

Country Reports

Netherlands

The Proportionality Principle in the Dutch Public Procurement Act

In this report, we look at how the Netherlands has applied the procurement law principle of proportionality since the Dutch Public Procurement Act¹ entered into effect in April 2013. The Public Procurement Act and the accompanying 'Proportionality Guide' lay down rules ensuring that, for all phases of a government tender, contracting authorities apply conditions and criteria reasonably proportionate to the contract. The generally formulated requirements provide more insight into the scope and application of the proportionality principle and offer contracting authorities guidelines they can use in procurement practice. The new rules have now been in place for a year and a half, and their positive effects on practice are obvious. Contracting authorities are more aware of their obligation (which predates the rules) to apply proportionate conditions and criteria. In addition, clear rules can assist tenderers (and potential tenderers) in more effectively objecting to any disproportionate elements.

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I. The Proportionality Principle in the Public Procurement Directive

The proportionality principle is considered one of the core principles of public procurement law. In Recital 2 of Directive 2004/18/EC ('the Directive'), the proportionality principle is - along with the principles of equal treatment, non-discrimination, transparency, and mutual recognition - expressly referred to as one of the principles ensuing from provisions on freedom of movement in the Treaty establishing the European Community and that must be honoured when awarding government contracts.

Nevertheless, the proportionality principle, unlike the principles of equal treatment, non-discrimination, and transparency, is only briefly dealt with in the Directive and the case law of the Court of Justice of the European Communities ('CJEU').² The only specific reference to the proportionality principle in the Directive (other than in the recitals) can be found in Article 44(2), which states that contracting authorities may, with regard to economic and financial standing and technical and professional ability, only impose minimum requirements reasonably related

and proportionate to the subject matter of the contract. Although the assumption is that contracting authorities are to act proportionately in general, the Directive and case law as yet offer few guidelines regarding the specific obligations imposed on contracting authorities.

Moreover, the options open to tenderers (and potential tenderers) seeking to raise the issue of disproportionate conditions are limited. Those asserting that a condition is disproportionate must provide sufficient reasons for such an assertion and, if necessary, they have the onus of proving that this condition is not reasonably proportionate to the contract. Potential tenderers who see that they will be unable to meet

¹ The law is formally cited in the Netherlands as the 'Public Procurement Act 2012' ['Aanbestedingswet 2012'].

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² CJEU case law particularly refers to the proportionality principle when addressing issues involving decisions regarding excluding tenderers; see, eg Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-01559; Case C-213/07 *Michaniki* [2008] ECR I-9999; Case C-538/07 *Assitur* [2009] ECR I-04219.

disproportionate conditions generally refrain from submitting tenders. After all, if they do not meet a disproportionate condition, but decide nevertheless to submit a tender, they run the very real risk of their tender being rejected as invalid.

Even so, before submitting a tender, tenderers are often hesitant to raise, in court or otherwise, the issue of the disproportionality of the conditions hindering them from submitting a competitive bid, either because they do not want to taint their relationship with the contracting authority before it even starts or because they consider their chances of being awarded the contract too slim to justify incurring the costs of legal proceedings.

II. The Dutch Public Procurement Act

In the Netherlands, the Directive had long been implemented through the EEC Tendering Regulations Framework Act and the related order in Council, the Public Contracts Procurement Rules Decree. The first public procurement bill was rejected by the Upper House of the Dutch Parliament in 2008. A second, comprehensively revised bill was passed by both houses of Parliament and the Public Procurement Act entered into effect in the Netherlands on the 1st of April 2013. The Public Procurement Act not only implements the European public procurement directives,³ but also includes a national framework for the awarding of government contracts by contracting authorities. This national framework sets out rules for contracts below the thresholds that do not fall within the scope of the public procurement guidelines but can nevertheless be awarded in a tender process,⁴ as well as several assumptions and principles applicable to both European and non-European (national) public procurement procedures. One of those principles is the proportionality principle. Below, we discuss the implications this principle has for European public procurement procedures.

3 These are Directive 2004/17/EC (special sectors), Directive 2004/18/EC (classic sectors), Directive 89/665/EEC, and Directive 2007/66/EC (remedies).

4 The premise is that, depending on their nature and scope, contracts below the thresholds will be granted by a single private award, a multiple private award, or a national public procurement process.

5 Article 10(1) of the Public Contracts Procurement Rules Decree.

III. Proportionality as a Core Principle: Details in the Guidelines

The Dutch legislature opted to explicitly declare in the Public Procurement Act that the proportionality principle - along with the principles of equal treatment, non-discrimination, and transparency - would apply to all phases of a European public procurement procedure. Under Article 1.10 of the Public Procurement Act, when preparing or effecting a government contract, a special-sector contract, a concession agreement for public works, or a design competition, contracting authorities and special-sector companies are required to impose only those requirements, conditions, and criteria that are reasonably proportionate to the subject of the contract. They must in any case take the following into account:

- whether contracts are combined or not;
- the grounds for exclusion;
- the substance of the suitability requirements;
- the number of suitability requirements to be imposed;
- the deadlines to be set;
- the contract award criteria;
- compensation for the high costs of submitting a tender;
- the conditions of the agreement.

By means of an order in the Council,⁵ the details and specifics of this obligation were laid down in a document with guidelines referred to as the 'Proportionality Guide'. The Proportionality Guide was produced in a bilateral consultation process involving representatives of the contracting authorities and representatives of the tenderers, under the supervision of an independent chairperson. They formulated general rules for all phases of a public procurement procedure and these rules are to ensure that the requirements, conditions and criteria applied in a specific procurement process are proportionate to the nature, scope and complexity of the contract. Where appropriate, eg on assessing the proportionality of turnover requirements and the scope of reference requirements, sliding scales (illustrated by coloured bars) are also used to explain the margins within which a contracting authority is generally considered to be acting proportionately.

Interpreting the proportionality principle in the Netherlands entails examining not just the issue of lawfulness (ie compliance with laws and regulations)

but also effectiveness. Part of the goal in following a public procurement process is the effective use of government resources, including obtaining the best value from financial resources (most of which come from taxpayers).⁶

IV. Comply or Explain

The guidelines in the Proportionality Guide are formulated as rules based on the 'comply or explain' principle. In other words, a contracting authority that decides not to act in accordance with the rules in the Proportionality Guide must set out its reasons for that decision in the tender documents. This is explicitly stated in Article 1.10(4) of the Public Procurement Act. Non-compliance is not permitted unless there is a good reason for it. Furthermore, contracting authorities must also always take into account the fact that non-compliance (even if permitted under the Public Procurement Act) must still comply with the European proportionality principle, which obviously cannot be overridden in certain situations by relying on the 'comply or explain' principle.

V. A Few Examples

Below we discuss a few specific examples of the rules included in the Proportionality Guide in order to broadly illustrate how the Proportionality Guide implements the proportionality principle.

1. Choice of Tender Procedure

Rule 3.4 A provides that the contracting authority must determine on a contract-by-contract basis which tender procedure is suitable and proportionate. In addition, the aspects to be considered in any case include the following: the scope of the contract, the transaction costs for the contracting authority and tenderers, the number of potential tenderers, the desired end result, the complexity of the contract, the type of contract, and the nature of the market.

The Proportionality Guide gives a variety of practical examples to provide clarification. For example, the market in the Netherlands for architectural services has a relatively large number of suppliers. In addition, the tender preparation costs in the case of

an architectural design contract are often substantial. Given this, choosing a restricted procedure would be most consistent with the proportionality principle: candidate efforts are kept to a minimum in the first round, while in the second round a limited number of selected parties are asked to prepare a tender and, in that context, to produce a design document, model or something else. The Proportionality Guide also requires contracting authorities to reimburse part of the tender costs if - as is often the case in design contracts - part of the contract to be awarded must already be performed just to submit the tender (Rule 3.8).

2. Assessing Technical and Professional Ability

In accordance with Rule 3.5 F, a contracting authority must assess technical and professional ability against key competencies corresponding to the desired experience on essential points of the contract.

Key competencies too numerous and too specific for many market parties to be able to match are regularly set as requirements, thus unnecessarily restricting competition. The rule forces contracting authorities to give careful consideration to identifying the experience and competencies actually essential to the proper performance of the contract and not to ask for the moon.

3. Contract Conditions

The Proportionality Guide has several rules regarding the issue of contract conditions. These provide, inter alia, that tenderers (and potential tenderers) must be afforded the opportunity during the tender procedure to make suggestions for amending the draft agreement or varying the terms and conditions of purchase (Rule 3.9 B). Imposing a contract without affording tenderers the opportunity to submit suggestions for variation is generally considered disproportionate.

Moreover, contracting authorities are not permitted to demand unlimited liability (Rule 3.9 D(1)). The

⁶ This principle is also laid down in the Public Procurement Act itself in Article 1.4.

level of liability must be suitable for the type, amount, and term of the contract and must be insurable at reasonable rates and subject to reasonable conditions.

The Proportionality Guide also provides that, in cases involving certain types of agreements for which there are existing contract models or general terms and conditions that have been bilaterally drafted (ie by both parties involved), these must be applied in their entirety (Rule 3.9 C). An example includes the set of general terms and conditions that is widely applicable in the Dutch construction industry and that was drafted by a writing group that included representatives from the parties involved (contractors, installers, principals and the government).⁷

VI. Anticipating the New Public Procurement Directive

Through the above, the Dutch legislature has implemented the proportionality principle in a manner far exceeding what the Directive requires Member States to do. As a result, the Netherlands has already anticipated the new public procurement directive, Directive 2014/24/EU, adopted on 26 February 2014, which the Member States must implement by no later than the 18th of April 2016.⁸ The new Directive devotes more express attention to the proportionality principle. First, it is notable that the principle of proportionality is, for the first time, not only referred to in the recitals, but is explicitly considered a public

procurement general legal principle with which contracting authorities must comply (Article 18(1)).⁹ The Directive also imposes various specific proportionality-related obligations on contracting authorities. For example, when applying the optional grounds for exclusion, minor irregularities may lead to the exclusion of an economic operator only in exceptional circumstances,¹⁰ conditions imposed on combinations of economic operators must be proportionate,¹¹ and Member States may derogate from the mandatory exclusion where that exclusion is clearly disproportionate.¹²

VII. Final Note: A Few Comments on the National Complaints Committee

Another new proportionality-related element in the Public Procurement Act is the introduction of a 'Committee of Public Procurement Experts'.¹³ The Proportionality Guide notes that the practice of public procurement law requires easily accessible complaint procedures. Besides, it is considered proportional to prevent and/or resolve any complaints and uncertainties at the earliest possible stage of a public procurement procedure. This would save both time and expense and would also ensure that any contractual (or pre-contractual) relationship between the contracting authority and the tenderer would not be subject to unnecessary pressure. In order to meet this need, the Minister responsible has established the Committee of Public Procurement Experts. This committee is presided over by a Dutch lawyer and a university professor, whose mandate is to provide independent opinions on complaints relating to public procurement procedures. Complaints can be submitted by economic operators who are submitting tenders, industry organisations that represent economic operators and contracting authorities.

Practitioners have already gained a year and a half of experience working with the Public Procurement Act. Practice has shown that tenderers (and potential tenderers) are increasingly invoking the proportionality principle in respect of the prerequisites and criteria being imposed by contracting authorities. The Committee of Public Procurement Experts therefore has an important role to play, because objections based on disproportionality must (to prevent forfeiture or lapse of rights)¹⁴ be by their very nature dis-

7 The Uniform Administrative Conditions for Construction Works 2012 (*Uniforme Administratieve Voorwaarden voor de uitvoering van werken*; UAV 2012).

8 Article 90(1).

9 Cf. Article 2 of the present Directive.

10 Recital 101 of Directive 2014/24/EU.

11 Recital 15 and Article 19(2) of Directive 2014/24/EU.

12 Article 57(3) of Directive 2014/24/EU.

13 Article 4.27 of the Public Procurement Act.

14 Long-established Dutch case law holds that disclosing objections after submitting a tender that should have by their very nature been disclosed in advance, such as objections to the conditions being imposed as such, will result in a forfeiture or lapse of rights. In this respect, it must also be noted that tender documents more and more often include a provision that sets a certain term for complaining about imperfections in the conditions being imposed, on penalty of a forfeiture or lapse of rights.

closed in advance. It is precisely the easily accessible complaints procedure available in proceedings before the Committee of Public Procurement Experts

that will be able to remedy irregularities early in the tender process, and still allow successful completion of the process afterwards.