether, according to the nature or amount of the products, services or works concerned, a notice in a specialised newspaper corresponding to the economic sector involved or

[16] Excluding VAT.

[17] Notice relating to thresholds applicable to public contracts and to the list of central government authorities in public procurement law, n° 171 (published on 31 December 2017 in the Official Journal of the French Republic).

[18] Ordinance, article 42.

in the Official Journal of the European Union is in addition necessary to guarantee an appropriate information for reasonably vigilant economic operators that might be interested in the contract (Decree, article 34-I-1°-b).

In any case, the fundamental principles of public procurement, such as equal access to public procurement and transparency, must be observed regardless of the value of the contract (even below € 25,000).

5. Simplification in respect of available tender procedures

5.1 Easier recourse to negotiated procedures

Whereas a contracting authority is free to choose among the open and the restricted procedure[19], they may use a negotiated procedure only under certain circumstances. Nonetheless hypotheses of recourse to negotiated procedures have been significantly widened.

The negotiated procedure without prior publication of a contract notice (*marché négocié sans publicité ni mise en concurrence préalables*) may be used in the specific cases and circumstances referred to in article 30 of the Decree, where using an open or restricted procedure without negotiation is not likely to lead to a satisfactory outcome, for example:

- insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, the time limits for the open procedure, restricted procedure, negotiated procedure with prior publication or competitive dialogue cannot be complied with;
- where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to (i) an open procedure or a restricted procedure carried out by a contracting authority, (ii) a tender procedure carried out by a contracting entity, or (iii) a tender procedure related to (a) a contract whose value is below the European thresholds or (b) related to social or other specific services or legal services involving the representation of the contracting authority in judicial proceedings, provided that the initial conditions of the public contract are not substantially altered;
- where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: (i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance; (ii) for technical reasons; (iii) the protection of exclusive rights, including intellectual property rights.

Contracting authorities may apply a competitive procedure with negotiation (*procédure concurrentielle avec négociation*) or competitive dialogue, in the specific cases and circumstances referred to in article 25-II of the Decree:

- the needs of the contracting authority require adapting readily available solutions;
- the needs of the contracting authority include innovative solutions;
- the public contract contains design performances;
- the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up of the contract or because of the risks attached to it;
- the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European technical assessment, common technical specification or technical reference;

[19] Ordinance, article 42; Decree, article 66.

- where an open or restricted procedure resulted only in irregular or unacceptable tenders within the meaning of article 59 of the Decree, provided that the initial conditions of the public contract are not substantially altered. The contracting authority is not held to publish a contract notice when it allows to participate in the procedure only the tenderers which, during the prior open or restricted procedure, submitted tenders in accordance with the formal and deadline requirements of the procurement procedure.

In the utility services sectors, the use of the negotiated procedure with prior publication (*procédure négociée avec mise en concurrence préalable*) by contracting entities is always possible (Decree, article 26).

5.2 Right to examine tenders before candidatures within the framework of an open procedure

In open procedures contracting authorities may examine tenders before candidatures (more specifically, the absence of grounds of exclusion and the fulfilment of the selection criteria set out in the tender documents), which may allow them to check only the candidature of the tenderer which has submitted the most economically advantageous tender[20].

However, the contracting authority must ensure that this verification is carried out in an impartial and transparent manner so that the public contract is not awarded to a tenderer that should have been excluded.

5.3 Innovation partnership

A new kind of public contract, *i.e.* the innovation partnership, was implemented into French law before the enactment of the Ordinance with the publication of decree n° 2014-1097 of 26 September 2014[21]. This contract should enable the award of research and development supplies, services or works, including the subsequent acquisition of the resulting products, services or works. It can only be resorted to provided that it complies with needs which cannot be satisfied by the acquisition of products, services or works already available on the market, which implies that the contracting authority will have to first carry out a thorough and precise study in order to check that their needs cannot be covered by already existing solutions.

An innovation partnership can be concluded with either one or more economic operators. In the latter case, this must be specified by the contracting authority in the tender documents and the innovation partnership is then composed of several individual contracts that must be performed separately.

Above European thresholds, the contracting authority may use the competitive procedure with negotiation or the negotiation procedure with prior publication subject to the specificities laid down by the Decree regarding innovation partnerships. In particular, the publication of a contract notice is mandatory. The contracting authority must identify the need for innovative products, services or works so as to enable economic operators to determine the nature and scope of the solution required and to decide whether to request to participate in the tender procedure. The tender documents must specify which elements of description must constitute the minimum requirements to be met by all tenders.

At this stage it is too soon to know whether this specific type of contract and procurement procedure will be used by many contracting authorities.

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[20] Decree, article 68.

[21] It is now provided for by articles 93 to 95 of the Decree.

6. E-procurement

On 1 October 2018[22], the use of electronic means of communication ("e-procurement") will become mandatory for all contracting authorities or entities regardless of the value of the contract[23]. However, exceptions to this obligation must apply: for example, contracts the value thereof is below € 25,000 or contracts for social and other specific services mentioned in article 28 of the Decree will be exempt from e-procurement[24].

More specifically, when e-procurement is mandatory, electronic means have to be used concerning the essential elements of a procurement procedure, such as procurement documents and the submission of tenders[25]. All contracting authorities and entities must also offer unrestricted and full direct access - by electronic means and free of charge - to the electronic device used in relation to public procurement[26].

Currently, several kinds of e-procurement platforms can be used by French contracting authorities: platforms proposed by private economic operators offering every function required by French and European public procurement law; numerous platforms developed by one public authority for its own needs; shared platforms developed by a grouping of public authorities for their own use.

The resort to e-signature has become optional by tenderers, under the current rules. It is up to the relevant contracting authority to decide whether it wishes to compel economic operators – in the contract notice or the tender rules within the framework of the relevant tender procedure – to sign bids electronically[27]. Executing a public contract electronically is also a faculty[28].

7. Traceability and transparency of decision-making in procurement procedures

Directive 2014/24/EU highlights that traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, in particular efficiently fighting corruption and fraud. Contracting authorities should consequently keep copies of concluded high-value contracts[29], in order to provide access to those documents to interested parties in accordance with applicable rules on access to documents[30].

After 1 October 2018, all contracting authorities and entities must offer unrestricted and full direct access - by electronic means and free of charge - to the essential data[31] of any procurement procedure for public contracts and concessions whose value is equal to or exceeds € 25,000 (excluding VAT), except for information the disclosure of which would disturb public order[32].

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[22] This has been already imposed on central purchasing bodies (*centrales d'achat*) since 1 April 2017.

[23] Decree, article 39.

[24] Decree, article 41.

[25] Decree, article 42.

[26] Decree, articles 39 and 42.

[27] Ministerial reply to the written question of a member of Parliament, n° 21405: *JO Sénat*, 16 June 2016, p. 2691.

[28] Ordinance, article 102.

[29] Ordinance, article 57; Decree, article 108.

[30] Cf. French code of relations between the public and administration, articles L. 300-1 and *seq.*

[31] Including the nature and subject-matter of the public contract, its term, its value and main financial terms (Ordinance, article 56, Decree, article 107).

[32] *Arrêté* of 14 April 2017 relating to essential data in public procurement (NOR: ECFM1637256A). Motorway concessionaires have had to do so since 1 January 2018 (decree n° 2017-1816 of 28 December 2017 on the regulation of contracts in the field of motorways).

8. Modification of contracts during their term

Cases where existing public contracts may be modified during their term without a new tender procedure being required are set out more precisely than before in article 139 of the Decree.

In substance, public contracts may be amended, in particular when:

- the modifications, regardless of their amount, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, or options, provided that they do not provide for modifications that would alter the overall nature of the contract;
- additional works, services or supplies by the original contractor have become necessary and were not included in the initial procurement where (i) a change of contractor (a) cannot be made for economic or technical reasons (*e.g.*, requirements of interchangeability and interoperability with existing equipment, services or installations procured under the initial procurement) and (b) would cause significant inconvenience or substantial duplication of costs for the contracting authority, (ii) any increase in price does not exceed 50% of the value of the original contract;
- the need for modification has arisen from circumstances that a diligent contracting authority could not foresee, (i) the modification does not alter the overall nature of the contract, and (ii) any increase in price of each modification (provided that consecutive modifications are not aimed at circumventing the rules of the Ordinance) shall not exceed 50% of the value of the original contract;
- a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either (i) an unequivocal review clause or option complying with the above-mentioned criteria, or (ii) universal or partial succession into the position of the initial contractor following corporate restructuring, provided that (i) this does not entail other substantial modifications to the contract, (ii) this is not aimed at circumventing the rules of the Ordinance and (iii) the new contractor fulfils the criteria for qualitative selection initially set out by the contracting authority;
- the modifications are not substantial, regardless of their amount, this being specified that indications to assess whether a modification is substantial are provided by the Decree;
- the amount of the modifications is below (i) the European thresholds and (ii) 15% of the initial amount in respect of public works contracts or 10% regarding supplies and services.

A reading grid of these provisions should be provided by European and French case law in the future.

9. Conclusion: major changes brought into French public procurement law by the transposition of the 2014 EU Directives on public procurement

The main major change resulting from the transposition into French law by the transposition of the 2014 EU Directives on public procurement consists in gathering in one single legal framework (*i.e.* the Order and the Decree) all rules applicable to the conclusion and performance of public procurement contracts whereas these rules were formerly spread in 17[33] legal instruments, in particular the *code des marchés publics*, ordinance n°2005-649 of 6 June 2005 and ordinance n° 2004-559 of 17 June 2004 on public-private partnership contracts.

The Order should also allow an easier access to public procurement, notably for small and medium-sized enterprises, among other things by extending to a certain extent the obligation to divide procurement contracts into lots and by establishing the European Single Procurement Document.

[33] According to the French Ministry of economy in July 2015.

On 1 October 2018, the use of e-procurement will become mandatory for all contracting authorities or entities involved in public contracts whose value exceeds € 25,000 (excluding VAT). Some public contracts, especially public contracts for social and other specific contracts, will nevertheless be exempt from this obligation.

Transposition of the 2014 European Directives on public procurement by Spain

Jaime Pintos Santiago

Abstract:

The major changes introduced by the new Spanish Law 9/2017 transposing the EU Directives of 2014 to the Spanish legal framework are discussed in this paper as well as major challenges due to their new law. Special attention is given to the adoption of mandatory e-procurement, including e-tendering, to all public contracts.

Keywords:

Law 9/2017 on Contracts of the Spanish Public Sector; general provisions; public administration contracts; mandatory electronic tender.

1. Latest developments regarding the general configuration of public procurement

In Title I, regarding rationality and consistency of public procurement we find three key concepts (Article 28): the need, the suitability and the efficiency, with another important novelty : *"Public sector entities will program the public procurement activity that they will carry out in a financial year or multi-year periods and will announce their contracting plan in advance by means of a prior information notice provided for in article 134, that at least includes those contracts that will be subject to a harmonized regulation. "*

Regarding the contracts period, extension's terms and conditions change. This is shown in the mandatory contract extension for the contractor if it is warned with a notice of at least two months before the end of the term of the contract. About contract duration, it includes, with exceptions, a 5 year of successive service period including the possible extensions for supply and services contracts. Also establishes five years (except the time that is reasonable for the concessionaire to recover the investments), for the contracts of concession of works and services. Moreover, there are no changes in minor contracts and are contemplated periods of 40, 25- and 10-year terms for certain contracts for the concession of works or services. It also contemplates a period of subjective duration (depending on the needs of users) for service contracts related to services to people.

However, there is a very important novelty and is that when a contract expires and the new contract that guarantees the continuity of the performance by the contractor is not yet formalized as a result of incidents resulting from events unforeseeable for the contracting authority and there are reasons of public interest not to interrupt the service, the original contract may be extended until the execution of the new contract begins and in any case for a maximum period of nine months, without changing the other conditions of the contract, since the notice of invitation to tender for the new contract has been published at least three months before the date of termination of the original contract. What means that if these premises are not given, these contracts cannot be extended.

Article 30 introduces the new possibility under specific conditions, of using individual elements of the public administration body for a specific contract providing that the contract value with such collaborators does not exceed 60 percent of the total amount of the project.

Articles 31 to 33 transpose the new rules of the Directives concerning the " in house contracting" embracing both the "vertical " and the " horizontal" cases.

There are also new developments regarding the minimal content of the contract (Article 35) *"taking into account in the definition of the object, the social, environmental and innovation considerations."* It shall also refer, where appropriate, to the circumstances in which the amendment proceeds, as well as to the obligation of the contractor to comply throughout the period of execution of the contract with the rules and conditions set out in the collective agreement of application.

The issue of nullity disappears, although the reasons for nullity will continue to be enforced through the special appeal in procurement. In the same way, the regulation of the invalidity system of public sector contracts and of the special appeal on procurement continues to be in force. Picking up the cases of invalidity, the causes of nullity and annullability of Administrative Law, the ex officio review and the effects of the declaration of nullity and annullability in arts. 38 to 42. Establishing in article 43 for the causes of disability of Civil Law the doctrine of separation of acts for the purposes of the applicable law.

Significant changes are made in the special appeal (articles 44 et seq.). It is still optional and free, but it extends the scope of the special resource on procurement (REMC) to modified, illegal orders and rescues concessions (article 44). On the other hand, it is no longer linked to the SARA contracts, thus being linked to contractual rates and certain amounts (estimated value over 3,000,000 million euros for works and concessions, 100,000 euros for services and supplies). Also applicable in certain cases to framework agreements, dynamic purchasing systems and special administrative contracts and also to management charges where, because of their characteristics, it is not possible to determine their amount or, in another case, when the latter, given its duration total plus extensions, is equal to or higher than what is established for service contracts. The possibility of creating local and provincial courts (Article 46.4) is regulated, which will create a greater dispersion of the advisory doctrine that will lead to greater legal uncertainty (a provision already contemplated by the DA23 denoting the conscience of the legislator in this regard). The right to take legal action (Article 48) was also extended so that *"trade union organizations will be able to contest a decision amenable to an action, where by the actions or decisions that may be appealed can be reasonably inferred that they imply that during the execution of the contract the employer breaches the social or labor obligations with respect to the workers. In any case, the sectoral business organization representative of the affected interests shall be considered legitimate.* "

We find some new developments in the processing of the REMC. So, when the appeal is filed against a modification or against an assignment to own means, will be interposed from the day following that in which it was published in the contractor profile. In all other cases, from the day following the notification. However, where the appeal is based on one of the reasons for nullity provided for in Article 39 (2) (c), (d), (e) or (f), the period for bringing an action shall be as follows:

a) Thirty days from the publication of the contract's signature in the form provided for in this Law, including the reasons for not having published in a legal form the call for tenders or from notification to the candidates or tenderers the reasons for the rejection of his application or his proposal and the characteristics of the tender of the successful tenderer who were determining the award in his favor.

b) In the remaining cases of nullity, before six months have passed since the contract was signed.

It also highlights, unlike before, the possibility of filing an appeal in the places established in article 16.4 of Law 39/2015 of October 1, of the Common Administrative Procedure of Public Administrations. Once the appeal has been initiated, the procedure will be suspended if the act in question is awarded, except in the case of contracts based on a framework agreement or specific contracts within the framework of a dynamic purchasing system. After two months from the date of the filing of the appeal without notice of its decision, the interested party may consider it dismissed for the purpose of filing a litigation-administrative appeal.

2. Latest developments in public administration contracts

Article 115 regulates as one of the great developments of the Law the preliminary consultations of the market, to correctly prepare the bid and inform economic operators about the procurement plans of the corresponding body and the requirements that will require to attend to the procedure. To that end, contracting authorities may carry out market research and consult the economic operators active in the market to prepare the tender correctly and inform the economic operators concerned about their plans and the requirements they will require to attend the procedure. To this end, contracting authorities may rely on the advice of third parties, who may be experts or independent authorities, professional associations, or even, exceptionally, economic operators active in the market.

Minor contracts are subject to an important modification that seeks to increase the accuracy and straighten control in their use (article 118). Are considered to be minor contracts the ones with an estimated value of less than € 40,000, in the case of works contracts, or € 15,000 in the case of supply or service contracts. Now, in the minor contracts the processing of the file will require the report of the contracting authority motivating the necessity of the contract. Likewise, approval of the expense and incorporation of the corresponding invoice will be required, which must meet the requirements established by the implementing regulations of this Law. On the other hand, the file will have to justify that the object of the contract is not being altered in order to avoid the application of the general contracting rules and that the contractor has not signed any contracts less than individual or jointly exceed the indicated figures. The contracting body will be in charge and responsible for verifying compliance with said rule, although the assumptions framed in article 168.a) .2 will be excluded.

An important modification regarding the repetition of the actions is contemplated in article 124. The contracting authority will approve prior to the authorization of the expenditure or together with it, and always before the contract is tendered, or if it does not exist before being awarded, the specifications and technical prescriptions that will govern the performance of the service and define their qualities, social and environmental conditions, in accordance with the requirements established by this contract for this Law, and may only be modified subsequently by material error, de facto or arithmetic. In another case, the modification of the specifications will lead to the repetition of actions.

Regarding to one of the most problematic issues, the subrogation of staff, the new LCSP does provide light in the sense of clarifying this figure (article 130). Thus, it will be necessary to subrogate as an employer when a legal rule, collective agreement or collective bargaining agreement of general effectiveness, imposes on the successful tenderer the obligation to subrogate. If a Public Administration decides to provide directly a service that has been provided by an economic operator to date, it will be obliged to subrogate the personnel that provided it if it is also established by a legal norm, a collective agreement or a collective bargaining.

If, once the subrogation takes place, the labor costs are higher than those resulting from the information provided by the former contractor to the contracting authority, the contractor will have direct action against the former contractor. In addition, the specific administrative clauses will always include the obligation of the contractor to pay unpaid wages to the workers affected by subrogation, as well as social security contributions accrued, even if the contract is terminated and those are subrogated by the new contractor, but in no case does this obligation correspond to the latter. In this case, an obligation is established for the Administration, which is that once the non-payment of said wages has been proven, it will proceed with the withholding of the amounts due to the contractor to guarantee the payment of said wages, and the non-refund of the definitive guarantee as long as the credit of the latter is not credited.

On the other hand, the duty of confidentiality of the contracting authority (Article 133) and its dependent services may not be extended to the entire contents of the tender of the successful tenderer or to all the contents of the reports and documentation which, if applicable, directly or indirectly generates the contracting authority in the course of the tendering procedure, something which the administrative courts of contractual appeals have already recognized. It may only be extended to documents that have a restricted circulation and in no case to documents that are publicly accessible.

The notice of invitation to tender for the award of Public Administration contracts (article 135), except for procedures negotiated without advertising, shall be published in the contractor profile, deleting the references to the bulletins of the Autonomous Communities and local entities "*Therefore, it will no longer be necessary to publish in the Official Bulletins, except for contracts entered into by the General State Administration, or by entities related to it, which enjoy the nature of Public Administrations, notice of bidding also in the Boletín Oficial del Estado*"[1]. However, as an obligation under the Directives, where contracts are subject to harmonized regulation, the invitation to tender must also be published in the Official Journal of the European Union, and the contracting authorities must be able to prove the date of the notice of invitation to tender publishing.

Regarding the application of the award criteria, Article 146 contains many changes. Thus, when only one award criterion is used, it must be related to the costs, being the price or a criterion based on profitability, such as the cost of the life cycle, a true novelty in the Law.

Where a plurality of award criteria is used, in their determination, wherever possible, preference shall be given to those referring to characteristics of the subject of the contract which can be assessed by figures or percentages obtained through the mere application of formulas established in the specifications.

In the award procedures, open or restricted, concluded by the bodies of the Public Administrations, the evaluation of the criteria whose quantification depends on a value judgment will correspond, in the cases in which it proceeds by having attributed a weighting greater than that corresponding to the criteria automatically assessable to a committee composed of experts with appropriate qualifications, with a minimum of three members, who may belong to the services dependent on the contracting authority, but in no case may be attached to the body proposing the contract , which will be responsible for evaluating the bids; or entrust this to a specialized technical agency, duly identified in the specifications. In the other cases, the evaluation of the criteria whose quantification depends on a value judgment, as well as, in any case, the criteria evaluable using formulas, will be made by the contracting jury, if involved, or by the services depending on the contracting authority otherwise, for which purpose the technical reports that it deems necessary may be requested.

Also, the choice of formulas will have to be justified in the file. Unless the price is considered exclusively, the specification of the specific administrative clauses or the descriptive document must specify the relative weighting attributed to each of the valuation criteria, which may be expressed by fixing a range of values with an adequate maximum amplitude.

About the life cycle previously mentioned (Article 148). For the purposes of the LCSP, all the consecutive or interrelated phases that occur during its existence are included in life cycle of a product, work or service manufacturing or production: the research and development to be carried out, marketing and the conditions under which it takes place, transport, use and maintenance, the

[1] Véase BATET JIMÉNEZ, M.P. "Las novedades de la nueva Ley de Contratos del Sector Público", Moography in Editorial SEPIN, november 2017. Available in https://www.sepin.es/revistas-digitales/administrativo/revista.asp?cod=0010f50Vc0GA2MP00v0G-0041yi0E-01f0XU09P1S_1S_07k1Gd1zy07P1911Sv0JP0yf1Dd08L07v0X008V00B0Gx08f1S-0G%26

acquisition of the necessary raw materials and the generation of resources; all this until the elimination, the dismantling or the end of the use take place.

Another important modification or novelty is found in abnormally low offers (article 149). The specifications will include parameters for detecting abnormal offers related to the offer as a whole.

Unless otherwise stated in the bidding documents, where the only criterion of award is the price, the objective parameters that are established by regulation and that, in any case, will determine the threshold of abnormality by reference to the set of valid offers that are submitted, without prejudice to what is established in the following section.

a) When a plurality of award criteria is used, it will be established in the Bidding Documents that govern the contract, in which the objective parameters must be established that should allow to identify the cases in which an offer is considered abnormal, referred to the offer considered as a whole.

b) When companies that belong to the same group of companies have submitted bids, only the one that is lower will be used, in order to apply the regime for identifying bids that are presumed to be abnormal, regardless of whether they submit their bids in solitary or jointly with another company or companies outside the group and with which they concur in temporary union.

The tenderer will be required to provide a reasoned and detailed explanation of the prices, costs, etc. Specifically, justification may be asked for:

a) the savings allowed by the manufacturing process, the services provided or the method of construction,

b) the technical solutions adopted and the exceptionally favourable conditions available to it to supply the products, to provide the services or to carry out the works,

c) the innovation and originality of the proposed solutions, to supply the products, to render the services or to execute the works,

d) compliance with obligations that are applicable in environmental, social or labor matters, and subcontracting, where market prices are not justifiable or do not comply with the provisions of Article 201,

- the possibility of Governmental aid.

In the procedure the technical advice of the corresponding service must be requested.

In any case and as an important novelty offers will be rejected if:

- Violate the rules on subcontracting
- Fail to fulfil environmental, social or labour obligations, national or international (including sectoral agreements in force - see article 201-).
- If the justification fails to explain satisfactorily the low level of bid prices or costs, or if it is incomplete or is based on inappropriate technical, legal or economic assumptions or practices

The proposal of acceptance or rejection will be justified. An offer will never be accepted unless the proposal is duly justified. If a company that had been involved in a presumption of abnormality was the successful bidder, implementation monitoring mechanisms will be established to guarantee it without loss in quality.

Of special interest are the provisions of Article 159 relating to the simplified open procedure, since "All the documentation necessary for the presentation of the offer must be available by electronic means from the day of publication of the advertisement on that contractor profile." In this procedure,

the LCSP establishes that "the company that has obtained the best score will be required through electronic communication to constitute the definitive guarantee, as well as to provide the commitment referred to in Article 75.2 and the supporting documentation available to it in fact, of the means that he had committed to dedicate or assign to the execution of the contract in accordance with article 76.2; and all this within 7 business days from the date of dispatch of the communication.

Likewise, and in the case of works contracts of estimated value of less than 80,000 euros, and in contracts for supplies and services with an estimated value of less than 35,000 euros, except for those whose purpose is intellectual property services to which it will not apply this section, re-bets on the use of electronic media and allows a processing with preference in its use. Thus, in the simplified open procedure, the following procedure can be adopted:

- It will be guaranteed, by means of an electronic device, that the opening of the proposals is not done until the deadline for submission has ended, so no public act of opening of the proposals will be held.
- The bids presented, and the documentation related to the valuation of the bids will be openly accessible by computer without any restriction from the moment in which the award of the contract is notified.
- Finally, the company that has obtained the best score through electronic communication will be required to constitute the definitive guarantee.

A new procedure is introduced called the Innovation Partnership, with the idea of favoring the most innovative companies in the field of innovation and development. This procedure for innovation partnership is expressly provided for those cases in which it is necessary to carry out research and development activities regarding innovative works, services and products, for subsequent acquisition by the Administration. It is, therefore, a case in which the solutions available on the market do not meet the requirements of the contracting authority.

Regarding to this new procedure, the new Directive outlines a process in which, after a call for tenders, any entrepreneur may make a request for participation, after which the successful candidates may submit bids, transforming themselves in bidders in a framework of a negotiation process. This can be developed in successive phases and will culminate with the creation of the association for innovation. This innovation partnership will in turn be structured in successive stages but will no longer take place between the contracting authority and the tenderers, but between the contracting authority and one or more partners; and generally, will culminate with the acquisition of the resulting supplies, services or works.

It is, therefore, a procedure in which could be distinguished, schematically, four differentiated moments:

1. selection of candidates,
2. negotiation with tenderers,
3. partnerships,
4. and the acquisition of the resulting product.

To this scheme correspond the articles of the Law dedicated to the regulation of this new procedure.

A very important issue is the obligation established in Article 202, in line with the provisions of Article 1.3, to establish in the list of administrative clauses at least one special condition of execution of a social, ethical, environmental or innovation-related nature. Bearing in mind, moreover, that all special conditions of execution will be required of all subcontractors involved in the contracts execution.

About the Bureau of Procurement (article 326), the new text also gives us important data that are timidly moving towards the professionalization of public procurement. In no case may representatives of public offices, or any contingent staff, form part of the Bureau of Procurement or issue evaluation reports of the tenders (see additional provision 2). The temporary staff member may be a member of the Bureau of Procurement only when there are no sufficiently qualified career staff members, and this is evidenced in the file. Nor may the staff who have participated in the drafting of the technical documentation of the contract in question be part of the Bureau of Procurement.

In summary, there are many developments that the new text of the LCSP provides and are not included in these short lines: contract modification, new governance (Book IV) with the creation, for example, of an Independent Office of Regulation and Supervision of Procurement (Article 332), partnership for innovation, generalization of the responsible declaration, general suppression of internal contracting instructions for contracting authorities not Public Administration, etc. Although, we understand that the indicated ones are those that can be considered main for a first approach to this important new Law of Contracts of the Public Sector.

3. Mandatory electronic tendering

Nowadays, we are facing a legislative panorama marked by the so-called "Europe 2020 strategy", in which public procurement plays a key role, since it is one of the instruments based on the internal market that must be used to achieve smart, sustainable and inclusive growth, while ensuring a more rational use of public funds.

The Green Paper of the Commission already pointed out the great advantages of a more widespread use of e-procurement, the achievement of with greater accessibility and transparency (e-procurement can improve companies' access to public procurement through automation and centralization of the flow of information on concrete bidding opportunities); advantages over specific procedures (as opposed to paper-based systems, e-procurement can help contracting authorities and economic operators to reduce their administrative costs and to speed up procurement procedures); advantages in terms of achieving greater efficiency in procurement management (where there are procurement centres, recourse to electronic procedures can help to centralize more costly procurement administrative tasks and achieve savings of scale in terms of management); and potential for the integration of contracting markets in the EU (in an environment characterized by the use of paper support, the lack of information and the problems associated with the submission of tenders in relation to contracts to be awarded to a certain distance from the place of establishment of the company itself may limit the number of suppliers competing in certain tenders or discourage them altogether from participating in them. E- procurement has the advantage of shortening such distances, bridging the gap in information and encourage greater participation, by increasing the number of potential suppliers and the possible expansion of markets).

With this background, the objectives that inspire the regulation contained in the new law are, first, to achieve greater transparency in public procurement, and secondly to achieve a better value for money. The objectives are to achieve them through the mandatory introduction of electronic contracting, since the Preamble of Law 9/2017, of November 8, Public Sector Contracts states that *"it must necessarily refer to the decided commitment that the new legal text makes in favor of electronic procurement, establishing it as mandatory in the terms indicated therein, from its entry into force, thus anticipating the deadlines set at Community level.*

We are here with a first transcendent decision of the LCSP 2017 that compulsorily incorporates e-procurement on March 9, 2018, the date of entry into force of the LCSP, thus advancing the deadline established by the classic public procurement directive that arrived until 18 of October of 2018.

To this end, the new LCSP also creates an organizational structure that will be in charge of ensuring compliance with this obligation of implementation within the administrative activity of Public Administrations and other contracting authorities of the obligation to contract electronically.

The new Cooperation Committee on public procurement, created by the article 329 LCSP 2017 within the State Procurement Advisory Board, will be responsible for coordinating the promotion of e-procurement in the public and private sectors. to promote compliance with the mandates and objectives of the relevant Community directives.

In this sense, among its sections, which will oversee the preparation of the matters for consideration by the Plenary, there will be an Electronic Public Procurement Section, responsible for executing the competences of the Cooperation Committee in this matter and supervision of the operation of the Public Sector Procurement Platform.

Also, the National Public Procurement Strategy[2] will have among its objectives to generalize the use of electronic contracting in all phases of the procedure (section d) of section 2 of article 334 LCSP 2017).

As we have seen, there is no doubt about the date of entry into force of the application to the procedure for procurement the means of electronic bidding, on March 9, 2018.

In implementing the 2017 LCSP, the principle of interpretation in line with European Union law is called upon to develop, as has always been the case to date, a decisive role, in particular with regard to the many indeterminate legal institutions and concepts of Spanish legislation, and of course in a relevant way in the implementation of the obligations related to electronic public procurement.

At the same time, the Member States' control of the action is normally carried out by national courts and tribunals, which may even render national provisions contrary to Community rules inapplicable; and that such work as ordinary guarantors of European Union law of national courts and tribunals is not exhausted, as is clear from the case-law of the Court of Justice of the European Union, in the proceedings proper to the question referred for a preliminary ruling, continues to have an obligation on the national court to give domestic law the duty to apply, to the maximum extent possible, an interpretation consistent with the requirements of European Union law (see, in particular, the judgments of the Court of Justice of the European Union Van Munster, paragraph 34, and Engelbrecht, paragraph 39). In the event that such a consistent interpretation is not possible, the national court must fully apply European Union law and protect the rights which it confers on individuals by refraining from applying, where appropriate, any national provision to the extent that such an application would lead, in the circumstances of the case, to an outcome contrary to European Union law (see, in particular, Solred, paragraph 30, and Engelbrecht, paragraph 40). Nor should we forget the obligation on Member States to repeal national law which is incompatible with European Union law.

However, it is lawful to be in favour of the approach followed by the CJEU in that its own case-law shows that, as I have already stated, it is for the national court to give to domestic law that it must apply, to the maximum extent possible, an interpretation consistent with the requirements of European Union law, which must be extended to the acquis communautaire, including the case-law of the CJEU. And although the ECJ's stated doctrine refers to the criterion to be followed by the courts in its activity, it is understood, and it is already recognized that it is equally applicable

[2] The National Public Procurement Strategy is the binding legal instrument, approved by the Independent Office of Regulation and Supervision of Procurement, which will be based, with a time horizon of 4 years, in the analysis of procurement actions carried out by the entire public sector including all contracting authorities and contracting entities in the public, regional or local public sector, as well as those of other entities, bodies and entities belonging to them which are not in the nature of contracting authorities (Article 334 (1) LCSP 2017) .

'mutatis mutandis' to the administrative courts and other administrative bodies in charge to apply the rules.

Such a consequence is also imposed on contracting authority bodies which, although they are administrative in nature, have the status of "court" for the purposes of the possibility of raising a question before the CJEU[3]. The STJUE of 2 June 2005, Koppensteiner, Case C-15/04, requires the bodies responsible for resolving the special action to refrain from applying national rules which prevent it from complying with the obligations imposed by the directives. also affects, as I said, the contracting authorities in order to avoid the beginning of contradictory procedures or not to issue administrative acts contrary to the current legal system[4].

If such a consistent interpretation of the new procurement directives with regard to electronic procurement and other matters in European legislation was already admissible before the deadline for transposition of the Directives, as Professor GIMENO FELIU, JM, states: "There is a legal force of the new Public Procurement Directives from which it is derived, before the deadline for transposition of the Directives, that the interpretation of the national framework in force be interpreted in accordance with them, always with the aim of not performing an interpretation that could frustrate the purpose ". the more it will be after the mandatory transposition period has expired, by virtue of the direct effect, and even more so after the entry into force of the 2017 LCSP transposing precisely the Directives of the European Parliament and the Council 2014/23 / EU and 2014/24 / EU of 26 February 2014, as its own name indicates.

In conclusion, if the main rule of European Union law on public procurement, Directive 2014/24 / EU, known as the "Classical Directive", obliges all States and Administrations of the European Union to use electronic means in all public procurement procedures, ensuring that all communications and all exchanges of information are carried out using electronic means of communication, and in particular electronic submission of offers and requests (Article 23 (1)); in the application of the 2017 LCSP transposing the 2014 directives into Spanish law, this principle of interpretation must be taken into account in accordance with European Union law enshrined in the case law of the Court of Justice of the European Union,

This leads us inevitably to the fact that the obligations established by the new LCPS regarding e-procurement reach the need to use exclusively electronic means in relation to notifications and communications and the obligation to submit bids and requests to participate using electronic means , which leads us inexorably to end-to-end e-procurement for all types of contracts and contracting procedures, apart from the four and well-considered exceptions contained in the fifteenth additional provision of the LCSP, cases in which, for the sake of completeness of the above, the contracting authorities will be obliged to justify and justify in a specific report the reasons why it was considered necessary to use means other than electronic means, in the electronic administrative file.

[3] See article 267 TFUE and STJUE of October, 6 2015, *Consorci Sanitari del Maresme*, Subject C-203/174.

[4] See the study document which the administrative courts for public procurement appeal have published, presented and approved at the meeting in Madrid on 1 March 2016 entitled "The legal effects of public procurement directives against maturity of the deadline for transposition without a new law on public sector contracts ", p. 12. The full text of the document can be seen on the website of the Public Procurement Observatory, http://www.obcp.es, [date last consulted: 27-June-2018].

The transposition of the 2014 EU Directives on public procurement by Portugal: woes and expectations

Luís Valadares Tavares

Abstract

The new EU Directives on Public Procurement are oriented to promote the application of the concept of strategic public procurement which has been subject to several communications and discussions promoted by the European Commission and European Parliament. This new approach to Public Procurement has deep implications in the legal framework adopted by each Member State as well as in the public administration culture and organization in order that the new objectives of promoting the qualification of markets, the increase of innovation, the respect by social cohesion and environmental sustainability and a better access to public markets by SME's will be achieved aligned with the UE 2020 Agenda.

In this paper, the process and the results of the transposition of this Directives by Portugal are studied not just in terms of the respect for the Directives rules but also considering its likely positive and negative impacts on Portuguese public markets which are also synthetically described herein.

Keywords

public procurement; EU directives; strategic procurement; MEAT; innovation

1. Previous legal framework

Portugal has a very rich tradition of Public Law based on several prestigious Faculties of Law (see, namely, Faculty of Law of the University of Lisbon- www.fd.ulisboa.pt; Faculty of Law of the Portuguese Catholic University: Lisbon Centre - http://fd.lisboa.ucp.pt/pt-pt and Porto Centre - http://www.direito.porto.ucp.pt/ and Faculty Law of the University of Coimbra- https://www.uc.pt/fduc) giving special attention to the area of public contracts and since the forties the legal framework sets up very extensive and detailed rules about the formation of public contracts. Portugal has a Latin culture of public administration, public law and civil law, so the theory of administrative contracts [*Assis Raimundo, 2013*] has been quite important to rule the execution of contracts of public works until 2008 when a new code of public contracts (*Código dos Contratos Públicos,* CCP- *Decreto-Lei 18/2008 de 29 de Janeiro*) was approved extending such approach to the execution of contracts concerning the acquisition of supplies or services.

The theory of administrative contracts is not part of EU directives and includes a set of rules giving additional governing power to the contracting authority about the contract execution covering a wide spectrum of decisions that can be imposed to the contractor.

It should be noted that in Portugal, before the seventies, public procurement would account for less than 5% of GDP and public works were the most complex contracts because there were no innovative technological services and acquired goods were quite basic. Public works contracts were based on execution design and very rarely the design and the execution were procured together as that was possible just in exceptional conditions.

The major procedures were the invitation (to at least 3 economic operators of the contract value not exceeding a specific threshold) and the open or restricted competition.

Since 1986, Portugal is a member of EU and the history of our successive laws on public procurement shows unquestionably that such evolution has been triggered or even enforced by the successive waves of EU procurement directives.

Special attention was given to the Directives of 2004 and the new code, CCP, was approved modernizing and integrating two existing different laws, one for public works (*Decreto-Lei 59/99)* and another for goods and services (*Decreto-Lei 197/99*) and introducing important changes:

a) The theory of administrative contracts is extended to the execution of public contracts concerning the acquisition of goods and services (Part III of CCP on the execution of public contracts);

b) The major criterion to select a procedure according to the Directives is based on the "estimated contract value" but CCP replaced this concept by a different notion: "Preço-Base" (Article 47º) or maximal price that has to be defined at the beginning the process of contract formation and that has to be respected at the contract award and contract signature stages. This restriction is aiming to reduce uncertainty, but it is quite demanding for the contracting authority because setting up the "Preço -Base" can be quite a hard job. Furthermore, this restriction has also negative impacts on the levels of flexibility and innovation required in modern public procurement;

c) An wider range set of procedures were introduced: (Open, Restricted, Negotiated Procedures; Competitive Dialogue, Framework Agreements and Dynamic Purchasing Systems) in Part II of CCP but, unfortunately, the case of framework agreements with multiple contractors and full specification of contract object was not transposed because the concept of Quasi-Market [*Tavares, 2009, a)*] was not known by the authors of the law text (Article 252º);

d) A procedure based on Invitation ("Ajuste Direto") without having to be sent to a minimal number of economic operators (Article 114º) was introduced for any contract with value not higher than 75000€ for goods and services or 150000€ for public works, which are the highest thresholds for invitation procedures in EU without a minimal number of invited economic operators. The previous law restricted the invitation procedure to much lower thresholds and a minimal number of three economic operators had to be invited;

e) A simplified invitation just requiring the acceptance of the invoice concerning the contract to be paid is also introduced for goods and services if the contract value does not exceed 5000 euros (Article 128º);

f) A multiple criteria linear additive model (see *[Tavares, 2009, b)] [Tavares et al., 2008])* was introduced to apply the most economic advantageous tender (MEAT) requiring full specification of the structure, function and parameters of such model to be included in the procedure documents (Articles 73º, 74º, 75º and 139º) if the procedure is not based on an invitation. These requirements have contributed to achieve a level of specification, transparency and equity much higher than the level prescribed by the Directives and adopted by other member States.

g) Abnormal tenders were identified in terms of a percentage of their price as a percentage of the " preço-base" (lower or equal to 60% for public works or 50% goods and services, Article 71º of CCP) and contracting authorities could change such percentages (Articles 115º, 132º and 189º) but they had to justify such changes and so these percentages have been generally adopted. Obviously, such high and uniform percentages have been responsible for smashing the price of many tenders with quite devastating effects on several economic sectors and on the normal completion of many public contracts;

h) Mandatory e-procurement was established [*Arantes et al., 2013*] for the formation of any contract using an electronic platform (Article 62º) excepting the cases based on an invitation. This was the first example of mandatory e-public procurement in EU based on the new concept of electronic platform (SAAS- Software as a Service) and it has been considered a remarkable success inspiring the mandatory adoption of e-public procurement since next October by the new 2014 Directives.

i) A national Portal – BASE (www.base.gov.pt) – was established (Article 465º) where any notice has to be posted concerning the formation and execution of the contract avoiding the usual practices in most European States of disseminating such information through a high number of heterogeneous sites.

j) A complex and quite restricted set of rules were enforced concerning the introduction of contract modifications during its execution for public administrative contracts (Part III of CCCP).

k) The execution of contracts was studied in great detail for public works (more than 70 articles!) but for the case of the execution of the contracts concerning the acquisition of goods and services it was just stated that they should follow such rules "under the required changes" (Article 454º-6).

An extensive analysis of CCP adopting a systemic approach is presented in *[Tavares, 2016,a)].* Between 2008 and 2016, CCP was subject to successive minor changes and its application during 8 years allows the identification of positive and negative impacts:

A- Positive impacts

- The transposition of new procedures has rejuvenated the formation of public contracts
- The adoption of the multi-criteria additive linear model has introduced a higher level of transparency and equity in the process of tender evaluation
- E-Procurement was a strong factor to achieve higher competitiveness and wider participation in public markets also reducing the time and cost of the bureaucratic load *[Costa et al., 2013] [Tavares, 2011, a)]*
- The new portal BASE set up by the national regulator for public contracts (IMPIC- Instituto dos Mercados Públicos, do Imobiliário e da Construção, www.impic.pt) has been a significant factor for more transparency and democratic public audit of public procurement expenditure as all relevant information about public contracts is now publicly available and easily accessible.

B- Negative Impacts

- Lack of competition due to high thresholds allowing invitation to one single economic operator;
- Excessive bureaucratic load to form and to execute contracts , particularly if classified as administrative contracts, and lack of flexibility to manage change and innovation;
- The abnormal tender rules combined with the frequent adoption of minimal price award criterion have been responsible for the pathologic situation of having most tenders with a price equal to the abnormal minimal price and so the process of contract award becomes based on absurd rules (the first tender to be presented, etc.)
- Such rules based on unreasonable and uniform percentages had a dramatic impact on price smashing responsible for lack of quality and unfeasibility of many contracts. Also, such rules combined with systematic and long payment delays by contracting authorities exceeding all reasonable and legal limits have been responsible for the destruction of a significant of percentage of Portuguese companies during the financial crises of 2009-2013.

Since 2009, an interdisciplinary society on public markets (APMEP - Associação Portuguesa dos Mercados Públicos - www.apmep.pt) embracing the participation of some the best reputed lawyers, economists, managers, public procurers and ICT experts has been contributing to the improvements of public markets and the dissemination of e-procurement through several initiatives, namely the international e-public procurement conferences [*Tavares, 2013] [Tavares, 2014*] vas well as the annual national conferences on e-public procurement also supported by the national regulator, IMPIC and the Portuguese "Tribunal de Contas" (equivalent to the UK "National Audit Office" or the French " Cour des Comptes") and private firms, namely the electronic platform –VORTAL (www.vortal.pt) .

APMEP has also launched the EUROPEAN JOURNAL OF PUBLIC PROCUREMENT MARKETS (www.eupublicmarkets.com) being the first issue published on 2018.

2. The Process of Transposition

After being published the Directives of 2014, the Portuguese Government (XIX Constitutional Government) set up a working group coordinated by the head of the Portuguese regulator of public contracts, IMPIC (Institute of Public Markets, Real Estate and Construction), to prepare the proposition of legal changes and that group has preferred to amend present law rather than to prepare a new one. Unfortunately, this work was not grounded on any independent diagnosis or evaluation of the application of existing law as it has happened in other Member States, such as Italy, England, Scotland, Denmark, etc. This Cabinet finished his office on 2015 and no report of this Group is known but the new Government starting office on October 2015 set up on the beginning of 2016 another working group just including professors of administrative law and, once again, the president of IMPIC. Initially, the chair of this Group, Prof. Maria João Estorninho, prepared a proposal developing a new law following the soft law approach which implies a more compact text to be followed by additional regulations, but the Government rejected this work and then another process has been started based on the office of the Secretary of State of Infra-Structures to prepare the amendments to the 2008 law. The draft version was circulated on August 2016 generating a wave of suggestions and criticisms and, finally, the new law was published on August 2017-: *Decreto-Lei 111-B/2017* (https://dre.pt/application/file/a/108085917) requiring already two corrections due to editing or consistency errors published on 30th October of 2017 (https://dre.pt/application/file/a/114133073) and 30th of November 2017 (https://dre.pt/application/file/a/114290199).

3. Strategic Public Procurement: Cultural and Policy Issues

The scope of the new Directives [*Tavares et al., 2014*] is not just contract awarding but the whole process of public procurement and its aim is to redirect public procurement [*Estorninho, 2016*] according to the key concept of strategic public procurement well described by the European Commission :

"*Public procurement is a strategic instrument in each Member State's economic policy toolbox. The 2015 single market strategy made the case for more transparent, efficient and accountable public procurement systems. This requires a shift from a purely administrative approach to a strategically and needs-driven approach, in full compliance with the rules. With roughly 14 % of the EU GDP in expenditure each year, public procurement can contribute to address many of Europe's major challenges, especially in creating sustainable growth and jobs. It can enable investment in the real economy and stimulate demand to increase competitiveness based on innovation and digitalisation, as highlighted in the Industry Communication. It can also support the transition to a resource-efficient, energy-efficient and circular economy and foster sustainable economic development and more equal, inclusive societies.*" [European Commission, 2017]

under the paradigm of pursuing the road map of the Agenda EU 2020 to increase the societal value of public procurement [*Piga and Thai, 2007] [Cunha Rodrigues, 2015].*

Unfortunately, the described process did not provide opportunity to interdisciplinary contributions on key areas underlined by the Directives such as Innovation, Quality/Price Multicriteria Evaluation, Digital Economy, Environmental Sustainability, Social Cohesion or even New Public Management. This lack of contributions is clearly shown by several examples:

a) The innovation challenge [*Tavares, 2018*, and *Tavares, 2016, b)*], namely concerning the ability to adapt the contract to new conditions, is not properly tackled and the rule of the "Preço-Base" (maximal contract price set up in the beginning of the procedure, Article 47º) keeps its mandatory nature. This approach is in contrast with the Directives concept of "estimated value" and the possibility to be corrected in innovative contracts as it is quite clear in several codes.;

b) The clear preference of the Directives for a multi-criteria evaluation of tender is not respected as the Article 74º states the adoption of the Most Economically Advantageous Tender (MEAT) but, quite surprisingly, considers that such formulation include the minimal price criterion(!). The concept of tender evaluation model has not been well understood by some authors as it is not considered as a pre-condition for any evaluation process but just existing if multi attributes are considered (see *[Gonçalves, 2018] 126.1 p788).* Obviously, as it could be also expected, the difference between a multi linear attribute model and the multiplicative model (quality/price) is simply ignored, also by several authors with expertise in public law but without expertise in Decision Theory (see *[Gonçalves, 2018*] *[Amaral e Almeida, 2016) and [Almeida, 2016].* Furthermore, the mandatory adoption of the award criterion of ratio quality/ price for the competitive dialogue or partnership for innovation established by the Directives in the Articles 30º and 31, was ignored too and so it is an evident transposition error which can be the source of unnecessary litigation.

c) Portugal had a pioneering role through the mandatory adoption of electronic procurement in any procedure not based on invitations from November 2009 and so another more ambitious step could have been expected but that was not the case, probably due to the lack of technologic background of the authors contributing to the law (Article 115º-1 g) of DL 111-B/2017). Even the adoption of mandatory electronic contracts (Article 94º to 106º) or e-invoices (Article 299º-B-5 of DL 111-B/2017) was not yet fully clarified. The rules concerning the electronic catalogues (Annex XIV of DL 111-B/2017) were introduced in the last minute as annex, perhaps to avoid disturbing the law text;

d) New public management was taken into account by EU Directives since 2004 through innovative concepts such as the framework agreements with multiple contractors (Quasi-Market) allowing to give back to the citizens the decision power to select the provider but the authors of 2008 law did not understand the concept and the proposed version by present Government made the same mistake, despite the clear explanation of the Recital 61 of the Directive 2014/ 24/ EU. Fortunately, the recommendation of APMEP (Portuguese Society of Public Markets, www.APMEP.pt) was accepted and the published law allows such important procedure.

e) Similarly, a correction was introduced about the domain of application of the Dynamic Purchasing Systems as the initial version of the code was not considering the new scope established by the Directives (Article 34º) but the proposition of APMEP was accepted and the new Article 237º of DL 111-B/2017 was improved enlarging the domain of application to small public works. Unfortunately, the restriction of "standardized goods and services " which is no longer required by the Article 34º of the Directive 24/2014/UE is kept by the Article 237º-1 DL 111-B/2017.

The option of not preparing a new law from scratch was initially supported by many lawyers and professors of Law under the expectation that amendments would be minor and few. However, the final result includes:

a) New articles: 54

b) Revoked articles: 34

c) Amendment articles: 155

which means that about 51% of the code was changed.

The final result includes about 500 articles being considered one of the most long (just comparable to the Greek and Spanish ones) and complex codes of the EU. Unfortunately, several errors or limitations concerning the transposition of the Directives can be pointed out and should be corrected as it is clear from Annex 1.

4. The Portuguese Public Markets

The Portuguese public markets are quite an important dimension of national economy because about 65 000 economic operators have direct public contracts and, in average, two key sub-contracts are associated to each public contract, obtaining a population of about 200 000 firms relying on public markets of a total of about 350 000 firms and the estimated value of public contracts exceeds 14 % of GDP.

In the next figure (See Figure 1) key features of these public markets are presented:

and the following conclusions can be obtained:

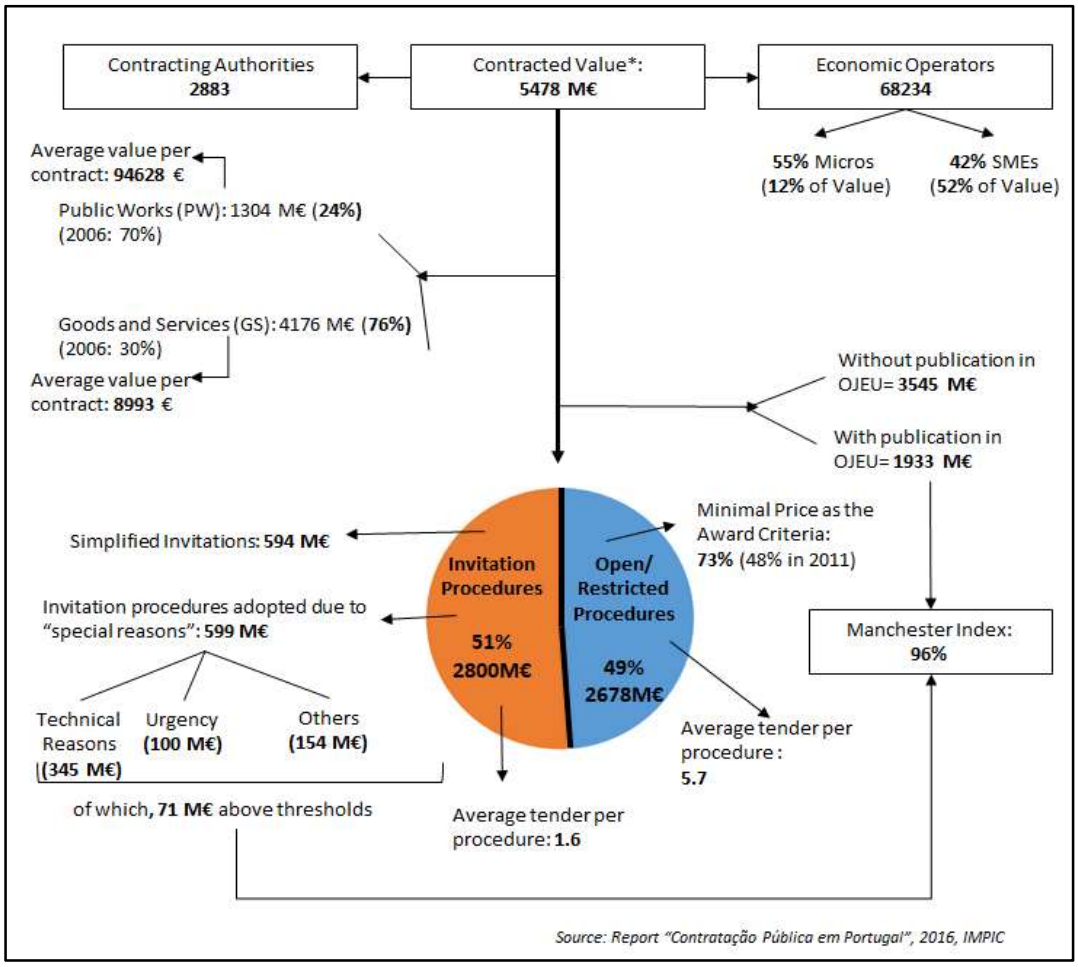

Figure 1 – Portuguese Public Markets, 2016

A- Most the contract value does not concern public works as it was in the past (about 70% in 2006) but nowadays the major class concerns services (ICT, health, etc.);

B- Most of the contracted value is awarded through direct invitation obtaining a low average number of tenders per invitation (1.6) which means that there is a clear lack of competition;

C- There is also a significant awarded value by direct invitation through contracts with a value exceeding the EU thresholds (71 million €) based on special reasons such as urgency, secrecy, exclusivity or property rights, etc. explaining why the Manchester Index [*Tavares, 2017*] is not 100% for Portugal as it could be expected.

5. Impacts of the new code on Portuguese public markets

Despite all limitations and shortcomings already pointed out, the amendments due to the new rules imposed by the Directives, can open new avenues for improvement of Portuguese markets and so a positive and optimistic attitude should be adopted overcoming the problems discussed in previous section:

a) More competition and participation

The full use of the electronic platforms can help to increase competition [*Tavares, 2011, b)*] through wide spread invitations to registered economic operators able to cope with the contract to be awarded by the contracting authority. This process is generally called "Request for Invitation" because it is a preliminary stage of the invitation that it will be sent to the selected economic operators.

A good illustration of more extensive use of direct award through e-platforms is the case of the Health Ministry since the innovative decision of January 2017 (*Despacho Nº 851 –A/2017* of 13 January of Ministry of Health published on *Diário da República Nº11, 2ª série, 16 January*)

Another efficient way to increase competition for recurrent acquisitions is the adoption of Dynamic Acquisition Systems avoiding the traditional invitation to just the few usual ones.

Also, electronic catalogues can help significantly as an addition to framework agreements or dynamic purchasing systems.

The upper bound for financial qualification (Article 165º-3 of DL 111-B/2017) and the need to adopt lotting in most cases (Article 46º-A of DL 111-B/2017) can also help to have more participation of SMEs.

b) More innovation

The adoption of specifications based on performance indicators and award criteria covering the full spectrum of relevant attributes can open wide opportunities for innovative tenders. Appropriate procedures can be now used to include key stages for improving the contract object to be awarded and to negotiate the best solution, such as open procedure with negotiation, competitive dialogue or partnership for innovation. This approach will be very favorable to attract SMEs as they tend to be more prone to innovation.

Of course, the award criterion of minimal price with full specification of all the other attributes should be avoided as it is a barrier to any innovation.

c) More "Good Value for Money"

A quite general criticism about public procurement is based on the deficient value for money achieved despite the long and complex procedures to form a public contract but the new approach to formulate the award criterion considering the whole range of expected benefits, the professional abilities of who is executing the contract, the post sales needs and services, the life cycle costing and the environmental impacts can help to avoid usual myopic or just price based approaches .

d) Better management of the contract execution and its performance evaluation

The Portuguese code establishes the need to have appointed a contract manager in charge of managing the process of contract execution including the estimation of the performance indicators to allow the evaluation of the contract execution (Article 290º-A of DL 111-B/2017).

Hopefully, such evaluation will be an incentive to improve performance of contractors and to select them in a better way.

Also, the new approach based on "performance-based contracting" can be more easily adopted introducing internal contract feed-backs to reduce the risk of lower levels of performance.

The new rule of exclusion of candidates associated to previous bad performance (Article 460º of DL 111-B/2017) is now applicable although the author believes that its application will be subject to generalized litigation.

e) Better regulation

Portugal was also pioneering public contracts regulation though the establishment of IMPIC since 2009. All contract notices and award notices have to be published through its portal and a national report on public procurement is annually published avoiding the usual data fragmentation of most member States (Spain, England, France, Italy, etc.).

The new Directives specify new roles and duties in the areas of support to better practices, reporting and auditing and so new competences and more resources should be allocated to IMPIC.

6. Conclusions

Portugal had an advanced- although too complex-code since 2008 but has not used the opportunity of having to transpose the new Directives to prepare a modern and consistent code because preference for an amendment approach prevailed. Also, a pure public law culture was considered and therefore other inter-disciplinary contributions were not integrated.

Still, important advances and improvements can be applied because the new law has transposed most of the Directives new rules and so public markets will be improved if properly applied. This objective implies extensive training of public procurers following the paradigm of their professionalization well described by the European Commission in Recital 121 of the Directive 2014/24/UE and the EU Recommendation [*European Commission, 2017]*

"…This Recommendation encourages the development and implementation of professionalization policies in the Member States, by offering a reference framework for consideration. The desired outcome of this initiative is to help Member States to build the policy for professionalization to increase the profile, influence, impact and reputation of procurement in delivering public objectives."

However, an estimated number of staff working on public procurement for contracting authorities is about 20.000 and the number of those having already received any training – even if just on legal matter – about the new Directives and Code is not exceeding 600 and so more than 97 % of our officers have not received any specific training. This situation is in contrast with good examples of national training programs embracing most the relevant public officers and organized in several member States such it is the case of Italy *[Guidi, 2018].*

Summing up, new public policies of training and of modernizing public procurement are critical to pursue the path designed by the Agenda UE 2020 and inspiring the new Directives of 2014 and aiming to achieve the paradigm of more sustainable, coherent and digital development which should make the best use of all the positive changes introduced by DL 111—B/ 2017.

7. References

- Almeida, T., 2016, Critérios de adjudicação - o (novo) conceito de oferta economicamente mais vantajosa, *Revista dos Contratos Públicos*, nº 13, 109-141.
- Amaral e Almeida, J., Sánchez, P.F., 2016, Comentários ao anteprojecto de revisão do código dos contratos públicos, Regime da Contratação Pública, Sérvulo & Associados.
- Arantes, A., Costa, A.A., Tavares, L.V. 2013, The evaluation of mandatory e-public procurement in Portugal: perceptions and results of the national survey (2010-2012) in Tavares, L.V., ed., 2013, Proceedings of the 1st European Conference on e-Public Procurement (ECPP): E-Public Procurement in Europe : Public Management , Technologies and Processes of Change, OPET.
- Assis Raimundo, M., 2013, A Formação Dos Contratos Públicos. Uma Concorrência Ajustada Ao Interesse Público, AA FDL.
- Costa, A.A., Arantes, A. e Tavares, L.V., 2013, Evidence of the impacts of public e-procurement: the portuguese experience, *Journal of Purchasing and Supply Management,* 19(2013), pp. 238-246.
- Cunha Rodrigues, N., 2015, A contratação pública como instrumento de política económica, Tese de Doutoramento, Almedina Brasil.

- Estorninho, M.J., 2016, A transposição das Diretivas europeias de 2014 e o Código dos Contratos Públicos: por uma contratação pública sustentável e amiga do bem comum em Estorninho, M.J, ed., A Transposição das Diretivas Europeias de 2014 e o Código dos Contratos Públicos, 2016, Instituto de Ciências Jurídico-Políticas.
- European Commission, 2017, Commission Recommendation (EU) 2017/1805 of 3 October 2017 on the professionalisation of public procurement — Building an architecture for the professionalisation of public procurement, C/2017/6654, European Commission
- European Commission, 2017, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Making Public Procurement work in and for Europe, COM/2017/0572 final, European Commission
- Guidi, V., 2018, The transposition of the 2014 Directives on public procurement into the Italian law: a challenge for a deep reform of the Italian public procurement system, European Journal of Public Procurement Markets
- Piga, G., Thai, K., 2007, The Economics of Public Procurement, Macmillan.
- Tavares, L. V., Coelho, J.S, Maia, P., 2008, O Modelo e o Software SIAP 2008 para avaliação de propostas e candidaturas segundo o Código dos Contratos Públicos (DL18/2008), OPET.
- Tavares, L.V., 2009, a), A Gestão das Aquisições Públicas: Guia de Aplicação do Código dos Contratos Públicos – Decreto-Lei 18/2008 – Empreitadas, Bens e Serviços, OPET.
- Tavares, L.V., 2009, b), A avaliação das propostas segundo as Diretivas 2004/17/CE e 2004/18/CE e o código dos contratos públicos, *Revista do Tribunal de Contas* nº50/56, julho-Dez 2008.
- Tavares, L.V., 2011, a), A business case on innovative health procurement how to provide better services using a lower budget by a major oncology hospital?, IESE, Madrid.
- Tavares, L.V., 2011, b), A strategy to reduce public expenditure based on e-tendering and procurement business inteligence: the case of Portugal, Vortal.
- Tavares, L.V., ed., 2013, Proceedings of the 1st European Conference on e-Public Procurement (ECPP): E-Public Procurement in Europe : Public Management , Technologies and Processes of Change, OPET.
- Tavares, L.V., ed., 2014, Proceedings of the 2nd European Conference on e-Public Procurement (ECPP): New Developments on E-Public Procurement, OPET.
- Tavares, L.V., Medeiros, R., Coelho, D., 2014, "The New Directive on 2014/24/UE on Public Procurement", OPET
- Tavares, L.V., 2016, a), Breve ensaio sobre a teoria dos sistemas e o código dos contratos públicos, em estorninho, M.J, ed., A Transposição das Diretivas Europeias de 2014 e o Código dos Contratos Públicos, 2016, Instituto de Ciências Jurídico-Políticas.
- Tavares, L.V., 2016, b), A Transposição da Nova Diretiva 2014/24/EU Relativa aos Processos de Aquisição de Bens, Serviços e Obras Baseados em Contratos Públicos: Concorrência e Inovação, *Revista do Tribunal de Contas*, nº63/64 , Janeiro/Dezembro 2015.
- Tavares, L.V, 2017, O Guia da Boa Contratação Pública: As Diretivas e o DL 111-B/2017, OPET

- Tavares, L.V., 2018, Public Procurement of Innovation: A cultural challenge, European Journal of Public Procurement Markets

Annex 1 - Major limitations or errors of the transposition of the new Directives by *Decreto-Lei 111-B/2017*

1. The approved Code does not cover the transposition of the Directive 2014/23/UE because the Article 429º states that regime of concessions of public services will be ruled by a new specific law;

2. The Article 29º of the Code is not a correct transposition of the Article 26º-4 a) of the Directive 2014/24/UE that states that *"(a) with regard to works, supplies or services fulfilling one or more of the following criteria: (i) the needs of the contracting authority cannot be met without adaptation of readily available solutions; (ii) they include design or innovative solutions.*" while the Article 29º of the Code just refers to "*goods or services that include the design of innovative solutions"* (Article 29º-1 b)). Obviously, this second condition is more restrictive than the one adopted by the Directive as it does not mention public works and because there is a wide scope of innovative contracts not including any conception but rather new approaches concerning the adopted materials, the execution processes, the combination of products, etc.

3. The Article 237º-1 of the Code about Dynamic Purchasing Systems introduced the restriction of concerning goods or services of "current use" but the Article 34º of the Directive 24º does not introduce this restriction.

4. The Article 74º-1 b) of the Code includes the award criteria based on the minimal price as a case of the general criteria of the most economically advantageous tender (MEAT) which is an obvious mistake.

5. The Directive 2014/24/UE states in Article 30º and 31º that the award criteria adopted for the competitive dialogue and the partnership for innovation must be the ratio quality/price but the Code forgets this requirement.

6. The Article 115º-2 b) of the Code concerning the award criteria to be adopted for the procedures based on invitation (Direct Award) does not require the specification of the weight coefficients allocated to the different attributes. However, the Article 67º-5 of the Directive 2014/24/UE states that such coefficients should be presented as a general rule.

7. The Article 115º-1 g) of the Code concerning the communication means adopted for the invitation procedure allows the use of "data electronic transmission" without further requirements and so a common email seems to be allowed. However, the Directive 2024/24/UE in the Article 22º-3 is clear about the requirements of confidentiality and integrity to be respected by such means which are not fulfilled by common emails.

8. The Article 5º-A-2 of the Code concerning "horizontal in-house contracting" as forgotten to specify the restrictions applicable to eventual private participation in the capital of the contracted authority and so, such restriction of Article 12º of the Directive 2024/24/UE is not mentioned.

9. The Article 198º-3 of the Code mentions that the deadlines for candidates of the Negotiation Procedure can be reduced by 7 days if using electronic means which is absurd because this means should be now used always, and such reduction which was mentioned in the Directive 2004/18/CE is not included in the new Directives.

The transposition of the 2014 Directives on public procurement into the Italian law: a challenge for a deep reform of the Italian public procurement system

Valentina Guidi[1]

Abstract

The transposition of the 2014 Directives on public procurement into the Italian law represented a unique opportunity to introduce an ambitious reform of the Italian public procurement system. A strategic document, issued in 2015 by the Italian Government with the support of the European Commission, provided the main objectives, as pointed out in the EU Directives, and the guidelines of the reform which were first transposed by the Italian institutions into the new legislation on public procurement, the Code of public contracts, in 2016 and are currently being implemented by the different actors involved.

Simplification has been one of the key issues of the reform process. Simplifying the legislation making the rules clearer and more stable and introducing lighter and flexible regulation. Simplifying and rationalizing the procurement system by reducing the number of contracting authorities through a better demand aggregation and the introduction of a new system to qualify the contracting authorities. Simplifying and shortening the processes and increasing efficiency and transparency through the intensive use of electronic tools. A strategic national e-procurement plan, which is currently being implemented, indicates the necessary steps driving the transition to the full digitalization of procurement by 2020.

Another key issue of the reform is a more sustainable approach to procurement policies. The transposition law introduces mandatory green criteria to be used by the contracting authorities as technical specification and contract clauses throughout their procurement processes. Moreover, guidance documents have been issued to provide general indications to contracting authorities on how to integrate social considerations throughout their tendering procedure and in the performance of the contract. Italian regions have developed good practices by implementing these guidelines.

The Strategy requires to improve skills and technical knowledge of public buyers for more effective procurement procedures and compliance with public procurement rules. An intensive training plan has been launched in 2017 and has been just completed, providing contracting authorities with a strong and permanent training on public procurement matters .

In order to effectively ensure a correct implementation of the rules and the actions envisaged by the reform a National Coordinator Body has been set up, responsible for monitoring the overall implementation and ensuring a unitary national policy on public procurement.

Even though the transposition of the Directives was timely, a part of the regulation enforcing the Code still has to be adopted. This slowed down the implementation of relevant measures such as the qualification system for contracting authorities. Some of the actions envisaged by the e-procurement plan are still being finalised.

Hopefully all the actors involved will re-launch soon the process in order to achieve all the ambitious objectives of the strategic reform that, in any case, can be seen as a good practice to share.

[1] The information and views set out in this article are those of the author and do not reflect the official opinion of the Italian administration and of the Department, nor are binding upon it.

Keywords

Strategy for the reform of the Italian public procurement system; Code of public contracts; national e-procurement plan; professionalization of public procurement; training plan on public procurement; sustainable procurement; green and social criteria (CAM).

1. The Strategy for the reform of the Italian public procurement system: a good practice to share

The transposition of the 2014 Directives on public procurement[2] into the Italian law has represented a good challenge for introducing a deep reform of the Italian public procurement system.

The need for a reform in the field of public procurement in Italy had been strongly recommended by the European Commission that, in 2014, proposed, among other Member States, also to the Italian authorities an informal partnership in order to elaborate a "Strategy" aiming at deeply reforming the Italian system on public procurement.

This was intended as a new method going beyond the infringement procedures, by using the implementation of the new public procurement Directives as an opportunity to introduce a deep revision not only of the current legislation but also of the general system through an intervention on the structural problems.

To meet this challenge, the Italian government set up a working group, gathering the main national authorities competent for public procurement, which, with the support of the European Commission, drafted the Strategy document.

The first step included a deep analysis of the main critical issues: the complexity of the legislative and institutional framework; the instability of the current regulation (too many and not coordinated rules); the lack of the necessary skills, technical knowledge or procedural understanding for effective public procurement and the need for a stronger professionalization; the complexity of requirements and selection procedures with too many administrative burdens for economic operators, including lack of competition, in particular in concession sector, and lack of efficiency and transparency in the control system; the need for better governance.

In the following step, the working group proposed a number of measures and concrete actions to improve the Italian system. The Strategy focused on the following policy priorities: to set up a structure charged of the coordination of public procurement national policy; to simplify the legislation through the transposition of the Directives and, at the same time, to reduce the current rules (revision of the Code of public contracts); to simplify the procedures by reducing the number of contracting authorities and strengthening e-procurement tools; improving and professionalizing the procurement management; a more efficient monitoring system.

The Strategy was approved by the Italian government in 2015[3] and subsequently endorsed by the European Commission. As an outcome it implemented the main objectives of the EU Directives. Most of the actions proposed by the Strategy were included in the EU Directives transposition legislation act, the ode of public contracts.

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[2] 2014/24/EU (the 'Classical Directive'), 2014/23/EU (the 'Concessions Directive'), and 2014/25/EU (the 'Utilities Directive') of the European Parliament and of the Council

[3] *Strategy for the reform of public procurement*, approved by the Interministerial Committee for european affairs, December 2015.

It is worth mentioning that the adoption of the Strategy and its implementation by 2016 is one of the main measures, intended as "ex ante conditionalities", included in the Action Plan for Public Procurement enclosed to the "Partnership Agreement" signed by Italy and the European Commission on using EU Structural and Investment Funds for growth and jobs in 2014-2020. In 2017 the European Commission assessed that Italy fulfilled all public procurement "ex ante conditionalities".

2. The main objectives of the EU Directives as implemented by the reform and transposed into the Italian law

2.1 A better governance

The Strategy stressed the lack of a national policy for public procurement and the need for better coordinating the competences spread among different authorities. Following the suggestion of the European Commission, the Code of public contracts states for setting up the National Coordinating Body – NCB (Cabina di regia), responsible for defining a single policy on public procurement in Italy and for cooperating with the European Commission for the correct implementation of public procurement rules. The National Coordinating Body is composed by representatives of the main public entities responsible for implementing public procurement rules both at central and at regional and local level. Representatives of contracting authorities and social and economic operators can be consulted to collect relevant data and information. The NCB started its activity in 2016 and its first task has been to draft the legislative decree which amended the Code of public contracts (see par. 2.2).

2.2 Simplifying the legislation and rationalising the system

Italy has been among the first EU countries that have transposed the Directives by the deadline. The legislative decree was adopted in April 2016[4], the new Code of public contracts.

The transposition process has required the full revision of the former Code of public contracts, a single legislative act which contains the provisions applying to both public procurement and concessions both above and below the threshold, both in ordinary and in special sectors. Some of the measures and tools provided by the new directives already existed in the Italian legislation on public procurement. This is the case, e.g., for self-declaration on the fulfilment of requirements for participation to public procurement procedures, for subdivision into lots to facilitate SME's participation (including the obligation of motivation if not), direct payments to subcontractors.

Only one year after it had entered into force, the Code was amended by the legislative decree so called "*correttivo*", as mentioned above, in April 2017. The "*correttivo*" did not affect the core of the transposition legislation but introduced some amendments for a correct and more effective implementation of the rules, as requested by the contracting authorities and economic operators.

The main changes introduced by the "correttivo" concern the following issues. Some of the rules applying to above the threshold contracts are extended to below the threshold contracts such as mandatory criteria for green procurement and non-mandatory social criteria (see par. 2.5). Mandatory grounds of exclusion are extended and apply also where the economic operator has been guilty of serious misrepresentation in supplying the information or the documents required. As for the contract award criteria the "correttivo" provides for extending the use of price as the sole award criterion to below the threshold works and services contracts. In applying the most economically advantageous criterion, the weighting to economic elements shall not exceed 30% whereas qualitative aspects shall be enhanced. Finally, modification of contracts during their term without a new

[4] Legislative decree 2016/50 modified by legislative decree 2017/56 ("*correttivo*")

procurement procedure is allowed also where the modification value does not exceed the EU threshold or is lower than 10% of the initial value of the contract in case of services and supplies contracts or 15% of the initial value of the contract in case of works contracts.

One of the main outcomes delivered by the Italian Parliament to the Government was the simplification of the current legislation by reducing the number of rules and avoiding too frequent changes. As a result, it was decided that the primary law, the Code, had to be implemented through guidelines, with more flexible regulation, drown up by the National Anticorruption Authority (ANAC), that is in charge of monitoring and ensuring compliance with the principles of legitimacy and transparency.

Currently eleven guidelines have already been adopted[5] by ANAC, some binding and others non-binding. They are addressed to the contracting authorities, in order to fully implement the new public procurement regulatory framework.

In order to simplify and rationalise the system, the Strategy proposed, and the Code introduced the reduction of the number of contracting authorities and a better demand aggregation and centralization of purchases, with the aim of speeding up the awarding procedures, assuring a stronger control on financial flows (spending review), monitoring and preventing corruption; improving the quality of purchasing.

Currently in Italy contracting authorities cannot decide autonomously how to purchase, but are required, depending on their typologies and on contract values, to use the tools provided by Consip - a joint-stock company held by the Italian Ministry of economy and finance and acting as national central purchasing body (MePA, framework agreements, dynamic purchasing system, etc.), or those provided by regional central purchasing bodies, or to use Consip's price and quality benchmarks (where these exist). The tendering procedure remains under the responsibility of the individual contracting authorities only when the use of Consip or other central purchasing bodies tools is not mandatory, but they are always allowed to jointly procure or ask for the support of central purchasing bodies.

The Code also introduced a qualification system to reduce the number of contracting authorities which have to be classified according to their competences and ability in managing the procurement procedures, on the basis of the category and the price of the contract they can perform and registered in a special list managed by ANAC, according to pre-defined criteria such as the control administrative capacity, the skills of the staff, anticorruption measures adopted. The qualified contracting authorities are obliged to standardize and harmonise public procurement procedures. Public contracts above the threshold of €40,000 (€150,000 for public works) can be awarded only by qualified contracting authorities. Contracting authorities, which are not qualified, have to purchase through a central purchasing body or, in alternative, through aggregation with one or more qualified contracting authorities. To implement the qualification system provided by the Code a Government decree still has to be adopted.

2.3 Strengthening e-procurement tools

The Strategy highlighted the need for specific governance in e-procurement including a policy to elaborate and implement a plan to enhance the use of electronic tools. The Code of public contracts states that the National Coordinating Body shall promote a national plan for the full digitalization of procurement procedures. For this purpose a working group was set up by the National Coordinator Body in 2017, performing the task of defining and monitoring the roadmap for the

[5] https://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/ContrattiPubblici/LineeGuida

eProcurement end to end. The working group is composed by representatives of central and regional authorities and chaired by AgID –Agency for digital Italy, which coordinates the policies for innovation and the actions to foster the adoption of *end-to-end electronic public procurement*.

The working group has finalized the national strategic plan, which has still to be approved by the National Coordinating Body. As proposed in the Strategy, the National Multi-stakeholder e-Procurement Forum was also established, which gathers a variety of relevant stakeholder, with the task of proposing and monitoring the actions to implement the e-procurement in Italy.

The plan defines the actions for the development of the National Public e-Procurement System named ComproPA, which is based on standards and technical specifications in order to support the digital transformation of the procurement processes and the interoperability system at European Level

The actions of the national plan are aligned with the three-year plan for ICT in Public Administration that identifies the investment lines in the ICT sector by the public entities. In order to ensure interoperability of the different systems, which is a pillar of the ICT Strategy, the guidelines on the technical rules for interoperability of eProcurement platforms were issued by AgID in 2016, defining the standards, the technical specifications and the main building blocks which shall be adopted for implementing the national eProcurement system. The Rules refer namely to: CEN TC 434 invoicing, CEN TC 440 electronic Public Procurement, CEF eDelivery building block PEPPOL infrastructures and profiles.

After having identified for each phase of the procurement process the involved actors and systems (e.g. procurement platform, national registers, data providers) security and interoperability requirements for all over the eprocurement process have been defined through specific guidelines which are being finalized by AgID .

The final goal is to achieve the full digitalization of the entire process “procure to pay” (100%). For this purpose by October 2018, 100% of purchase and negotiation procedures shall be digitalized. The deadline for the implementation of EU Directives provisions concerning electronic means of communication in public procurement procedures is defined as follows: 17 April 2017 mandatory for central purchasing bodies; 17 October 2018 generally mandatory. By 2019 the electronic post-award phase should be completed and by 2020 the European standard for e-invoicing shall be adopted.

2.4 Professionalizing the public buyers

As recommended by the European Commission in its recent initiative on the professionalization of public procurement[6], public buyers should procure according to the highest standards of professionalism because “enhancing and supporting professionalism among public procurement practitioners can help foster the impact of public procurement in the whole economy”.

This aim can be achieved mainly by improving the whole range of professional skills and competences, knowledge and experience of people conducting or participating in tasks related to procurement. Specific actions to enhance public procurement skills were identified in the Strategy and developed by the Italian authorities through an intensive **training plan**, aimed at providing contracting authorities with a strong and permanent training on public procurement. A structured training system is also included among the criteria required by the Code for qualifying the contracting authorities.

[6] Commission Recommendation on 3.10.2017 "Building an architecture for the professionalization of public procurement".

The training programme on public procurement, launched in 2017 and completed half 2018, was partially financed with the EU Structural Funds (2014-2020). It consisted of a basic and a more specific training. The basic module, delivered by the National School of Public Administrations (SNA) through e-learning tools, was directed to staff working in all public authorities involved in public procurement both at central and at regional and local level, providing them with an overall update of the new transposition law (the Code of public contracts and implementation acts). Almost 25.000 people (central, regional and local authorities) were trained. Specialized modules were addressed to staff working in the central purchasing bodies and Regional Managing and Auditing authorities and it was delivered by the SNA with the support of Italian Regions. The content of courses covered the full procurement cycle (from the programming until the performing of the contract) and focused on e-procurement tools and the aggregation procedures such as framework agreements, and 10.000 people were trained.

All the staff trained through the plan received a certification to be used by the contracting authorities to be qualified according to the new system.

New editions of the courses are planned to be launched in 2019. The plan has been included in the collection of good practices from Member States which accompany the European Commission Recommendation.

2.5 More sustainability: green and social procurement

The EU Directives provide a toolbox enabling Member States to make more efficient and strategic use of public procurement and the Italian legislation, transposing the Directives, includes, among its main objectives, environmental sustainability and social inclusion .

As for the use of environmental criteria, the Italian legislation goes beyond what the EU Directives require. According to the Code "in the performance of public procurement contracts and concessions, contracting authorities shall comply with environmental, social and labour obligations provided by European and national legislation, collective agreements or international provisions listed in Annex X (where Annex X refers to the core ILO conventions and environmental conventions)". In order to implement this provision that transposes one of the most relevant provision of the Directives, the Code introduced mandatory rules for contacting authorities. Already before the transposition of the Directives Italy has implemented the National Action Plan (NAP) for green public procurement (GPP), by setting national green criteria ("*criteri ambientali minimi*" - CAM) for eighteen categories of goods and services, published on the Italian Official Journal.[7] According to the Code contracting authorities are obliged to introduce in their procurement procedures those green criteria, defined by ministerial decrees, as technical specification and contract clauses. ANAC will monitor on the correct implementation of the CAM and will ensure necessary support and training to the staff of contracting authorities which have to comply with the new obligation.

While Italy has a comprehensive environmental law and experience in using certification as qualification requirements in public contracts, social criteria are less well known. Italy has the world's highest proportion of SA8000 certified manufacturers and, while this can provide useful information about conditions in Italian factories and farms, this cannot be used as a reliable indicator of conditions in supply chains outside of Italy.

Nevertheless, significant progress has been made in the last years. In 2012 a Guide "for the integration of social aspects in public tenders" was published by the Ministry of the Environment, where social criteria refer to criteria for the promotion, throughout the supply chain, of social

[7] http://www.minambiente.it/pagina/criteri-vigore

standards relating to human rights and working conditions, internationally recognized and defined by ILO Conventions. The Guide also foresees a "structured dialogue", developed in eight phases, between the contracting authority and the successful tenderer, including follow-up questionnaires, audits and penalties. As an example of good practices, some Italian regions have experienced actions implementing the Guide. The regional purchasing body of Lombardy Region (ARCA Lombardia), acting as a central purchasing body for 1600 contracting authorities (including healthcare structures), has engaged economic operators in a survey on ethical criteria. On the basis of the results of the survey, ARCA Lombardia has integrated the principles of the Guide into eight tenders, four of which are in the healthcare sector for a total purchasing amount of over 990 million euros. Other authorities are following similar approaches, such as Tuscany Region and the Emilia-Romagna regional purchasing bodies (Intercent-ER).

Although only environmental criteria are mandatory in Italy, non-mandatory ethical criteria can be included among the CAM. As an example, the newest ethical criteria have been introduced in the textile sector, one of the highest risk sectors, and include: selection criteria as technical and professional skills of economic operators; the award criteria relating to social characteristics of specific production stages (i.e. the supply chains of the tender object); fair-trade certification; contract clauses.

Among the most relevant developments it is worth mentioning the National Action Plan on Business & Human Rights 2016-2021 adopted by Italian Authorities on December 2016 (Inter-ministerial Committee for Human Rights -CIDU). The Plan highlights the need to regulate public procurement and business to avoid a skewed market so that economic operators not complying with law or international labour rights conventions should be excluded from public contracts. To achieve these goals, within the overall framework of the implementation of EU directives, the Italian Government is developing the concept of a "human rights clause" to be included as a requirement in all tenders and agreements with enterprises for the purchase of goods and provision of services, with focus on enterprises operating abroad and foreign enterprises.

3. Final remarks

Although the transposition of the Directives in Italy was timely, a part of the regulation enforcing the Code still has to be adopted. This slowed down the implementation of relevant measures such as the qualification system for contracting authorities. Some of the actions envisaged by the e-procurement plan are still being finalised.

Hopefully all the actors involved will re-launch soon the process in order to achieve all the ambitious objectives of the strategic reform that, in any case, can be seen as a good practice to share.

Public procurement culture after accession to the EU – The case of a Central European transition country

Tünde Tátrai

Abstract

Understanding and implementing European public procurement directives does not mean that countries that joined the European Union at a later stage were immediately able to adjust to their logic. It is not necessarily a problem of skills; cumbersome and slow learning is due much more to cultural differences, and lack of practice and knowledge of the interpretation of law by the European Court of Justice. This article sums up the results of four surveys presenting the changes in Hungary's public procurement culture over 10 years, which has a useful message for other more recent Member States.

Keywords:

public procurement, culture, transition country, European Union

1. Introduction

Let us assume that we can talk about culture also in relation to public procurement. If we search for the meaning of culture in this environment, we also assume that *Culture* is the characteristic and knowledge of a particular group of people, the social behaviour and norms found in human societies. It is worthwhile to study the elements of public procurement culture, which researchers of the field have already raised, to explore characteristics which are decisive in identifying a public procurement culture. This article has no intention to explore or qualify the differences between public procurement cultures, rather it calls attention to changes in the approaches and opinions of market agents, which also demonstrates the changes and development of public procurement culture.

The literature on public procurement is not replete with writings about cultural changes reaching the public procurement market. Preuss (2009) refers to organisational culture, Moon (2005) to managerial culture, Erridge (2007) mentions risk avoidance culture, but public procurement literature does not really delve into general cultural changes. Edler et al (2005) regards good culture as an important factor, expressly laying the foundations for innovation, Caldwell et al (2004) highlights the importance of culture in relation to the decisions of procuring entities. Smith (2008) underlines the importance of corruption culture in relation to public procurement.

Researchers apply a manifold of approaches, some of which relate to sustainability, innovation, some to corruption and efficiency or to the level of preparedness of market agents. Lawyers and economists address cultural aspects in a variety of ways and they place emphasis on different aspects accordingly.

In the course of this research, it has already been possible to explore some questions in the questionnaire. Tátrai-Nyikos (2012) examined what set of objectives Hungarian contracting authorities need to adhere to when doing their procurement. The frequently contradictory objectives and EU strategic directions call attention to the fact that it is not possible to quickly achieve fundamental cultural changes in a diverse system of objectives. For instance, the incorporation of the sustainability objectives into everyday dealings is not decided at the level of regulations. Tátrai reinforced this (2015), when she wished to examine the level of development achieved by Hungarian public procurement based on the 7-stage model by Telgen et al (2007). Although the seven stages of development are built on one another, yet it is not necessary for public procurement markets,

regions or countries to reach these levels one after the other in the course of their development. The first steps generally result in defining the existing demands and the development of a legal background, after which the focus shifts to criteria of efficiency, value-orientation and accountability. The difference between the last two steps lies in the depth and genuineness of the realisation of broader government objectives. Levels of development go beyond issues of general regulation; the model intends to take market movements and capabilities into consideration rather more substantially than the desires and plans formulated in words and policies.

Table 1 – The 7-stage model [Telgen et al, 2007]

Stage 1	Sourcing and delivery of goods and services
Stage 2	Compliance with legislation/regulation
Stage 3	Efficient use of public funds
Stage 4	Accountability
Stage 5	Value for money
Stage 6	Supporting of broader government policy objectives
Stage 7	Delivery of broader government objectives

In the course of research affecting Hungary, Tátrai (2015) draws the conclusion that "the European Member States having an advanced procurement culture would only be able to reach stage 7, i.e., the level of sustainable procurement where public procurement genuinely becomes the engine of economic growth, if they set up their own guidelines, help the contracting authorities and develop their practices taking into account their cultural differences and data." [Tátrai, 2015. pp. 285.)

The implementation of the new rules of public procurement implying new approaches and logic for which Member States will be accountable has been implemented in several countries that have become Member States of the European Union. The process has not been smooth in any one of them. The introduction of the European regulation led gradually to their true understanding and to changes in the opinion of the market agents. The regulation and its impact can best be analysed in the course of a research project where the questions of a technical questionnaire are answered by stakeholders of the public procurement market.

2. Methodology

In the course of our research, we conducted questionnaire surveys in Hungary following the transition to a market economy (1989), accession to the EU (2004) and the implementation of the EU directives. The four questionnaire surveys between 2009 and 2018 follow the changes in the opinions of economic operators, the gradual evolution of demands and expectations in a country that had public procurement practised from the 1990s. Yet, getting used to the set of rules developed in line with European regulations and understanding the system began with the control of public procurement under projects implemented using EU funds and debates over increasingly complex issues. Becoming acquainted with the decisions of the European Court of Justice, shedding light on major cases of corruption, getting to know electronic public procurement and the appearance of foreign bidders gradually changed the approach of economic operators. Research has demonstrated changes in approaches over 9 years and it has perhaps brought a promise of development. We assume that the approach to competition, corruption and sustainability are criteria which fundamentally determine the public procurement culture of a country which also constitutes part of the EU Public Procurement Priorities [Public Procurement Communication, 2017].

Corvinus University of Budapest and Transparency International Hungary have monitored the Hungarian public procurement market since 2009; the Hungarian rules harmonised with the directives were enacted between 2004 and 2006. The first few years enabled economic operators to gradually get used to their public procurement obligations. On-line questionnaires were used in 2009, 2011, 2013 and 2018 to explore the opinions of contracting authorities, bidders, consultants and legislators of the public procurement market. The on-line questionnaires are accessible at www.kozbeszkut.hu; the research summaries were published on each occasion.

The number of responses received was between 100 and 106. The respondents included contracting authorities, utilities, bidders, legislators and public procurement consultants. Over 50% of the respondents have been engaged in public procurement for more than 5 years.

By comparing the four questionnaires, we underline the most important changes and challenges in relation to competition and efficiency, ethics and corruption and sustainability and innovation.

3. Research results

Below, we focus on three important areas based on the responses given to the questionnaires and draw our conclusions. The first group is competition and efficiency, the second is ethics and corruption, and the third is innovation and sustainability, of which we highlight the relevant message and experience, which goes beyond the Hungarian example.

3.1. Competition and efficiency

Generally speaking, market players understand a great deal by the level of development of the public procurement market and their views have not changed all that much over almost a decade. Albeit their assessment improved a little, but as the market has evolved, expectations increased too, thus the opinion on development does not signify genuine changes.

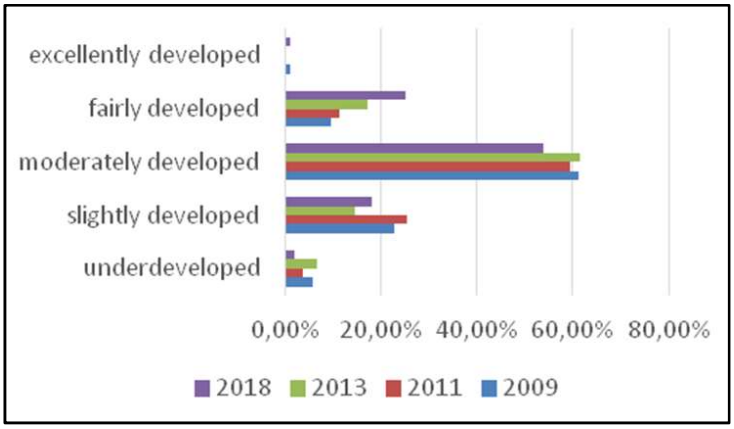

Figure 1 – How do you assess the level of development of the public procurement market?

In terms of efficiency, economic operators have a better opinion of the potential of the public procurement market, yet practically three-quarters of the respondents cannot imagine the achievement of the efficiency of procurement in the profit-oriented sphere in public procurement. In other words, they regard public procurement not as a regulated procurement process in the traditional sense, but as procurement under increasingly difficult conditions.

Hungarian public procurement procedures are subject to a large number of mandatory fees, such as the announcement control fee, the fee for using the electronic public procurement system, the administrative service fee in the case of legal remedies; it is also mandatory to engage an independent accredited public procurement consultant under the EU regime and in cases specified in other legal

regulations. Economic operators attach great importance to the costs of the procedure from the aspect of the efficiency of public procurement, but their resistance is not strong, they have become used to it, despite the fact that the extent of costs directly burdening the procedure is outstanding relative to the other Member States of the European Union. The fees charged to finance the institutional system have not decreased over the past 10 years, greatly restraining the competitiveness of Hungarian public procurement public.

The actors are more tolerant when they state their opinion on the regulation of public procurement comparing the costs of public procurement to other legal regulations. They have become used to the high costs and they tend to handle this rather neutrally, with regard to the fees directly burdening public procurement procedures as increasingly acceptable, which for instance exceed EUR 1,000 per procedure only for controlling the announcements under the EU regime.

Economic operators are, however, more critical of the regulation. Every year, it has been regarded as excessively regulated by as much as 64% of its users, and this rate rose to 80% by 2013. At the same time, the number of those who regarded public procurement as an activity requiring economic, technical and IT skills in addition to legal knowledge also increased.

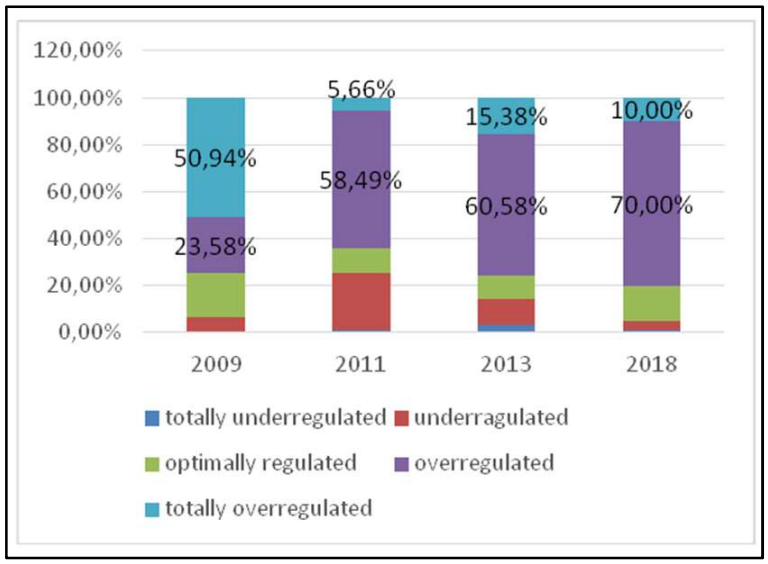

Figure 2 – To what extent is the Hungarian public procurement market regulated?

Responses to the question of to what extent public procurement allows market processes to prevail provide a thoroughly qualified picture. Public procurement appears as an impeding factor in the opinion of economic operators, irrespective of whether they are contracting authorities or bidders.

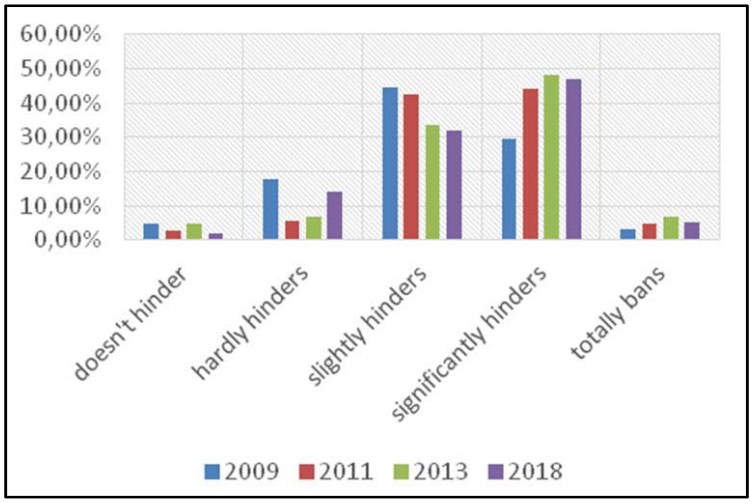

Figure 3 – To what extent regulations allow market processes to prevail?

While regulations leave less scope for market processes, contracting authorities seem to turn towards the least bureaucratic solutions, open procedures and a choice of simple evaluation criteria, and there is a stronger interest for longer term and more rational solutions, such as choosing the framework agreement procedure. The complicated regulatory environment impedes creativity, but despite initial uncertainties, contracting authorities are gaining on courage. This, however, does not mean that they would be happy to opt for evaluation criteria that are hard to quantify, sustainable elements, dynamic procurement systems or innovation partnerships.

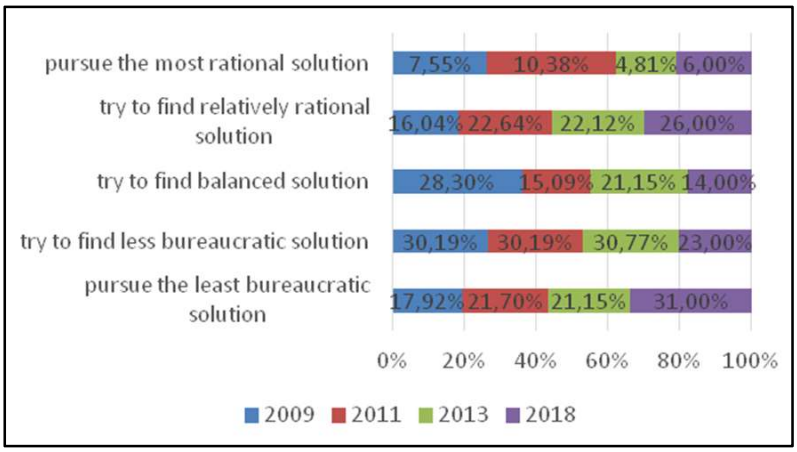

Figure 4 – In your opinion, will actors turn towards more complex and more rational solutions from the viewpoint of procurement (e.g. choosing the framework agreement procedure or the lowest cost) or would they prefer less complicated, less flexible solutions (e.g. choice of an open procedure or using the lowest price as evaluation criterion) with regard to the administration of procurement?

As to the question of how to improve the efficiency of public procurement, three-quarters of respondents supported the adoption of project culture every year, while the development of public procurement culture takes the lead among the responses to the same question. Whatever it may mean, economic operators would prefer to have a culturally more advanced market because it would certainly be more efficient.

1	Efficient spending of public money
2	Fight against corruption
3	Transparency
4	Supporting SMEs
5	Decreasing go-round debt
6	Increasing employment
7	Supporting environmental protection
8	Supporting social considerations
9	Easing up the fiscal crisis by slowing down public procurement

Table 2 – The order of importance of the declared objectives of public procurement implemented through public procurement based on the opinion of respondents (2018)

The determination of the order of importance is in harmony with additional opinions, which show – also with regard to earlier years – that sustainability aspects or the objectives of the government impeding public procurement and using public procurement to resolve the crisis receive much less support. Supporting SMEs is the only element not linked to corruption or efficiency enjoying relative support. Respondents regard efficiency and combating corruption as the most important objectives based on all the previous questionnaire surveys. They call the government to account for ensuring competition and for excessive regulation, but they accept that they themselves have to finance the institutional system via the fees.

3.2. Ethics and corruption

The research projects posed a large number of questions concerning the ethical attitudes of the individual stakeholder groups. Ethical behaviour improved in every stakeholder group, be they contracting authorities, utilities or bidders. Yet, when they were asked to state their opinion on regulations, the results were worse year after year and more and more of them believe that regulations cannot put an end to unfair competition. That is why they do not believe in excessive regulation and do not regard it as a solution leading to efficiency.

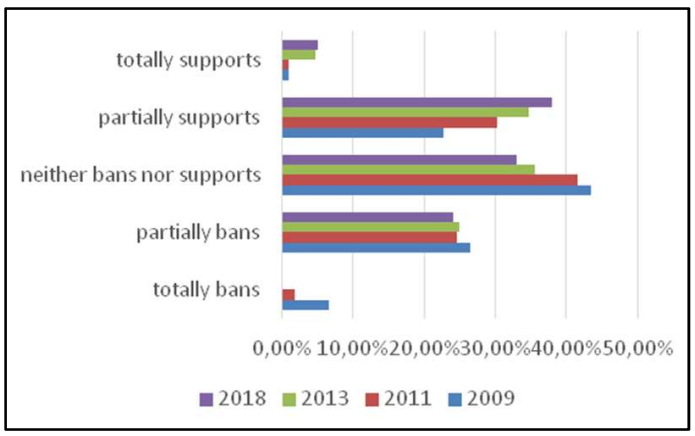

Figure 5 – In your view, to what extent can the regulation of public procurement put an end to unfair competition (banning unsuitable bidders, giving illegal advantage to bidders, corruption)?

Of the individual subjects of procurement, infestation by corruption is clearly the highest in the case of works contracts, where close to 90% of the respondents declare that this is the subject of procurement, which is directly affected by corruption. Naturally, this perception may arise from the fact that characteristically cases of corruption involving a higher value arise in relation to works contracts as the value limit as well as the estimated values are *ab ovo* higher in this category. At the same time, the exploitation of subcontractors, the omission of engaging the promised experts and problems of quality arise most frequently in the case of works contracts.

It is indicative that respondents see low value public procurements being increasingly infested by corruption. The diagram clearly indicates deteriorating opinions as well as the spill-over of forms of corrupt behaviour to the relatively small projects.

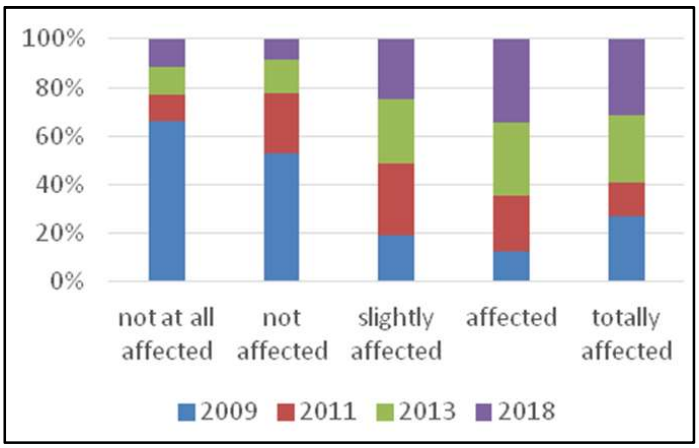

Figure 6 – To what extent do you believe low value public procurements are infected by corruption?

Of the various phases and the acts of the procedure, respondents clearly regarded the preparation of the procedure as the most infested by corruption, and negative opinion on performance also gained ground. Accordingly, the struggle for efficiency through stringent control of the procedures and their regulation is less suitable to reduce corruption because preparation and performance fall outside the scope of the administration of the procedure in a legal sense.

3.3. Sustainability and innovation

Based on the opinions of economic operators, the prevalence of sustainability is practically negligible. In spite of compliance with the direction of EU strategy, development can be perceived only very poorly with regard to the prevalence of both green criteria and social criteria. The results below show responses to two questions demonstrating the exceedingly restrained application of these criteria and a lack of change. The *usually* or *always consider* responses are hardly measurable, but in all cases, they are below 5%.

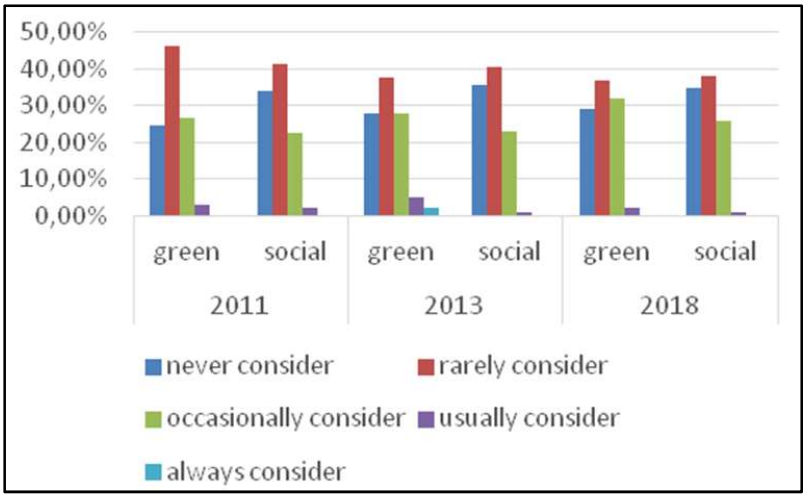

Figure 7 – To what extent can our public procurement be regarded as green/social, that is, in your view, to what extent do contracting authorities take criteria of environment protection/social aspects into consideration when developing the subjects of procurement and the evaluation criteria?

Public procurement as a factor impeding innovation is continuously in the crossfire of the opinions of economic operators. Their opinion is increasingly negative, in spite of the fact that in the course of implementing the new directives of 2014, the new innovation partnership and non-price-evaluation criteria were introduced. The market has not yet reacted to the regulation, it fails to utilise the opportunities.

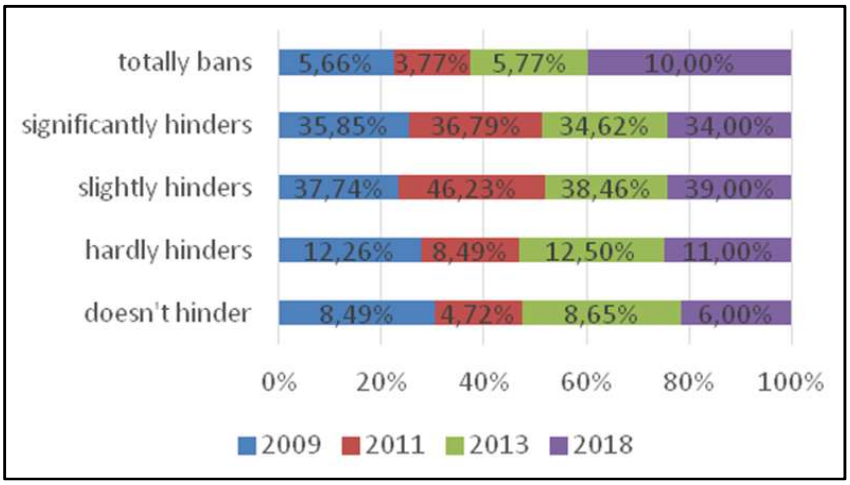

Figure 8 – To what extent can public procurement impede innovation?

Practically, the attributes carrying European modernity in public procurement, such as innovation, sustainability and creative evaluation criteria hardly appear, moreover a comparison of the sets of objectives reveals that they are clearly subordinated.

Based on the accumulated experience in the implementation of the Public Procurement Directives, the greatest expectations were on competition, efficiency gains, reduction of corruption and the emergence of innovative elements. Public procurers follow the needs of regulation, but this indicates a moderate cultural change. The mandatory introduction of the Electronic Public Procurement System in 2018 is expected to have an impact on the attitudes of stakeholders, which should be considered in the future.

4. Summary

Tátrai-Nyikos (2012) mapped out the objectives, for which public procurement is applied in Hungary. The individual and contradictory objectives included the issues that are also subject to this research. The research revealed that the individual objectives may extinguish one another, or they may have effects in opposite directions. Diverse sets of criteria in the EU Public Procurement policy priorities [EU Public Procurement Communication, 2017] and the Public Procurement Directives (23/2014/EU, 24/2014/EU, 25/2014/EU) did not automatically result in enhancing the openness of economic operators. The document itself [EU Public Procurement Communication, 2017. pp.2] also mentions the need for immediate cultural change. In a Member State where stakeholders have been getting to know the logic of the EU Directives since 2004, the new environment of the 2014 Directives has an impact on the market at least of a magnitude that equals that of the implementation of the 2004 Directives (17/2004/EC, 18/2004/EC). Change is necessary – this, however, does not necessarily mean striking, clear and rapid cultural development.

Getting used to the many types of controls, accepting the costs, the passive attitudes and the lack of information on European examples, adjusting to a continuously changing environment goes actually faster but it does not result in any improvement in the creativity of the stakeholders. This supports the ideas of Telgen et al (2007) concerning the stages of development in public procurement, assuming that the individual stages develop back to back. So long as economic operators are preoccupied with primarily ethical issues, additional mainly sustainable elements and policies appear less often in everyday practice, i.e. not at the level of the rules. A common public procurer definitely follows the EU's direction at the level of words and plans, in reality however he does not get to this point, he will only fight the elements, resolve the everyday administration issues and struggle with ethical challenges.

It is not the public procurement market that hinders development and a more balanced cultural change, but society and general culture and approaches, which do not enable fair competition in public procurement. It is worthwhile to take the opinion of economic operators seriously, one should not set unrealistic expectations for those having a less advanced public procurement culture, one should take into consideration that it is not possible to automatically require the same standards for states newly acceding to the EU and to call them to account for compliance. For cultural change in public procurement, more is needed than drafting new directives and strategies.

References

Caldwell, N., Walker, H., Harland, C., Knight, L., Zheng, J., t& Wakeley, T. (2004): Promoting Competitive Markets: The Role of Public Procurement. In K. V. Thai et al. (Eds.), Challenges in Public Procurement: an International Perspective (pp. 315- 334). Boca Raton, FL: PrAcademics Press.

Edler, J., Ruhland, S., Hafner, S., Rigby, J., Georghiou, L., Hommen, L., & Papadakou, M. (2005). Innovation and public procurement. Review of issues at stake. *ISI Fraunhofer Institute Systems and Innovation Research, Karlsruhe*.

Erridge, A. (2007). Public procurement, public value and the Northern Ireland unemployment pilot project. *Public Administration*, *85*(4), 1023-1043.

EU Public Procurement Strategy (2017): Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions https://ec.europa.eu/growth/single-market/public-procurement/strategy_en

Moon, M. J. (2005). E-procurement management in state governments: diffusion of e-procurement practices and its determinants. *Journal of Public Procurement*, *5*(1), 54-72.

Preuss, L. (2009). Addressing sustainable development through public procurement: the case of local government. *Supply Chain Management: An International Journal*, *14*(3), 213-223.

Smith, J. J. S. (2008). Competition and Transparency: What works for public procurement reform. *Public Contract Law Journal*, 85-129.

Telgen, J., Harland, C., & Kinght, L. (2007): Public Procurement in Perspective in Knight L., Harland C., Telgen J., Thai K.V., Callender G., McKen K. (Edt. 2007): *Public Procurement: International Cases and Commentary. Routhledge*. pp. 20-22.

Tátrai, T. (2015). Stages of development towards sustainable public procurement. In *International Public Procurement* (pp. 271-286). Springer, Cham.

Tátrai, T. & Nyikos, Gy. (2012): The Uses and Abuses of Public Procurement in Hungary.5th International Public Procurement Conference. Seattle, USA. 17-19 Aug. 2012, in Albano G. L., Snider K. F., Thai K. V. (edt): *Charting a Course in Pubic Procurement Innovation and Knowledge Sharing. Pracademics Press, Florida, USA*.

Centralization vs. Bundling: The Victory of an Italian David against an Italian Goliath

Gustavo Piga[1]

Abstract

By drawing on the data and evidence related to a recent annulment, following the complaint of a small local SME, in an Italian administrative court of a large, limited-lots, tender published by the Italian largest Central Purchasing Body, we review the evidence for aggregation and bundling strategies of public procurement tenders in the light of the negative impact they generate on SME participation. We conclude by suggesting that an optimal strategy of centralization, which has several benefits, to survive requires limiting its bundling temptation.

Keywords

centralization; bundling; sme; lots; central purchasing body; procurement tenders

1. Introduction

SMEs access to public procurement tenders generates relevant challenges over at least four dimensions:

a) The contract object

b) The financial requirements

c) The technical requirements

d) The bureaucratic process.

E-procurement is helping in alleviating problems arising from d). This paper focuses its attention on a) (lot size) which tends to drag also to b) and c) as they are correlated with the contract object estimated value, by looking at a very relevant judicial episode in the Italian pubic procurement market.

In a recent tendering of integrated surveillance services[2] at sites granted for use, on whatever basis, to Public Administrations, Consip S.p.a., the Italian Central Purchasing Body for goods and services, performed a territorial lot sub-division (13 regional lots) that was challenged in court by a small firm ("Mondialpol") that could not participate (due to the lot size and the related minimum turnover requirements) to the competition itself in one of the lots.

As the small firm won, in both stages of the administrative judgement (appealed unsuccessfully by Consip and its unique shareholder, the Italian Ministry of Economy and Finance) , and the tender was finally annulled, setting a precedent for future bundled procedures in Italy, it is worth reviewing the issues that were raised in the litigation in light of the twin objectives set forth by national law and European directives, aimed at promoting the largest participation by Small and Medium-Size

[1] I wish to thank Luis Valadares Tavares for helpful comments.

[2] Call for tender published on October 15, 2015.

Enterprises ("SMEs") while pushing centralization, and within the typical need to contain public spending.

The subject of this paper is currently at the centre of a European debate regarding the best practices in the matter of public procurement. The dilemma faced by the decision-maker is well summarized at the outset in the Recital (59) of the new European regulations on the matter (emphasis added):

"There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. *However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs.*"

Beyond the dilemma concerning the debate at issue here, what is made evident and relevant in the Recital is that aggregation and centralization are two markedly distinct terms. Indeed, if, on the one hand, the Recital illustrates that, to reach aggregation in public procurement (so as to generate economies of scale), centralization appears to be a necessary condition, on the other hand the opposite is not necessarily the case, i.e. centralization does not need to be inevitably tied to the aggregation of tenders in ever bigger lots. Indeed, based both on tendering operating practices and relevant economic theories, there are various factors that would justify an increased centralized procurement without leaning towards an aggregation of demand; in other words, it could for example make sense to continue the trend towards more centralization with, however, particularly small lots (hence without aggregation of demand). This centralization could certainly benefit the citizen and the taxpayer more than if several (small) contracting authorities were responsible for the different tenders (i.e. without centralization). Some of these advantages include: a reduction in the costs of publishing calls for tender, the centralization of administrative disputes under one single administrative entity with wide legal authority and thus capable of facing suppliers in court who are represented by highly effective legal teams and also economies of scale in personnel - mentioned above in the Directive - which lead to more qualified tender specifications, which in turn reduce costs, disputes and waste of time. These several features can all be achieved also in the case of Consip, without therefore speaking necessarily of aggregation.

This lack of identity between the concepts of centralization and aggregation was confirmed from the inception of the program in the late XX century, within the Italian Public Administration's purchasing efficiency plan. The Ministry's decree, D.M. 24 February 2000, following the budget law, art. 26, December 23, 1999 clarified that the plan is aimed "realizing economies of scale on purchasing volumes, optimize demand and standardize consumption, simplifying the tendering procedures, reducing procurement lead time and the quality standards, promote the diffusion and the use of advanced instruments like e-procurement, and obtain results in terms of reduction of expenditure".

As demonstrated by economic theory, policy recommendations and available empirical evidence – as we will discuss later - all these objectives *may* but do not necessarily *need* to rely on the aggregation of demand (a term never mentioned in the above original wording) at the level of the relevant centralizing authority. Even the more recent art. 9 of the Law Decree 66/2014, which sets forth directives for the rationalization of public spending, refers to "the identification of spending values that are significant for the purchasing of goods and services with reference to optimal dimensions, even on a territorial basis, for the aggregation and centralization of demand." The decree thus emphasizes that it is indeed the context, often in territorial terms, that make optimal a

certain degree of aggregation, rather than aggregation being an objective per se, to be achieved through an ever growing size of tendering lots.

Confusing centralization and aggregation would also go against European Recommendations like the one published by the European Commission: "The Public Procurement Directives allow contracts to be awarded in the form of separate lots. The sub-division of public purchases into lots clearly facilitates access by SMEs, both quantitatively (the size of the lots may better correspond to the productive capacity of the SME) and qualitatively (the content of the lots may correspond more closely to the specialised sector of the SME). Furthermore, sub-dividing contracts into lots and thereby further opening the way for SMEs to participate, broadens competition, which is beneficial for the contracting authorities provided that this is appropriate and feasible in the light of the respective works, supplies and services concerned. Against this background, contracting authorities should keep in mind that, while they are allowed to limit the number of lots tenderers can bid for, they must not use this possibility in a way which would impair the conditions for fair competition. In addition, making it possible to tender *for an unlimited number of lots* has the advantage that it does not discourage general contractors from participating and the growth of enterprises" (our emphasis)[3].

These introductory observations clearly show that, if implemented in a reasonable manner, the mechanism of purchases within a scheme of centralization can be deemed compatible with the principle of participation in public procurement by relevant economic stakeholders, especially the smaller enterprises, through the lack of recourse to aggregation.

What is needed to understand the issues at stake it thus not so much a legal analysis of how the concept of centralization evolved, in Italy or elsewhere, but, rather, an economic assessment of how such an innovative and interesting organizational form, centralization, has been applied and what has been the ensuing impact on market competition through the unfolding of individual public tenders, particularly with reference to if and how aggregation has been developing with respect to the specific territorial area affected.

In this context, the opinion of the Administrative Court in Italy (TAR Lazio), regarding the specific tender we analyse, seems completely valid when it states that the issue at hand is "the assessment whether the subdivision of the procurement, which affects the entire national territory, in 13 lots guarantees an optimal division of the (Italian, NoA) territory. Considering that safeguarding competition ensures a proper functioning of the market, such optimal territorial division is defined as that where competition can be stimulated most effectively to the advantage not just of the market, where enterprises can compete fully and freely, but also of the contracting authority and hence of the public in general, both in terms of the quality of services rendered by the best contractor and of the prices to be paid to the latter."

Therefore, the task for this paper is to evaluate the state of progress in Italy of this operational management of the centralization mechanism, verify if it occurred by means of an increased aggregation of contracts, and if it seems to be confirmed that an unreasonable level of aggregation - in terms of EU objectives and public spending containment – was developed, or instead it should be deemed as optimal. Only after carrying out this context analysis we will have suitable tools to confirm or dismiss the validity of the complaint of the firm that initiated the complaint and led to the annulment of the Consip's tender and therefore, also of the validity of the sentencing by the Italian administrative courts.

[3] Brussels, 25.6.2008 SEC(2008) 2193, COMMISSION STAFF WORKING DOCUMENT, EUROPEAN CODE OF BEST PRACTICES FACILITATING ACCESS BY SMEs TO PUBLIC PROCUREMENT CONTRACTS.
https://www.ecec.net/fileadmin/pdf/law/2/smecodeofbestpracticesen1.pdf

2. The context

Undoubtedly, Italy does not reflect European best practices in its handling of its small enterprises when involved in public procurement. In the graph below, thanks to an effective synthetic indicator, we can examine the difficulties that Small and Medium-Size Enterprises encounter everywhere within the European Union in securing public contracts.[4] Such assessment can be carried out through a simple comparison between the percentage of total gross value added (GVA) that Micro, Small and Medium Enterprises (MSMEs) produce in the "real economy" and the share of public procurement they won in order to fulfil that portion of added value stemming from public "procurement" (see Graphic below), which is decidedly lower: if MSMEs generate 58% of European national income each year, in public procurement that share shrinks to 29%.

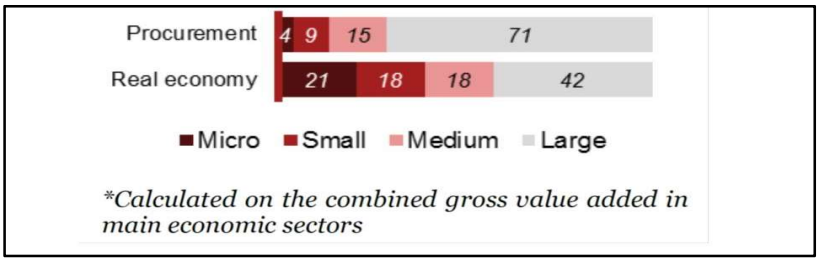

Figure 1 – Difference between the share of SMEs in public procurement (average 2009-2011) and their role in the economy (EU-27)*

We can safely interpret the difference between these two data points, "29" (58-29) as a discrimination index against MSMEs in public procurement, even if we could attribute part of it to other factors. Italy's position within this European index is certainly discouraging as it points to a peculiar national anomaly compared to the rest of the European Union.

[4] Graphic from "SMEs' access to public procurement markets and aggregation of demand in the EU", a study commissioned by the European Commission in February 2014.

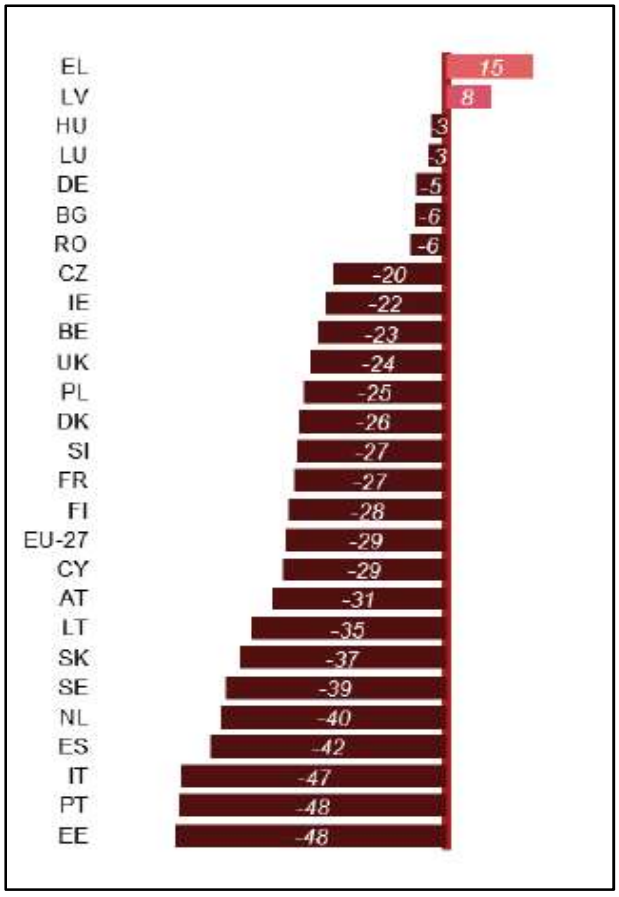

Figure 2 – Difference between the share of SMEs in public procurement and their role in the economy by Member State (average 2009-2011)

Indeed, where the European differential factor is 29%, in Italy it goes up to 47%! Italy ranks third from the bottom, just after the Republic of Estonia and Portugal in terms of the difference between share of awards of public procurement contracts to MSMEs and their respective share of the real economy. Such data point should undoubtedly be ascribed to internal anomalies within the country when it comes to the participation of MSMEs in public procurement tenders.

The cited study, commissioned by the European Commission, seems to also provide a possible decisive explanation for such a result, since, based on its own empirical evidence, it ascribes the drop in the share of contracts awarded to SMEs to centralized purchasing and larger contract values.[5]

Italian public procurement policy appears problematic compared with the rest of the European Union also when examining the official tables released by the Ministry of Economic Development based on the European Commission's data, in terms of the indicators of attention to SMEs, as stimulated by the European Small Business Act. While over the five-year period between 2009-2014 Italy's performance improved on some dimensions relative to its attention to SMEs, the most worrisome data point in the figure below (see highlighted part) refers to the evident drop when it comes to the indicator of attention to MSMEs in public procurement ("appalti pubblici e aiuti di stato") in Italy, whereas France, Germany and the United Kingdom show improvement.

[5] "Centralized purchasing has a considerable negative effect on SME access (on a *ceteris paribus* basis)". Ibid, p. 63.

Table 1 - Growth rates of SBA indicators

SBA Criteria	EU 27	France	Germany	Italy	UK
Entrepreneurship	0,8	1,0	1,5	-2,8	1,2
Second Chance	0,2	0,6	-1,3	-1,1	-0,4
Think Small First	2,0	2,6	2,9	1,6	2,0
State aid and public procurement	-0,7	0,1	3,0	-10,2	1,3
Finance	-0,8	-2,3	0,7	-4,6	-1,2
Single Market	2,6	4,9	1,4	7,2	1,6
Skills and innovation	1,0	0,8	1,0	5,6	0,9
Environment	1,0	1,0	0,6	-1,1	3,0
Internationalisation	1,3	-1,2	2,0	1,1	0,8

Source: Elaborated based on European Comission data

Based on these prima facie evidence, it seems evident that, to verify more accurately what occurred in Italy in this first turn of the century, we need to look at a more specific indicator. The evolution of the average lot size in tenders in these past few years, when centralization was promoted through a series of reforms meant to reduce the discretion and buying power of small contracting authorities, is often chosen by the Italian authority supervising public procurement, ANAC as a key indicator to gauge the extent of problems suffered by SMEs in this field.

We rely, in this respect, on the 2015 Annual Report of the National Anti-Corruption Authority where, referring to the below Figure 6.5 it is mentioned that "it demonstrates how in the 5-year period between 2011-2015 the average lot value for type of contract has seen a considerable increase, compared to 2011, in the average amount related to *services* and supplies *(+85.0%* and +50.5%) and a very slight increase, almost in a sinusoidal trajectory, in the average amount related to works (+7.1%). These data appear quite consistent with the evidence gathered in the last few years, which shows how a reduction in award procedures is usually linked to larger value amounts per tender, mainly due to the fact that calls for tender are issued by centralized purchasing bodies and large scale contracting authorities. Like in recent past, the value increase per tender does not seem to correlate to a significant increase in the number of lots. Tendering procedures organized by contracting authorities, therefore, cover lots that tend to have on average a higher value, reaching in 2015 the highest mean value of the last five years. *It seems, thus, that this year too we can justifiably claim that the structure of demand is not particularly advantageous to the participation of Small and Medium-Size Enterprises (SMEs) in the market of public procurement.*" In relation to this debate, we should only add that the phenomenon pointed out by ANAC (Italian National Anti-Corruption Authority) appears to be particularly serious in the service sector (purple line), to which belongs the applicant of the case at hand, Mondialpol.

A similar trend is confirmed by ANAC's most recent report: in the 5 years 2013-2017, the average size of lots for goods rose by 101% since 2013, and by 33.4% only in the last year. As for services, the numbers are 52,3% and 12,6%. The explanation provided by ANAC: "a greater base value of tenders, especially because of the procurement coming from central purchasing bodies or large procurers." (p. 132, Annual report 2017, ANAC).

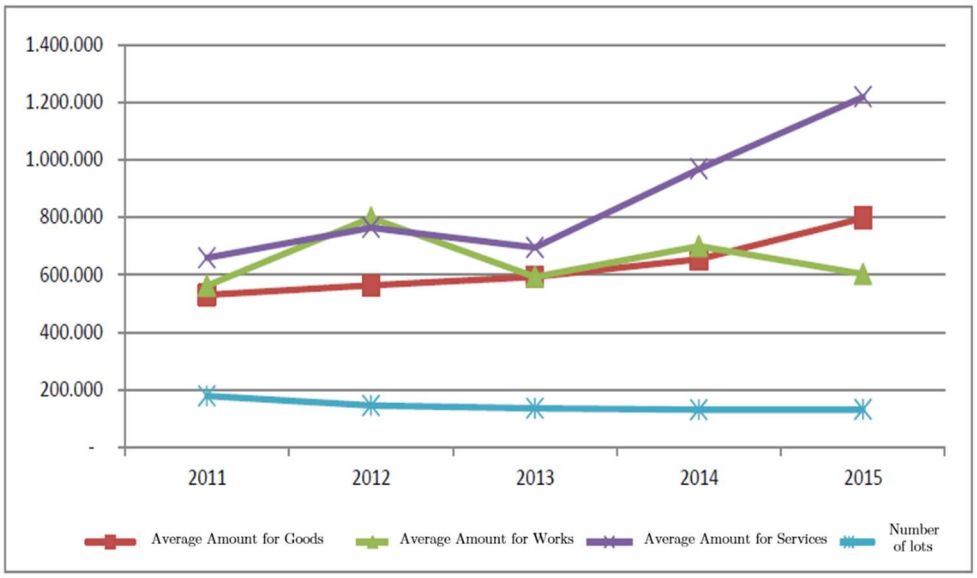

Figure 3 - Evolution of the total number of lots and their average amount by type of contract (procedures equal to or greater than 40,000 euros, ordinary and special sectors, 2011-2015 (Source: ANAC)

This section thus illustrates with ample policy details and data, how in the world of public procurement in Italy, along with the phenomenon of centralization, in itself potentially beneficial, a mechanism of demand aggregation has developed, which has necessarily impacted on the capacity to access of SMEs to public procurement and their probability of success in winning tenders. Obviously, a similar situation could be considered *unreasonable* only if alternative tendering strategies existed which did not undermine neither the objectives established by the law, nor centralized procurement or a wider participation of MSMEs.

Especially thanks to the specific case at hand, the one of surveillance services at issue in this paper, we can argue that the answer is likely to be affirmative: such strategies do exist and can be actively pursued without affecting any of the objectives mentioned above; these refer to decisions of lower aggregation and smaller - and therefore more numerous - lots.

3. Lot Subdivision in the procurement tender published on October 15, 2015.

Based on the proceedings relative to the tender discussed in the introduction, the first data to emerge, the most direct, objective and unquestionable at least, is the fact that for the small firm, Mondialpol, that complained against the Consip tender in front of the Administrative Court, it was impossible to take part in the Consip tendering as an individual entity, because of a lack of sufficient revenues (turnover), specifically in relation to the Consip's chosen size of the lot. As appropriately observed by Consip during the proceedings, Mondialpol could have gained access to the tender if the size of the lot under consideration had been reduced by two thirds. Beyond any other consideration to be discussed in the next pages, this first fact – the impossibility for one player to participate - represents an objective and undisputable loss for the Public Administration, since it reduces the competitive game both in terms of expected quality and expected contracting price.
Interestingly, Mondialpol asked the (only) 2 large firms that were finally able to participate to join them in a consortium and received a written negative reply by one of them. The fact that Mondialpol could not form a temporary grouping with another enterprise, despite its willingness to do so, serves only to confirm what was discussed above; however, it should be noted that an agreement between two enterprises to participate jointly in a tender does not, in principle, provide the same opportunity as the one coming from submitting an individual bid. If Mondialpol, for instance, had had a more

competitive cost structure than the other enterprise with which it were to join in a consortium, the overall offer of the temporary grouping would have inevitably had higher costs than the potential offer Mondialpol could have submitted if participating as a single entity, thus preventing the citizen/taxpayer to get the best value deal – in terms of quality/price ratio – available on the market.

Due to the way it was structured, Consip's call for tender, thus, reduces *prima facie* the best expected value of the contract simply by the fact of negating access to a particular offer that could have been submitted and evaluated by the tendering commission. It is significant to note that this advantage would have not been lost only in the event that Mondialpol had won the tender but also in the case it did not, since its access to the tender would have forced competing enterprises to become even more aggressive in their offering to the contracting authority in terms of costs and quality.

Beyond the issue of whether it would have been appropriate for SMEs to participate in the procurement under discussion, it is important to verify whether the expected costs from excluding the individual participation of such an enterprise exceed the expected advantages of such exclusion, taking into consideration the objectives set forth by the relevant national and European regulation.

Evidently, to justify the choice of such large-scale lots for the tender under discussion, Consip should have given as reason the possibility of deriving advantages from a set of other different strategical factors, which would have not materialized had the lots been so reduced so as to allow for Mondialpol's participation. As stated above, it must be however clear that these advantages could not result from some typical benefits of a larger level of centralization - such as the quality of the call for tender or the better litigation capacity of Consip - because these would have been available even in the alternative case of smaller lots yet still centralized under Consip.

Consip indeed identifies "demand risk" as one of the potential additional costs linked with a strategy of reducing the number of lots (and therefore its avoidance as one of the additional benefits of larger lots). According to Consip's in its case defense, "lots that are "excessively reduced in value" risk facing a demand that is too dependent on the occurrence of a single order (if a large order is submitted, the lot is sold out, vice-versa the contracted supplier does not work or does so only on small contracts that are not well remunerated)".

It should be first of all noted that the "potential" lot at issue, the one of such value that the small firm Mondialpol could have participated, amounts to a total value that is far from insignificant (3 million euro) and, thus, it would have been "higher" than the values of those tenders that the single contracting authorities would have resorted to in the absence of Consip's centralized procurement (as one can verify by looking also at the autonomous tenders in the sector of surveillance services published by ANAC).

That said, this criticism by Consip, on account of a so-called demand risk, reveals most of all Consip's inability (or unwillingness) to analyze the demand generated in the specific region and then to adapt to it by tailoring the size of the relevant (smaller) lots in such a way as to avoid and prevent the potential demand risk.

A similar argument could be made for the construction of those geographical lots for which demand would have exceeded the maximum amount of the lot itself because of the existence of some large administration. In this case, specific lots could have been conceived for such administrations, obviously anyway smaller than the one that was built and eventually annulled. Put it another way, the demand risk could be reduced to zero by Consip's (high indeed) established competence and its finely detailed knowledge of the dispersed nature of demand in the relevant territorial sector, at a much more granular level than the choice that was made of the lot size in the tender at issue.

Going back to the data submitted in Court by Consip, fully aware that this does not represent the only valid alternative scheme, there did exist the possibility of structuring the tender instead than with only one regional lot of almost 11 Mn euro, with a lot exclusively for the largest territorial purchaser A (correctly presenting the argument based on a demand risk), amounting to 4.2 mn a year and to which Mondialpol could not have gained access, another lot of 2.2 mn a year (again correctly presenting the argument based on a demand risk) exclusively for the second largest procurer B, in which Mondialpol could have instead participated and where the remaining 4.350 million, based on the size of lot 13, could have been divided in two or more lots to meet the aforementioned extremely "high number of minor orders". In such a way Consip would have given Mondialpol (and other small and medium-size enterprises!) the true opportunity to compete and to reduce expected costs. This would have all been to the advantage of competition without modifying any of the overall dimensions mentioned by the Italian rationalization plan. The "single contracts" mentioned above for the 2 large contractors A and B would have benefited from the quality of Consip's tender, inherent in its superior capacity of drafting the procurement specifications and of ensuring the optimal legal assistance at the stage of litigation, hence reducing transaction costs while shortening the publication phase of the tender and the timing and precision of the contract. This would have also freed up resources for the two local buyers A and B, which would otherwise have been tied up in drafting an individual tender on surveillance, and which could have instead dedicated time to achieving their own internal strategic objectives, taking full advantage of the centralization via Consip.

Besides, as an added advantage, it would have avoided the paradoxical outcome that saw only two groups of contractors participate in the tender for lot 13, which again confirms that a similar aggregation of demand, in the context of centralization, hinders free competition.

Yet Consip, in its defense, found further potential risks in a strategy that relies on a larger number of lots. It claims in fact that a growing number of lots could lend a hand to collusive bidding and non-competitive allocation, whereas a small number of lots, compared to the number of big players, would generate competition among the latter.

Such a conclusion seems quite paradoxical though; the market we are analysing of surveillance services does not comprise only large enterprises but rather it is known that "35% is controlled by multiple small and medium-size enterprises," as reminded by Consip itself. The aforementioned rule of a number of lots lower than potential participants, known by many economists and suggested initially by the Italian Antitrust authority in its examination of Consip tenders[6], is only applicable when the tender sees the exclusive participation of large companies, which, in the absence of competing small and medium-size enterprises, tend to form cartels, the more so the larger the number of lots.[7] Yet, if smaller lots were to be designed, the market would be mainly made up of small and medium-size enterprises and in that case there would be, as is well known among economists, the added advantage (besides a larger participation) of making a cartel formation impossible because the access of competitive small and medium-size enterprises to the bidding would force larger companies to reduce their prices accordingly, thereby also reducing the profits deriving from a monopolistic cartel formation, an outcome which would clearly be to the advantage of citizens and taxpayers.

We can further add that the risk of cartel formation would also be significantly reduced by the participation of more *outsiders* that can bid individually (and not in groupings with potential members of cartels). While such principle holds general relevance, it is particularly significant when

[6]http://www.agcm.it/component/domino/download/C12563290035806C/5E274DA065844B61C1256CD1003E2E20.html?a=AS251.pdf

[7] See Bos and Harrington, http://assets.wharton.upenn.edu/~harrij/pdf/rje10.pdf .

dealing with the surveillance sector at hand, since it should not be forgotten that in Italy the latter still operates under the residual impact of an oligopolistic market due to the limited number of prefectural licenses and their territorial principle.

A last point needs a separate and detailed empirical confirmation.

Consip stresses that there is a risk that successful bidders for small contracts on small lots may view them as not very profitable due to little demand. In this case, a large company could decide not to bid, leaving only small enterprises to fill the demand. Even if this were to be the case, in the economic literature available on the matter, we can find empirical evidence that this would still entail significant benefits for the contracting authority.

In Japan, for instance, it was investigated what happens when small tenders are reserved for small businesses, excluding *de jure* larger enterprises.[8] A similar operation led to a greater participation of large enterprises in large tenders, reducing costs for large work orders by about 1%. With regard to small tenders where more small businesses than large ones participate, the overall number of bidders increased: each large enterprise not participating would open the space for 1.56 additional small businesses, thus also leading to a reduction in cost of about 0.22%. This program attracted small businesses and increased their participation by about 40%, creating an overall advantage in the cost incurred by the contracting authorities. A similar end-effect could result *de facto* from Consip's transition toward tenders that are better differentiated on the basis of size, whereby larger enterprises would participate in large procurement tenders, making space for more small business alone or almost alone to participate in small tenders (for small lots). If we take into consideration the impact on its market, Consip's lot subdivision does not, therefore, appear reasonable.

Unless the economies of scale generated through aggregation are so significant that they can make up for the loss of all the indisputable advantages, as proven above, of a fully competitive environment, which could be created by allowing individual access to Mondialpol and other potential small and medium-size enterprises by means of a large number of centralized lots procured by Consip.

It is then inevitable that we address one final issue, often raised in the discussions about the topic, the one of how to find a fair balance between the principle of maximum participation and the need to promote the aggregation of demand through mechanisms of centralized purchasing by the Public Administration, so as to ensure the appropriate level of services, the consistency of the offer and the reduction of unit prices relative to the economies of scale generated by the aggregation process.

However, it is not at all clear to what extent such fair balance should be pursued: maybe to the point that only one enterprise can participate, for the sole purpose of maximizing the economies of scale? or maybe with a tender with just one large-sized lot for the whole country instead of 13 regional lots? Or with the minimum number of lots such that only two enterprises are able participate, as in the case of lot 13? Solving such dilemma may prove not only difficult but also misplaced.

Indeed, it is certain that the best strategy cannot *always* be one that leads to the so-called "economies of scale" via large-scale lots. Indeed, it is common knowledge that such condition, even when available, is not in itself enough to generate expenditure savings for the contracting authority: where economies of scale do in fact materialize in the absence of competition (either because of existing cartels or because of a lack of competing businesses), any advantage that may arise from

[8] Small business set-asides in procurement auctions: An empirical analysis, Jun Nakabayashi.

the size of the tender does not actually benefit the contracting authority or the taxpayer, but rather the supplier, who is indeed the one to gain the most profit.

As far as it concerns for this debate, it is even more crucial to observe that there are sectors where the economies of scale are weak or non-existent and thus where the number of the lots does not impact in any way n costs and unit prices; in these instances, other factors dominate the debate, such as a larger participation via smaller lots.

The service sector, in opposition to manufacturing, has often been deemed free of significant economies of scale. When it comes to services, in order to expand production, there is always the need for more personnel and rarely can the same person perform better when the size of the service grows. As it pertains to surveillance specifically, in order to control a given territorial space and ensure the desired degree of safety, one person will always be needed, no matter if the tender is of a certain size or 10 times that size, with additional territorial areas to cover. Indeed, in the case of the specific annulled tender, when demanding a certain turnover amount following the award of a lot in the call for tender, Consip specifically requested that a "bidder who intends to participate in the tender of more than one lot meet the participation requirements … for at least an amount equal to the sum of what is required for the bidding on a single lot". This clearly demonstrates that even the centralized contracting authority does not believe that by being contracted for several lots, an enterprise may become more profitable on single lots, hence alleviating the execution risk.

It is useful to point out that Consip in its tender rules of the annulled tender spells out the reasons for not splitting the contract in functional lots: "the key aspect of the category of products with regard to the present tender is the integrated supply of services for the purposes of implementing an *anti-crime security plan* designed by the supplier, which provides the appropriate amount of human, technological and physical defences in a coordinated fashion. The subdivision of the above mentioned services in functional lots would have compromised the *primary objective of containing the crime risk*, which, as stated, requires an integrated supply of services, with no fragmentation." (emphasis added).

Notwithstanding considerations as to whether it is appropriate to split the tender in functional lots, it should be emphasized that, in any case, the alleged reason given for such a decision cannot justify the size of the individual lots (or the territorial area they cover), since when the single contractor operates at a larger distance from the physical location where the service is required (in the case of a larger-sized lot) one does not see how there can be any real advantage in terms of crime risk containment. On the contrary, the fact that licenses for security services are granted on a provincial basis, matching those issued by provincial prefectures, seems to identify in the provincial dimension (smaller than the regional ones chosen by Consip) the best territorial area for services aimed primarily at containing the crime risk.

If economies of scale are, thus, not common in the sector under discussion, the decision to exclude from the tender enterprises such as Mondialpol, preventing them from bidding individually, appears to be based on totally unreasonable motivations. Thereby, the centralized public procurement authority is indeed prevented, because of its own choice, from taking advantage of a potentially better quality/price ratio, justifiably the primary aim of a rationalization strategy for the public sector, at least within a category of services such as surveillance. A centralization strategy based on a larger number of lots would have guaranteed better such results.

4. Conclusion

After losing its first-degree defense, Consip and the Italian Ministry of the Economy appealed the decision to the Council of State ("Consiglio di Stato". Here too, they succumbed. It is worth quoting some passages that underly the decision that confirmed the annulment of the Consip tender.

Consip accordingly has no right to "freely and arbitrarily choose how to subdivide the tender… any choice of the public administration, even the lot subdivision of a public contract, can be challenged in an administrative court … aggregation and centralization of purchases should be closely monitored to avoid an excessive concentration of purchasing power and collusion, and to preserve transparency and the possibility of access to the market by SMEs".

Once this is said, it remains to be seen how to avoid that such strategic issues are solved "too late", at the pathological level, in a court, impairing the potential for a procurement cycle to function properly without delays and transaction costs due to avoidable litigation.

In the first degree sentencing one can find a revolutionary suggestion by the TAR Italian Court, likely to affect Central Purchasing Bodies in the peninsula for years to come and maximize the chances that SMEs are duly taken into account in CPB's tenders: it is necessary to evaluate if the subdivision of the tender has "allowed to define the *optimal territorial context*, that is, the context in which competition … can thrive better with the ensuing benefit, beside the one for the market… for the public procurer and thus for citizens, both in terms of quality of service … and prices". (emphasis added).

One might hope that in the future such considerations will be taken into account ahead of time so as to avoid judicial dissent. One must stress that the solution does not necessarily preclude an optimal organization of public procurement at the national level to give up on centralization; rather, it requires centralization to be focused on these dimensions that are naturally advantageous, unlike aggregation. The Directives do help in many ways, including their focus, for example, on the introduction of the criterion "personal and proximity services". As mentioned by Luis Tavares while reading this article, "I believe that there has been a systematic mistake in public procurement denying a general consensus of Management Sciences, assuming that bigger is always better! Obviously if we need some home rehabilitation we do not consider as a qualified firm a big construction company!".

One final point. The economic analysis offered in this paper focuses exclusively on the short term advantages, in the European market of public procurement, resulting from a centralizing strategy that can provide more access for SMEs, avoiding those unreasonable restrictions that limit competition, like aggregation of purchases where there is no need of it. However, the economic literature has shown that most of the benefit resulting from a more open participation of micro and small firms comes mainly in the long run, both in the local and international private markets where the SME will successfully gain from the experience it has gained in the implementation of public contracts, and also in the public market where the contracting authority will benefit from the higher quality and ever increasing number of bids submitted also by the grown SMEs. These advantages, not mentioned in our paper, make the case for SME-oriented strategies in public procurement (like avoiding unnecessary aggregation and bundling) even more relevant.

CASE STUDIES

The Amagasaki Pilot Social Impact Bond in Japan -Participation of SMEs in Public Markets-

Shinji Hosomi

Abstract

Social Impact Bond (SIBs) attracts massive attention recently not only by major enterprises, but by SMEs in Japan to solve the social problems. This paper analyzes the first SIBs case on youth employment support in Amagasaki, Japan as well as the first SIBs case in Augsburg, Germany. Further, it considers the entry of SMEs that are familiar with local fields and circumstances to realize public-private partnerships and examine the possibility of their participating into the SIBs in Japan. SIBs invite the process improvement of the public procurement. Across SIBs, participation of SMEs in solving social problems conforms to the growth strategy of the Japanese government, and as a result to contribute the process improvement of public procurement.

Keywords

Social Impact Bonds (SIBs); Youth unemployment; SMEs; Amagasaki; Augsburg, Public procurement

1. Introduction - Social tasks common to advanced countries

In Japan, the employment environment for youth has deteriorated since the late 1990s, and the reports on NEET and withdrawal have increased significantly. According to the data released by the Cabinet Office[1] in June 2017[i], there are 770,000 unemployed in 15-39 years old, which is 2.3% of the population in this range. The economic downturn in the Japanese economy is said to be "Lost 20 years", incurred a style of irregular labor, which led to a rapid increase in temporary workers. Further, new graduate students who dropped out of job hunting couldn't get on the rail of society successfully, which resulted in one of the causes of increasing temporary labor force as well. Although the employment environment has been recovering in accordance with improving economic situation over the past few years, regular graduates who were unable to ride on the rails are still in a higher range. So far, Japanese government has taken various employment support, few of which led to the satisfying result of declining the number of young unemployed. In other words, a new unemployed are born every year. In general, withdrawal has been considered as a phenomenon peculiar to Japan, while according to newspaper[2], similar phenomena have been reported overseas for example in Italy, isolating from the society. In the severe financial situation, the central and local government is seeking support for living reconstruction by early intervention. It is considered effective for private enterprises having good level of knowledge to support in the early stage. Collaboration based on the framework of public-private partnership has been planned, and SMEs familiar with the real circumstances of the region are likely to be able to participate in the public market as the key players of SIBs.

[1] Cabinet Office, Government of Japan, accessed at
http://www8.cao.go.jp/youth/whitepaper/h29honpen/pdf/b1_03_02_01.pdf (20 Dec 2017)

[2] Yomiuri Shimbun newspaper dated 31st August 2017, World in depth, Increasing Hikikomori (withdrawal) in Italy

2. Social Impact Bond

2.1

SIBs is a kind of payment by results (PbR) typed public contract model. It is a form of partnership involving public and private entities (governments, investors, procurement organizations, NPOs, social enterprises, intermediately). In the definition of OECD, SIBs is a type of PPP, and social services are supplied by PbR scheme, where government, foundation, companies are joined as procurement players.

2.2

Why can SIBs contribute to solve youth unemployment problems? It may be able to explore a part of cause by the social problem solution approached under government control exclusively in the past. A government project might end up regardless of the effectiveness of the outcome. Even the high project costs are incurred, continuation is guaranteed. Further, compensation for the project is paid to the activity itself by the party, not to the expected outcome. By adopting performance oriented approach to improve the unemployment problem, there is some expectation that improvement of activity would be aimed at better outcome. To solve the unemployment problem of young people, it is considered significantly to introduce and learn from the business management method.

2.3

There are three types of contract forms. The first one is a direct contract type, between the government and the service provider. The second one is a SPV contract type between government and investor owned SPV, and then the SPV is a two-tier contract with a service provider. The third one is an intermediately contract type. Contract between government and intermediately, and plus the intermediately contracts with the service provider. (Bridge Impact + 2014: 20-23)

Regarding the contract type, if the target value would not be achieved, the investors might lose everything they spent including the principal. It is a high risk type. The other is the type that a mid-time outcome (output quantity) is set up and is paid for the achievement step by step.

3. SIB case in Japan

3.1 Background

In 2015, the pilot project was implemented to support young people with withdrawal of welfare households in Amagasaki, Japan for employment support. Due to severe financial situation by local authority, this project was programmed supporting by Nippon foundation. Amagasaki city was ranked the 4th worth welfare recipient nationwide, according to the data by the Ministry of Health, Labor and Welfare. It is in the urgent issue to reduce the expenditure. Amagasaki, located between Osaka and Kobe, has been playing an important role of the reconstruction and prosperity after the World War II. The Hanshin (Osaka-Kobe) industrial area was formed in the Osaka gulf, where the heavy chemical industry cluster has been built in Amagasaki. In the period of high economic growth era in Japan, they faced a shortage of labor force and implemented measures such as free nighttime school for promoting domestic immigration from the rural area in the other region. As a result, Amagasaki became a big capacity of immigrants from western Japan. In 1974, the population of the city exceeded 550,000, growing to the 12th scale in the whole country. However, due to subsequent shift of Japanese industrial structure and withdrawal from factories, the population has continued to decline, and as of December 2017, it is 451,095, decreased by 100 thousand from the peak, with ranking the 37th in Japan. What is more serious thing nowadays is the fact that the people on welfare are the worst 4th place, as mentioned. Workers who lost the jobs due to the withdrawal of

the factory cannot reconstruct their living. They become a day-to-day living and have no alternatives other than to receive welfare from the municipal.

Figure 1: Location of Amagasaki

3.2 SIB contents

A SIBs project has been launched to increase employment with implementing a visit support program targeting young people in living welfare households. The Nippon Foundation provided the fund, and the city selected the target person with the caseworkers. The NPO "Training Net" was appointed to the approach as the service provider. As a project evaluation advisor, Musashi University in Tokyo was assigned to review the process and results. The scheme was supposed to improve employment of 6 employees and 4 possible employees out of 200 candidates. The cost reduction effect was expected at 13 million yen[3], assessing the benefits resulting from the reduction in welfare expenses and income tax payment, while the total project cost was set at 13 million yen, almost the same amount. One year after the program, the results of the project were far from satisfying.

Why did it fail? Firstly, there were only 20 people to be approached for visit support, only 1/10 of the population. In the first stage of listing the target, the city staff had no appropriate data, and it was necessary for them to provide the data arrangement. Then, the caseworkers were slow in submitting the list, because it took time to sort out the target who accepts the visit support. Each caseworker has different view angle individually so that it was difficult to make judgement on who should get the specific support. With various factors i.e. material preparation, differences in caseworker's judgment and etc., the initial activity were slow decisively, and as a result, only 20 people were listed finally. In addition, it took time consuming to agree and execute processes such as support process, information and budget control.

3.3

Regarding the process of public procurement, the Nippon Foundation was responsible for the role of investors as this project is positioned as social experiment to penetrate SIBs into Japan. Also, the contract type was executed in a high risk type without taking measures such as setting an intermediate outcome. Investors have played the role of the Nippon Foundation as well, who is the famous philanthropy organization over half century. In this project SMEs are not involved. On the other hand, there are many SMEs in the area who seek the social contribution. The issue is that lack of guideline in terms of fund management as to where and how to invest. There is the good traditional culture in Japan that a lot of fundraising is to be gathered once the purpose is clearly shown. In that respect, it can be said that recognition of SIB's and contribution to solving social problems is important for SIBs.

[3] Social Impact Bond Pilot case (Oct 2016) issued by Japan fundraising association, accessed at https://www.nippon-foundation.or.jp/news/articles/2016/img/63/4.pdf (22 Dec 2017)

3.4 Setting outcome

The fact that the number of visit support target decreased from 200 anticipated to 20 was a painful disadvantage to achieve the target. It is obvious from the case of Amagasaki that we made benchmark numerical values exceeding costs related to implementation in benefit calculation. Concerning the expenditure, the benefit is raised to 13,268,548 yen against the total project cost of 13,000,000 yen. In order to calculate the benefit, achievement targets of 6 workers and improvement of work possibilities of 4 people are set. The outcome goal is considered to be the benefit calculation estimating the total project cost. If the benefit target is less than expenditure, it does not meet the real purpose of SIBs. While the benefit target greatly exceeds target value, it means that the target value may be set too high, to be difficult for reimbursement. It is necessary for the stakeholder to draw up the appropriate target amount based on the purpose and difficulty of the project, proficiency of the service provider, etc. while examining the outcome goal in the future and at total project cost.

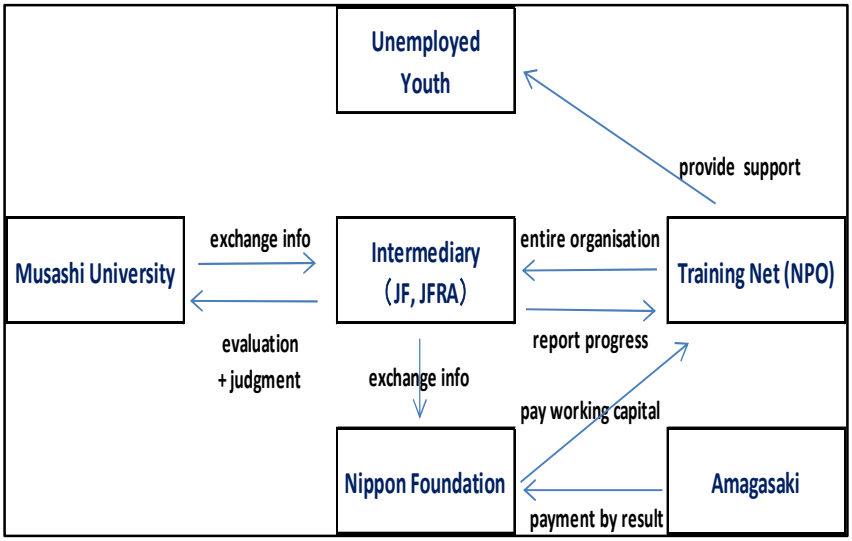

Figure 2: Amagasaki's SIB's stakeholder relationship chart.

(Source: Constructed by author, referring to http://www.nippon-foundation.or.jp)

3.5 Chapter Summary

The Amagasaki case is the purpose of accumulating knowledge as a pilot for the future model. Regarding outcomes, the target figures were not reached during the pilot period. However, after evaluating the usefulness of the initiative, the city decided to continue the project by own budget after the SIBs period ended. Although it did not achieve the numerical target as a pilot case, it is considered to be connected at the next stage. This suggests that SIBs will be applied to public procurement in the future. Another possibility is the role of social enterprises as investors. Further, if the attractiveness as an investment market increases, the possibility of fund investment is sufficiently considered even for SMEs. This is nothing other than SMEs participating in public procurement activities. Hence the advocacy activities to raise this momentum are important.

4. A case of SIB of Augsburg, Germany

In October 2013, as the first project of the Continental Europe, SIBs of youth employment support was constructed in Augsburg, Germany. Augsburg is an industrial city located 80 km northwest of Munich, with a population of ca.260, 000 and the third largest population in Bavaria. Curiously,

Amagasaki and Augsburg signed a partnership city agreement in 1959[4], because of the connections between Rudolph Diesel, inventor of diesel engine and YANMAR Diesel of Japanese Company. Mr. Diesel's father came from Augsburg, and factory of YANMAR Diesel was built in Amagasaki. It is the first partnership city agreement between Japan and Germany, which has already 59 year history since then.

Augsburg's SIBs was set as a target for unemployed young people under 25 years old to work for 20 or more people in the city, including practical training, to work in the city for over 9 months, and to join the social insurance. Four NPO were participated as the service providers. Although the investment amount is not disclosed, the redemption interest rate is set to ca. 3%.[5]

Augsburg showed 21 people out of 100 achieved goals, the project was successfully completed, and the investment amount agreed upon was redeemed. In addition, the four investors made another social project with the return utilized with the Augsburg case, which was wise spending of funds.

The result in Augsburg was contrary to that in Amagasaki. What is the difference between the outcomes of these two cities? One reason is that the target setting and the length of the project. Amagasaki's case seems to be more challenging because they try to reach for the withdrawal ("Hikikomori" in Japanese word) among unemployed people. On the other hand, in Augsburg case they approached unemployed people who are not engaged in job hunting. The level of difficulty might be different. In addition, Amagasaki project ran only one year for the implementation period, while Augsburg project ran two years three months. It is obvious that the difference of the period affected the actual outcome.

[4] Augsburg accessed at http://www.augsburg.de/buergerservice-rathaus/rathaus/internationales/partnerstaedte (20 October 2017)

[5] Juvat accessed at http://www.benckiser-stiftung.org/content/5-blog/75-ziele-erreicht-der-erste-deutsche-social-impact-bond-ist-abgeschlossen/overview_finalization_SIB_germany_en.pdf (latest connection 20 October 2017)

Incidentally, there are multiple investors and evaluators as subjects, but the fact is that the second SIBs is not programed yet in Germany. As an important subject in public procurement innovation including establishment of SIBs, issues of human resource development and benefits attributable to municipalities are raised. As a result, municipalities do not get motivated by the mechanism in which benefits are brought to the central government beyond the municipality. It is quite important to undertake the resolution in order to promote public procurement by SIBs.

Place	Amagasaki, Japan Population ca. 450,000, badget pa $ 285 mil.	Augusburg, Germany Population ca 260,000, badget pa $ 98 mil.
Timeline	07/2015 - 06/2016 (1 year)	9/2013 – 12/2015 (2 year 3 months)
Investment	ca. $ 110,000	ca. $ 330,000
Target group	Unemployed adolescents in Amagasaki under the age of 15 - 39 years old with household on warefare	Unemployed adolescents in the Augsburg region under the age of 25 years old
Outcome founder	Japan foundation on behalf of Amagasaki	Bavarian state Ministry of Labour and Social Affairs and Family and Integration
Service provider	Sodateage net (means training net)	1. programs over the last two years before being in touch with the project 2. Education Management Augusburg 3. Child and Youth Services Hochzoll 4. Joblinge
Intermediary	Japan foundation / Japan fundrasing	Juvat
Invester	Japan foundation	1. BHF-BANK Foundation 2. BonVenture (a social venture capital fund) 3. BMW Foundation Herbert Quandt 4. Eberhard von Kuenheim Foundation - the Foundation of BMW AG
Evaluation / Monitor	Musashi University	1. Dr. Mohren & Partner(low office) 2. Faculty of Economic and Social Sciences at the University of Hamburg
Target	6 of 200 candidtes target start working, and another 4 working to be	20 members of the target group - into an apprenticeship or gainful employment (in both cases subject to social insurance) - for more than 9 months - in the city or district of Augsburg, or the district of Aichach-Friedberg
Return to investot	not setting	max. 3%
Result	Not achieved	Achieved and return for invester

Figure 3: SIB comparison with Amagasaki and Augsburg (JUVAT)

5. Participation of SMEs in public procurement

SIBs is a public procurement mechanism with public utility of solving social problems. It is possible to join the scheme for the private sector as investors from the viewpoint of CSR. If SIB is viewed as the financial product, it requires some more argument to forecast the risk of the investment. Measures to attract investment by appealing "social aspects" contribute to the solution of the fundraising.

SMEs who know the region well have a significance of existence as SIBs players. Especially service providers familiar with local circumstances are able to participate as players to solve social problems. Regional financial institutions (e.g. regional bank) can form a bond and be at the forefront of fundraising. As an implementing player, local NPOs with skills of visiting support can enter the framework as a service provider. Comparing Amagasaki and Augsburg cases, the difference of success and failure was said to be the target setting and the length of period, furthermore the service provider in Amagasaki was alone, and Augsburg had four NPOs. In addition, the evaluators also have multiple in Augsburg. A variety of methods and perspectives are born by multiple stakeholders' efforts, and there is a high possibility that best practices would be exchanged. The expected effect of collective impact among stakeholders may come out. It is highly significant that Japanese SMEs enters into the public procurement market, such as NPOs and local financial institutions. SIBs is likely to become a gateway to the public procurement market in Japan.

There are two possibilities to be considered participating SIBs by SMEs. One is the public procurement by the social enterprises. The number of Social enterprises in Japan count ca. 200,000, among which NPO accounts for 1/4. Although it confronts various social problems, the source of the activity often relies on donations and subsidies, and weakness of fund procurement aspect has been pointed out for a long time. If the way of financial resources is secured through participation of SIBs, activities of these SMEs are expected to expand massively based on the stability of the financial base. Another possibility is the role of social enterprises as investors. If the attractiveness of investment market increases, then the possibility of fund investment for SIBs is sufficiently considered even by SMEs. Last but not least, the advocacy activities to mention about the public innovation by SMEs' participation into SIBs are significantly important.

6. Final remarks

Regarding the process improvement of public procurement, SIBs is categorized as private outsourcing project, although the municipality pays fee to the service provider according to the outcome and evaluation, the mechanism that the compensation increases or decreases with its evaluation is new in the public procurement field. If the outcome is poor, the compensation would decrease and the investment yield will also decrease, so service providers will have discipline for improvement. This "discipline" is the source of driving force. The method started in Europe will brought to Japan, but first of all, in order to take root in the private consignment mechanism linked with outcome, a broad framework is developed by forming with public and private sectors as well as forming in which SMEs can participate. Especially in Japan, there are so many SMEs, with 3.81 million companies[103], accounting for 99.7% of the total. In addition, when measured by added value of manufacturing industry, SMEs account for 142 trillion yen[104], accounting for 51.2% of the total. Apart from the macro figures, for example, having a look at the convenience stores opening with 24/7 service, they are nowadays the security infrastructure in the region, with over 56,000 stores nationwide. There are a lot of opportunities for small companies to be active in various scenes. Utilization of diverse entities is also a pillar of growth strategies by Japanese government. In the

[103] The small and medium enterprise agency accessed at http://www.chusho.meti.go.jp/sme_english/index.html (latest connection 25 February 2018)

[104] 142 trillion yen = ca. 1.09 trillion Euro

field of public procurement, the author would like to conclude the participation of SMEs in the new public framework called SIBs is further required and activated.

References

Big Society Capital, *Social Investment Insights Series.* London: Big Society Capital 2014

Bridges Impact+, C*hoosing Social Impact Bonds, A practitioner's Guide.* London: Bridges Ventures 2014

Brest P and K Born, "When Can Impact Create Impact?" *Stanford Social Innovation Review* 2014

Cabinet Office, Guidance on the template contract for social impact bonds and payment by result. London: Cabinet Office 2013

Clifford J and Jung T, Social Impact Bonds: Exploring and Understanding an Emerging Funding Approach, 2016

OECD *Social Impact Investment: Building the Evidence Base.* Paris; OECD Publishing 2015

Social Impact Bonds, Opportunity and Challenges in the Netherlands, ABN AMRO BANK NV 2015

Social Finance, *Guide to Social Impact Bond Development: A technical Guide to Developing Social Impact Bonds.* London: Social Finance

Augsburg Germany SIB https://emmatomkinson.com/category/augsberg-germany-SIB latest connection 1st September 2017

Eleven http://www.benckiser-stiftung.org/eleven latest connection 1st September 2017

JUVAT http://www.benckiser-stiftung.org/content/5-blog/75-ziele-erreicht-der-erste- latest connection 15th October 2017

Osaka SIB http://www.pref.osaka.lg.jp/attach/27006/00000000/houkokusyo.pdf latest connection 15th October 2017

Tomkinson, E. Social Impact Bonds and Pay for Success – are they synonyms http://emmatomkinson.com/2014/07/03/social-impact-bonds-and-pay-for-success-are-they-synonyms

latest connection 15th October 2017

The Art and the Science in Winning Public-Sector e-Procurement Contracts particularly by Small and Medium-Sized Enterprises [SMEs]

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Abstract:

This paper considers public-sector purchasing in the EU and particularly the UK and how SMEs have benefited and can further do so, from the opportunities presented by e-procurement by addressing its perceived barriers through integrating via this on-line platform, traditional sales and, marketing skills & experience, together with project management expertise, to successfully bid for contracts. A glossary of terms; and checklist & discussion of 'dos and don'ts', for SMEs seeking to successfully engage with e-procurement public markets are presented, based on the analysis of numerous case studies.

Keywords:

bid; bid-consultant; bid-writer; bid scoring/contract assessment; contracts; Contracts Finder; EC; e-procurement; EU; good practices; government; ICT; NHS Supply Chain; on-line branding; portals; project management; public-sector procurement; sales & marketing; SMEs; TED; tender; UK.

1. A brief background to public e-procurement and the role of SMEs

United Kingdom [UK] Central Government procurement spending was around £45 Billion (about 51 Billion Euros) in 2015, of which approximately £5 Billion (5.65 Billion Euros) was placed directly with SMEs[1]. However, all forms of public sector spending for goods and services (by hospitals; universities; local governments, including schools & colleges; housing bodies; etc.) in the UK exceeded £ 230 Billion (260 Billion Euros) annually[2].

In August 2015, the UK Cabinet Office increased the target for the percentage of government spending to be placed with SMEs, from 25 to 33 per cent, by 2020. The target covers both direct contracts with SMEs and spending that reaches SMEs indirectly (where the government's contract is with a larger provider that subcontracts with SMEs as part of its supply chain).

In 2016, the UK Government's Department for Business, Innovation & Skills [**BIS**] estimated there were 5.4 million SMEs in the Country. The definition of an SME followed that of the European Commission: an entity engaged in economic activity employing fewer than 250 people; having annual sales of, or less than, 50 million Euros (£44.26 million); and assets of or less than, 43 million Euros (£38 million). Most were private sector businesses, but the definition included many voluntary, community and social enterprise [VCSE] organizations[1].

To achieve the target of 33 percent of government spending to be placed with SMEs by 2020, the UK Government has sought to remove some of the barriers that SMEs face when bidding for public sector contracts. Among the constraints identified were the poor visibility of opportunities and burdensome pre-qualification requirements. Therefore, the Government abolished (supplier) pre-qualification questionnaires for low-value contracts (£100,000 or about 113,000 Euros, or less) and required the greater use of e-procurement information systems, such as 'Contracts Finder' (a portal for advertising government tenders, first launched in 2011). Furthermore, the Social Value Act 2012 had already required government bodies commissioning a contract for supply of goods and services,

to consider wider social, economic and environmental benefits of the procurement process (which in particular, is often thought to benefit VCSEs).

Largely because of the increased use of e-procurement systems, processes, innovations and simplifications discussed above and elsewhere in this paper, SMEs increased their share of the public procurement market in the UK. Public bodies spent £268.3 Billion (about 304 Billion Euros) on goods and services in 2015/16. The proportion of direct spending with SMEs increased from 6.5% in 2009-10 to 10.9% in 2014-15. However, by the same year, £4.9 Billion (about 5.55 Billion Euros) or 27 percent of government spending was received in total by SMEs when indirect spending is included ('indirect' meaning being part of a larger contractor's supply chain to fulfil a government contract)[3], exceeding its pre-set target of one-quarter (or 25 percent) for this date, by an additional 2 percent.

In 2012, The European Commission put forward a 'communication' to the European Parliament; Council; European Economic and Social Committee [EESC]; and the Committee of the Regions, entitled 'A Strategy for e-procurement'[4] which presented the strategic importance of electronic procurement (e-procurement) and set out the main actions through which the Commission intended to support the transition towards full e-procurement in the EU. At that date, the Commission believed that the objective of completing this transition by mid-2016 was feasible (albeit recognising that this would more probably be 2017, given the two years needed for transposition).

The EC's ambitious proposition envisaged that a total of around 100 Billion Euros (£ 88 Billion) could be saved annually from the 2 Trillion Euros (£ 1.77 Trillion) overall public procurement spend across the EC by mandating e-procurement must be used for this purpose. This was to include posting all contract opportunities online, making all tender documents available, the electronic submission of bids and making all communication digital. The target-date for Central government bodies to achieve all this was mid-2014. The wider public sector was to seek to achieve the first two elements by the same date, but mid-2016 was suggested for meeting the communication aspect. The Commission projected it could itself move to full e-procurement of its own purchasing needs by mid-2015.

However, while welcoming the EU's statement as a proper and ambitious objective, the EESC recognised this would represent a massive acceleration in comparison with what had been achieved in the (then) previous eight years. Indeed, the Commission was itself then currently completing a study (due for publication before the end of 2012) to show the level reached in each country, with the average percentage of public e-procurement remaining very low, for example, Italy had achieved only 4 percent. Thus, the EESC emphasised that numerous conditions on such issues of standardization, interoperability and accessibility, etc. would have to be met if such an objective was to be achieved[4].

In addition to the projected cost savings for government authorities; the European Commission was also seeking to increase transparency and reduce corruption; promote increased integration of EU markets; also supporting SMEs, believing that any new costs associated with implementing bidding for contracts on-line, would quickly be offset by the benefits of greater access to public markets. The EESC highlighted the key contribution that e-procurement can make to transparency in public sector supply processes and to combating fraud[4]. With electronic tools, the entire process can be monitored and assessed, as can suppliers' performance in it. This information is important in ensuring maximum e-transparency in the public sector and can provide a powerful incentive for the adoption of e-procurement tools, especially for SMEs. Interestingly, Portugal provides an example of best practice in this field[5].

2. Opportunities and Constraints to SMEs participation in e-public procurement

Notwithstanding the above discussion, it is well documented that SMEs have often been particularly disadvantaged when it comes to leveraging Internet & Communications Technology [ICT] such as e-procurement, to their advantage. SME suppliers with little initial leverage in the market are often reluctant to use e-procurement because they consider that the perceived benefits of participating do not compensate for the perceived investment required. However, it is often simply unfamiliarity with, dislike or distrust of technology that presents a perceived rather than a real barrier to SMEs, which might otherwise benefit from greater access to public sector contracts through increasing use of e-procurement by government buyers and contract commissioners.

ICT may be viewed simply as a means of obtaining easy and up-to-date access to a wide source of contract opportunities now offered through e-procurement systems rather than as previously advertised and disseminated via paper-based and word-of-mouth based systems and simultaneously permitting tenders to be submitted on-line rather than in hardcopy documentation. In addition, SMEs can integrate traditional sales and marketing skills & experience, together with project management expertise, in responding to e-procurement, particularly as public organisations have vast and varied contract requirements, presenting many sector, country-wide and even international opportunities.

How does a SME identify the opportunities most relevant to its business? A simple and effective way to find appropriate contracts (by type; technology; size; delivery; and payment schedules; etc.) is to make use of the online portals set up to allow an organization to search for public sector tenders. These usually allow a business to enter specific search terms and key information relevant to them, such that currently listed contract opportunities that match the criteria will then be pulled out of the data-base being accessed.

3. On-line portals for e-public procurement

Among the most well-known portals used in the UK to access public sector business are:

'Contracts Finder', a free-access service (https://www.gov.uk/contracts-finder). Constituent parts of the UK i.e. Scotland, Wales and Northern Ireland have their own dedicated public-sector procurement websites. These are: 'Public Contracts Scotland' (https://www.publiccontractsscotland.gov.uk/search/search_mainpage.aspx) for opportunities with public sector bodies in Scotland; 'Sell2Wales' (https://www.sell2wales.gov.wales/) for opportunities with public sector bodies in Wales; and 'eSourcing NI' (https://e-sourcingni.bravosolution.co.uk/web/login.shtml) for opportunities with public sector bodies in Northern Ireland.

Tenders Electronic Daily [TED] (https://data.europa.eu/euodp/en/data/dataset/ted-1). TED is the 'Supplement to the Official Journal of the EU [OJS] providing information on public procurement contracts, according to the EU rules on public procurements, of notices published in EU Member States, the European Economic Area (EEA) and beyond. Users can browse, search and sort procurement notices by country, region, business sector, etc.

NHS Supply Chain (https://www.supplychain.nhs.uk/). NHS Supply Chain is an organisation run by DHL Supply Chain (a division of Deutsche Post DHL) on behalf of NHS Business Services Authority, the role of which is to provide a dedicated supply chain to the National Health Service [NHS] in England.

Procontract (https://procontract.due-north.com/). This is a portal developed by PROACTIS Holdings PLC, a UK company, which is a Spend Control and e-Procurement solution provider.

Additionally, there are numerous fee-charging portals, as well as dedicated regional and in-house procurement portals; some free, some fee and some subscription.

Opportunities vary hugely but a wide range of different businesses benefit from winning public sector contracts each year. Of course, 'to win it you have to be in it' so a company has nothing to lose by registering with a free portal and just looking at what opportunities present themselves.

4. Project management of the e-public procurement tendering process

Once an opportunity has been identified, a company needs to put the appropriate planning in place from an early stage to ensure that it maximizes its chances of making a successful bid. Effective early engagement with and profiling of the potential customer are essential. The tender should be treated as a project, putting in place effective project management tools and key milestones, to measure and ensure the smooth running of the process. Investing time at this stage will pay off in the longer term, particularly if competitors are more complacent about the process.

It is important to make sure the right people are involved in the project and that they are fully committed: whether this means using in-house employees or investing in outside help if there is a knowledge gap. If there is not the right combination of skill-sets working on the bid, valuable knowledge and experience may be omitted that could result in the loss of the contract. There are now professional firms of 'Bid-Consultants' and dedicated 'Bid-Writers' who have seen hundreds of different types of tenders (and whose expertise will often include having assessed bids) that will often know exactly what information needs to be included in a bid and how the bid needs to be written to gain the highest possible 'score' (assessment) for each section of the tender. Investing time and money in this type of expertise (whether employing specialists in-house or buying-in on a contract-to-contract basis) can really pay off and place a company well ahead of its competitors.

It is also important to ensure support from sufficiently high up in the company management, otherwise there may be insufficient resource allocation, or necessary personnel may not take a project as seriously as they should, to achieve success.

When it comes to completing the tender documentation, a company must ensure that it is well-prepared, develops a project plan and sticks to it. One key piece of advice which any good bid-consultant would tell a client is to find out exactly what the buyer is looking for in response to their tender and, for the client not to assume that it knows what the customer wants. This information is usually laid out within the original specifications of the tender document, but if there is any doubt there is no reason a supplier cannot request further clarification from the buying organization (this is NOT soliciting or badgering). Indeed, most 'live' tenders have a function allowing the asking of questions within pre-determined timeframes. Sensible and appropriate questions aimed at providing a more precise or cost-effective solution also allow a good opportunity to influence and raise supplier credibility with the buyer, so it can be invaluable.

Writing a bid should not always be allocated to only one person within an organisation, nor to someone who simply appears to have the time available to do it. This is unlikely to provide the right person for the job; or build-up in-house expertise: not to mention increasing an organization's commercial vulnerability. The individual who takes primary responsibility for executing the bid must be able to write well, be grammatically coherent, intimately understand the business, as well as the customer and the specific needs of the contract! The right in-house employees who are experts on technical details pertaining to the contract should be involved for specific aspects of the tender, or it may even be necessary to engage experts from outside, to feed into the writing of the bid.

Once the tender document is complete, it is essential that it is thoroughly checked, line-by-line, word-by-word and to have more than one party do so. The document must be submitted on time

in accordance with the tender schedule and preferably 24 hours before the final deadline: if it is late it will not be considered. All necessary supplemental documents, evidence, blueprints, plans, photographs, etc. as appropriate, should be submitted at the same time.

After submission, it is necessary to wait for the 'decision of intended award outcome' to find out the party that has won the contract. The timescale for the evaluation process is usually published well in advance. The final announcement will be made online and a company may also receive a letter to inform whether a bid has been successful or not.

The customer will communicate with the successful bidder when it is ready to move the process forward. An unsuccessful bidder may be able to find out why they were unsuccessful, if for instance, this was decided by anything other than having submitted the most competitive price. This can help a company be more successful in tailoring its on-line bidding in the future and there is generally no harm in an appropriate and politely-worded request. Of course, a response may not always be forthcoming. Occasionally, it is possible to challenge a decision, but only if there are genuine, sufficient and transparent reasons for doing so.

5. Two Case studies of successful e-procurement by SMEs

The following two case studies from the UK illustrate how SMEs can leverage e-procurement technology and markets to their advantage:

A small creative agency based within 20 miles of central London had been supplying services to the British Broadcasting Corporation [**BBC**] for several years, for exhibition stand design; branding for BBC projects; and graphics for public areas within BBC buildings and studios. However, when the company's contract expired, it was required to bid via an e-procurement platform; if not successful it would lose a valuable and prestigious customer that it had spent years nurturing. The agency brought in the assistance of a professional firm of Bid-Consultants which first spent time to develop a good understanding of the agency's business; corporate culture; and service offering, before turning attention to working with its own personnel to draft the tender response to the BBC response, which was first thoroughly checked by the senior management team of both parties, before submission. Not only was the bid successful and the contract reinstated, thereby safeguarding its incumbent business, but further exciting opportunities opened to supply additional services to the BBC, including being able to develop further projects with them under a contracting partnership.

A small janitorial company based in the south-west of England serviced a wide variety of public and private sector organisations within its immediate region and its contracts varied greatly in size. It had established a reputation for providing reliable and customer-tailored staff, but it wanted to build a more sustainable business over a wider area by winning public sector contracts, particularly for educational establishments. The company had neither time, resources, nor in-house skills to pursue e-procurement public sector bids. However, it approached a bid-consultant that tailored provision of its support in line with the company's timelines and budget that resulted within a few years to winning over £600,000 in contracts, for a tiny fraction of this amount in fees for bought-in expertise; demonstrating that even a modest, but nevertheless sensible investment in the bidding process, can produce significant return. The bid-consultant guided the company so that it became able to produce its own successful public-sector bids based on the model it initially proposed after studying its business. While the company and the bid-consultant continue to have a productive relationship, this successful example of knowledge-transfer, means that it now only provides specialist advice (if required) including reviewing some more complex bids, before these are presented to the customer.

6. Good Practices in e-procurement: 'dos and don'ts'

The above examples and many more of which the authors have direct or indirect experience, have allowed the formulation of a checklist of 'good practices' that companies and SMEs particularly, can follow to successfully address e-procurement opportunities. Using more commercial terms, these may be labelled 'dos and don'ts':

Figure 1: 'Dos and Don'ts' for Successful e-procurement Bids

• Do complete the tender in full, do what is asked and avoid sending stock corporate sales material and standard copy;
• Do not ignore the word count or fail to fill in any part of the tender and if asked to complete the tender in a certain format then do so;
• Do hire a consultant to help complete a bid if in-house personnel do not have the time or experience;
• Do not include bold statements that cannot be backed up with the appropriate evidence;
• Do enter a dialogue with the buyer if any aspects of the tender are unclear (the tender document will usually provide instructions for such communication);
• Do not forget to inform nominated referees, as this may otherwise end up giving a poor or the wrong impression to the buyer;
• Do be creative and work out the company's unique selling point and make the response relevant to the requirement;
• Do not submit the tender late and, if possible, send it off 24 hours prior to the deadline.
• Do price at a point which is sustainable for the bidding company.

7. Understanding common terms used in e-procurement: 'Jargon Buster'

Often when entering into new markets, companies and particularly SMEs, may be daunted by encountering terms and conditions with which they are not familiar. However, e-procurement lends itself to little that is new in this regard and which will not be familiar to manual or paper-based tendering procedures. From the authors' direct or indirect experience of multiple e-procurement tenders, an explanation of many of these terms is provided below. Again, using more commercial language, this may be called a 'Jargon Buster':

Figure 2: 'Jargon Buster' for Understanding e-procurement Bids

• **Award Criteria -** evaluation criteria used to inform and evidence the decision-making by which a candidate supplier can be awarded a specific contract;
• **Clarifications -** these are (written) discussions with candidates or tenderers to clarify or supplement the content of tenders or the requirements of the contracting authority and they must not involve discrimination (i.e. the clarification must be circulated to all relevant parties);
• **Contract Notice -** a notice, published via OJEU (see below) to inform the EU market of an opportunity to win a contract;
• **Contract Award Notice -** a notice, published via OJEU, to inform the EU market of which contract was awarded to which supplier;
• **Contracts Finder -** this is the system, where all new UK Government contract opportunities can be found;
• **Evaluation Criteria -** high level selection and award criteria found in the PQQ and/or the ITT (see below); it may be broken down into more detailed sub-criterion;

- **Expression of Interest** [**EOI**] - an expression of interest is a formal notice to potential suppliers that a prospective buyer is planning to acquire goods or services and inviting interested suppliers to register their interest;
- **Framework Agreement -** a general term for agreements with one or more providers that set out terms and conditions under which specific purchases ('call-offs') can be made throughout the term of the agreement (often 4 years);
- **Invitation to Tender** [**ITT**] - a call for bids or call for tenders or invitation to tender (ITT) (often called tender for short) is a special procedure for generating competing offers from different bidders looking to obtain an award of business activity in works, supply, or service contracts and are sometimes preceded by a pre-qualification questionnaire [**PQQ**] where allowed;
- **Most Economically Advantageous Tender** [**MEAT**] - factors other than or in addition to price, such as quality, technical merit and running costs can be considered, this is the evaluation option other than lowest price;
- **OJEU** - Official Journal of the European Union;
- **Pre-Qualification Questionnaire** [**PQQ**] - the PQQ is a tool used as the first part of a two-stage procurement process to enable public sector procurers to identify the most suitable suppliers to invite to tender (or quote) for contracts in the second part of a two-stage procurement process;
- **Selection Criteria -** evaluation criteria and sub-criterion used to inform and evidence, decision-making on reducing the quantity of candidate supplier(s) to pass through to next stage selection that will be based on award criteria;
- **Specification -** a document contained within a contract setting out clearly the client's specific requirements for the goods, services or works in question, see also Input Specification (performance) and Output Specification (technical);
- **Standstill Period** (sometimes known as the **Alcatel Period**) - a set period (usually 10-calendar days) prior to the award stage to permit unsuccessful tenderers to seek further information about the award decision and enable them to take legal action where they have sufficient grounds;
- **Whole-life Cost** [**WLC**] - the total cost of investing in an asset, evaluated by considering not only the initial outlay, but also all the costs of owning, operating and disposing of that asset.

8. Sales and Marketing in e-procurement

As with sales and marketing in general, there are different techniques and tactics a company can use to ensure an e-procurement bid scores well in assessment, but once a winning formula is discovered it can be successfully applied to bid for more contracts with different public bodies. There are over 50,000 registered public bodies in the UK, let alone the EU and the procurement process they are legally required to follow is more-or-less the same, so by default, the tender process will be too[6]. Using an experienced bid writer (whether a bought-in consultant or in-house specialist) will generally see 'win-rate' soar. As referenced above, for a SME new to the process, buying-in expertise can provide a framework to grow in-house expertise in tendering and even to developing a highly recognizable and trustworthy on-line brand for responding to e-procurement contracts.

Finally, what of the quite common view among many SMEs that 'the current supplier nearly always retains a repeat (or is awarded a new but similar) contract? While it is true that if an incumbent supplier has met the service-level agreement [SLA][7] and Key Performance Indicators [KPIs][8] of the contract, they are in a strong position to re-tender, there is no guarantee they will be successful. Because of the principles of fair and open competition, public contracts must be re-tendered on a level playing field and in the UK, only 35% of public contracts are retained by the incumbent supplier.

Of course, the corollary is how does an SME leverage its advantage if it is already the incumbent supplier? There is an enormous amount that can be done to influence the re-tender requirement and specification by focusing on winning themes: drawing upon the successes delivered in the current contract, highlighting continuous improvement initiatives and emerging technologies that will add value and, most importantly, reminding the customer what has been achieved, what might be lost and even more so, what risks may be engendered by awarding a contract to a new supplier. The challenge is including this within the confines of a prescriptive and standard public tender, often with a restricted word or character count. Responding to this challenge is worthwhile as it is usually more profitable to retain business than try to replace it, of course, this does not preclude growing new business.

9. Conclusion: e-procurement by SMEs is critical to national economies

At the start of 2015, there were 5.4 million businesses in the UK. Over 99% of these were SMEs. Of these, most were micro-businesses, employing fewer than ten people[9]. The Office for National Statistics estimates that SMEs create around £35 of gross value added to the UK economy for every £100 of turnover, while larger companies only create around £24[10]. Thus SMEs are very important for the UK (as well as the EU) economy and their role in delivering public contracts and thus their increased ability to participate in e-procurement is critical. The lesson is clear: for SMEs to optimise their response to public sector e-procurement, it is not enough to see this just as the need to improve the application of ICT or administrative platforms and regulations, but the integration of sales and marketing skills & experience, together with project management expertise, is essential.

References

[1] 'Government's spending with small and medium-sized enterprises', UK National Audit Office, London, 7 March 2016; accessible on-line at:

(https://www.nao.org.uk/wp-content/uploads/2016/03/Governments-spending-with-small-and-medium-sizes-enterprises.pdf)

[2] '2010 to 2015 government policy: government buying' (Policy Paper), Gov.UK, London, 8 May 2015; accessible on-line at:

(https://www.gov.uk/government/publications/2010-to-2015-government-policy-government-buying/2010-to-2015-government-policy-government-buying)

[3] Rutter, T. and Trendall**, S.** 'SMEs still being shut out as half of Whitehall spend goes on mega-deals', Public Technology.net, 23 August 2017; accessible on-line at:

(https://www.publictechnology.net/articles/news/smes-still-being-shut-out-half-whitehall-spend-goes-mega-deals-report-claims)

[4] Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A strategy for e-procurement', COM (2012) 179 final, accessible on-line at:

(http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012AE1715)

[5] (http://www.base.gov.pt/Base/pt)

[6] Unfortunately, a corruption-free and level playing-field does not yet seem to be in operation for all public procurement across the whole of the EU. Based on the Tenders Electronic Daily [TED] database archive of over 4 million purchases made by EU Member governments over the previous

decade, by 2015, 30 percent of calls for tenders received only one bid and the median number of bids per tender had fallen from five to three. SMEs were often losing out to large corporations and national suppliers frequently received favourable discrimination vis-à-vis international bids. For example, see: 'Procurement Spending: Rigging the Bids - Government contracting is growing less competitive, and often more corrupt', The Economist, 19 November 2016. However, this is a subject for a separate paper.

[7] The service-level agreement [SLA] is part of a contract between a service provider and its internal or external customers that documents what services the provider will furnish and defines the performance standards the provider is obligated to meet.

[8] A Key Performance Indicator [KPI] is a measurable value that demonstrates how effectively a company is achieving key objectives i.e. pre-determined targets, in its contract delivery.

[9] UK Department for Business, Innovation & Skills, Business, 'Population Estimates for UK and the Regions', 2015.

[10] UK Office for National Statistics, 'Annual Business Survey', 2013.

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