Seminar organized by the Supreme Administrative Court of Finland and ACA-Europe

"Recent case law of the Court of Justice of the European Union and of the (Supreme) Administrative Courts in public procurement litigation"

Helsinki 22 – 23 October 2015

1. National legal system

1.1. Which court is responsible for the implementation of the appeal proceedings with respect to public procurement falling within the scope of the directives?

1.1.1. Is there an administrative, civil or special court, or an authority of a different kind?

Directives 92/13/EEC and 89/665/EEC seek to ensure that Member States provide effective and rapid remedies against decisions taken by contracting authorities. In the Netherlands, both Directives – as amended by Directive 2007/66/EC – were implemented in the *Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden* (Wira) that entered into force in February 2010. This Act was later incorporated in the *Aanbestedingswet* 2012 (Public Procurement Act 2012) which deals with all aspects of public procurement law, including the implementation of Directives 2004/17/EC and 2004/18/EC.

Public procurement is governed by private law in the Netherlands and concluding a procurement contract is therefore considered a private act under Dutch law. All decisions made by the contracting authority before signing the procurement contract are part of the pre-contractual phase that is also governed by private law. Article 8:3 of the *Algemene Wet Bestuursrecht* (Dutch Act on Administrative Law) provides that such decisions are excluded from appeal at the administrative courts.

Article 112(1) of the Dutch Constitution provides that the civil court is competent in cases in which the appeal is based on a private law claim.[1] Since public procurement is part of private law, the civil court is (in principle) competent in appeals against the procurement decision of a contracting authority. However, in a few exceptional cases, the decisions of the contracting authority are considered to be public acts which consequently fall under the competence of the administrative courts. This is the case if the law explicitly sets out that the procurement decisions of the contracting authority are public acts, as is the case in the *Wet Personenvervoer* 2000 (Transport of Passengers Act 2000).[2] These usually concern concessions which within the Dutch legal system fall under the competence of the administrative courts. Nevertheless, Dutch procurement law, for the most part falls under the competence of the civil court.

[1] HR 21 December 1915, NJ 1916, 407 (Guldemond/Noordwijkerhout).

[2] Articles 56 (1), 59 (1), 94(1) and 96(1) of the Wet Personenvervoer 2000, provide that the *College van Beroep voor het Bedrijfsleven* (College of Appeal for Trade and Industry and one of the three highest administrative courts in the Netherlands) is the competent court in disputes concerning the application for a concession.

In the Netherlands, the court of first instance in private law proceedings is the general court (rechtbank, abbreviated to Rb in the footnotes), which also examines claims of administrative and criminal law. There are eleven general courts in the Netherlands. An appeal against the decisions of the general court can be made at the appeal court (gerechtshof), which are four in number. The court of last instance in public procurement proceedings is the Supreme Court (Hoge Raad, abbreviated to HR in the footnotes), which is not a member of ACA.

Appeals against decisions of the general courts (rechtbank) concerning administrative law are possible, depending on the public law concerned, at one of the three distinct highest administrative courts; 1*)De Afdeling Bestuursrechtspraak van de Raad van State* (the Administrative Law Division of the Dutch Council of State, member of ACA); 2) *De Centrale Raad van Beroep (*The Central Council of Appeal); 3) *Het College van Beroep voor het Bedrijfsleven* (the College of Appeal for Trade and Industry).

The Administrative Law Division of the Dutch Council of State is not competent in cases concerning private law, nor in any of the exceptional cases concerning public procurement. As a consequence, in terms of this questionnaire, public procurement law is not a field of law that the Dutch Council of State deals with. It is however bound to the obligation of transparency and the principle of equality based on Article 56 of the Treaty on European Union when awarding exclusive rights to carry out an economic activity, irrespective of the method of selection.[3]

To nevertheless provide useful answers for this questionnaire, we therefore worked together with the Dutch Supreme Court (Hoge Raad), which, as the court of last instance competent in private law cases, deals with most of the questions referred to in this questionnaire.

1.1.2. Is there a distribution of functions between these courts (disputes for a substantiated decision? Compensation? Declaration of ineffectiveness? Any others?)

The civil court is competent regarding all claims relating to public procurement, regardless of the nature of the claim. It is therefore competent in all public procurement proceedings as well as in proceedings for interim or suspension measures and it does not share the competence with other authorities.

In addition to the civil courts there are a few other authorities that deal with some aspects of public procurement law. To fit in with the Dutch legal system, the Dutch legislator decided that fines serving as an alternative sanction[4] to a declaration of ineffectiveness should be administrative fines.[5] The infliction of fines is therefore distributed to a distinct authority rather than a court. The competent authority in this case is the *Autoriteit*

[3] CJEU, June 3, 2010, C-203/08, ECLI:EU:C:2010:307, *Betfair*, paragraph 38-51; final judgement: ABRvS 3 March 2011, ECLI:NL:RVS:2011:BP8768.
[4] As provided for in Article 2e, paragraph 2 of Directive 2007/66/EC.
[5] *Kamerstukken II (Parliamentary Papers),* 2008/09, 32027, no. 3, p. 13.

Consument en Markt (Dutch Competition Authority).[6] The competent court for proceedings against fines imposed by this authority is the administrative court of Rotterdam, since these fines are classified as a decision of a public body. A more elaborate explanation on alternative sanctions is given in the answer to question 4.1.

In addition, an authority has been established specifically to examine complaints of parties to a tendering procedure, as an alternative or prelude to starting legal proceedings before the court.[7] This authority is the Commission of procurement experts.[8] However, submitting a complaint to the Commission is not a compulsory step before legal proceedings. Potential parties to procurement proceedings may hand in a complaint on a voluntary basis before initiating actual proceedings before the court. The Commission is meant to stimulate dispute parties to resolve conflicts by mutual agreement instead of legal proceedings.[9] The advice of the Commission is non-binding.

The parties to disputes regarding public procurement can also agree to bring the matter before an arbiter in accordance with Article 4.26 Aanbestedingswet 2012 (Public Procurement Act 2012). The parties can request annulment of the arbitral decision before the civil court.[10]

In the past many cases concerning procurement were brought before a special arbitrage Council concerning constructions; the *Raad voor Arbitrage voor de Bouw*. The Uniform Procurement Regulations (*Uniforme Aanbestedingsreglementen*) for works contained an arbitration clause. The ministries concerned with construction (Ministry of Housing, Spatial Planning and the Environment, Ministry of Transport, Public Works and Water Management and Ministry of Defence) were obliged to apply the Uniform Procurement Regulations. For other contracting authorities, the application was optional. The arbitration clause was cancelled in the Procurement regulations for Works 2004 (*Aanbestedingsreglement voor Werken 2004*) and following regulations and as a consequence, currently there are very few procurement cases that are dealt with through arbitration.[11]

The above-mentioned arbitration clause precluded the possibility of starting proceedings before the court. The Advisory Division of the Council of State stated in an advisory opinion that compulsory arbitration should be suspended.[12] Effective legal protection by a court should not be precluded by arbitration. Therefore parties to a dispute concerning public procurement currently have the possibility to voluntarily choose arbitration and to still appeal to the civil court against the arbitral decision. The review of the civil court is very restricted in this kind of appeal.[13]

---

[6] Article 4.21 Aanbestedingswet 2012 (Public Procurement Act 2012).

[7] Article 2 para. 2 Instellingsbesluit Commissie van Aanbestedingsexperts of 4 March 2013, Government Gazette 2013, 6182.

[8] Based on article 4.27 Aanbestedingswet 2012.

[9] Advies klachtenafhandeling bij aanbesteding, Ministry of Economic Affairs, 7 March 2013.

[10] Article 4.26(2) Aanbestedingswet 2012 (Public Procurement Act 2012).

[11] As set out in article 4.26(1) Aanbestedingswet 2012 (Public Procurement Act 2012). *(N.B. the standards referred to (article 1c and 1d of the Judicial Officers Act (Wet rechtspositie rechterlijke ambtenaren) were retracted in 2010; the reference is probably to article 1, paragraph 1 under c and article 1, paragraph 1 under d).*

[12] Government Gazette. 11 October 2005, no. 197.

[13] Articles 1065 and 1068 Code of Civil Procedural law (*Wetboek van Burgerlijke Rechtsvordering*).

1.1.3. What exactly is the role of the Supreme Administrative Court[14] in disputes pertaining to procurement contracts (judge for full remedy proceedings, court of cassation, judge for abuse of power?)

For the reasons explained in the answer to question 1.1.1, public procurement law is governed by private law in the Netherlands. The Administrative Law Division of the Dutch Council of State, which is the Supreme Administrative Court of the Netherlands according to the definition given in this questionnaire, therefore does not play a role in public procurement proceedings in the Netherlands.

The Dutch Supreme Court (Hoge Raad) is the court of last instance in public procurement proceedings. As court of last instance, the Hoge Raad is tasked with cassation and with guarding the unity of national law.[15] The possibilities of the Hoge Raad are limited. It reviews whether the law has been applied incorrectly and whether formal requirements have been violated. The Hoge Raad does not fully review the facts of the cases brought before it as established by the lower courts, but only checks to ascertain whether the judgement of the lower courts is incomprehensive. The Hoge Raad is also bound by the claims in cassation and may not rule on anything other than the claims brought before it. Under certain circumstances the Hoge Raad may conclude the proceedings itself though in most cases it refers the case back to the lower courts to form a new judgement. Since July 2012, lower courts furthermore may refer preliminary questions concerning the application of national law to the Hoge Raad in civil proceedings.[16] To date, no national preliminary referral concerning public procurement law has been put forward.

1.1.4. Does the distribution between the courts change in relation to the proceedings for the measures introduced after concluding the contract?

No. In the Netherlands, both the pre-contractual phase and the post-contractual phase of public procurement are governed by private law, as explained in the answer to question 1.1.1.

Therefore, all claims related to public contracts are examined by the civil court. These include all claims brought by a third party, for example the request for an annulment of the contract or a damages claim and claims brought forward by the parties to the contract, including claims concerning the execution of the contract. Since the civil court is also competent in proceedings before the conclusion of the public contract in the Netherlands, as explained in the answer to question 1.1.1, the distribution of competence between the courts does not change.

2. Length of court proceedings

[14] The Supreme Administrative Court refers to a court that is a member court of the ACA and that acts as a court of last instance.

[15] Article 118 Grondwet (Dutch Constitution).

[16] Wet prejudiciële vragen aan de Hoge Raad (Preliminary questions to the Supreme Court Act); Article 392-394 Code of Civil Procedural Law (*Wetboek van Burgerlijke Rechtsvordering*).

2.1. Are there any specific proceedings or methods to verify whether the national procedure applied is quick and efficient (for example: definite deadlines to rule on interim measures, etc.)?

There is no specific legislation incorporated in general Dutch civil procedural law regarding definite deadlines, neither for interim measures nor for proceedings on the merits. There are also no specific rules safeguarding the efficiency of public procurement proceedings to be found in the Aanbestedingswet 2012. There are deadlines for handing in evidence and other documents by the parties to the proceedings, but there are no deadlines for the judgement itself.

However, most proceedings concerning public procurement are interim proceedings (*kort geding*), as more elaborately explained in the answer to question 2.3. Due to their urgent nature, it is unlikely for the proceedings not to be quick and efficient or even violate time limits. Explicit methods to guarantee the speed and efficiency of proceedings concerning public procurement law would therefore seem superfluous.

Dutch civil procedural law however does prescribe that the judges should guard against unreasonable delay.[17] The court may take action to prevent this, either at the request of one of the parties or ex officio. Moreover, parties to proceedings before the civil court may always rely on Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) concerning the right to a trial within reasonable time.

The Netherlands was called before the European Court of Human Rights because of the lack of remedies in 2009.[18] During these proceedings the Netherlands admitted to violating article 13 ECHR through the lack of effective remedies against unreasonably long proceedings. To correct this the Dutch government introduced a bill *(wetsvoorstel KEI)* that aims to accelerate proceedings by introducing deadlines for their duration and for the delivering of judgements.[19] The legislation will allow the judge to safeguard deadlines more effectively. Moreover, there has recently been an internet consultation concerning the amendment of Article 17 of the Dutch Constitution to introduce the right to a fair trial by an impartial and independent judge within a reasonable time.[20] Such an explicit provision is currently lacking in Dutch legislation and parties in proceedings therefore need to rely on Article 6 ECHR.

Recent case law of the Hoge Raad and the Administrative Law Division of the Dutch Council of State, introduced remedies in the form of compensation for immaterial damages in cases concerning the violation of the right to a trial within a reasonable time, based on Articles 6 and 13 ECHR.

[17] Article 20 *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedural Law).
[18] ECHR 3 March 2009, 28692/06 (Voorhuis).
[19] *Kamerstukken II* 2014/15, 34 059 (Wetsvoorstel KEI) Wetsvoorstel wijziging van het *Wetboek van Burgerlijke Rechtsvordering* en de Algemene wet bestuursrecht in verband met de vereenvoudiging en digitalisering van het procesrecht (legislative proposal for changes in the Code of Civil Procedural law and in the General Administrative Law Act concerning the simplification and digitalisation of procedural law).
[20] www.internetconsultatie.nl/eerlijkproces.

Private law

The Hoge Raad and the highest court in civil cases recently opened up the possibility of claiming compensation for immaterial damages as a result of the breach of the right to a trial within a reasonable time (Article 6 ECHR) in a case concerning expropriation by the government.[21] The Hoge Raad ruled that there is no obligation to produce prima facie evidence for such a claim and that such proceedings may only start in a separate proceeding after the main proceedings concerned have been terminated. With this ruling, the Hoge Raad largely followed the jurisprudence of the Administrative Law Division of the Dutch Council of State, in which it has set a definite deadline for proceedings concerning administrative law.[22] However, these definite deadlines were not introduced by the Hoge Raad in this particular case of private law proceedings[23] since proceedings before the Dutch civil courts differ significantly in nature, complexity and the conduct of the case. Consequently, no strict deadlines apply in public procurement proceedings. However, public procurement proceedings for the most part concern interim proceedings because of the urgency of the claim. Since such proceedings are handled with urgency, there is no breach of Article 6 ECHR.

Furthermore, the Hoge Raad is competent to quickly conclude the proceedings ex officio in the event of it being evident that the claimant does not have sufficient interest in the cassation or that the claims cannot be awarded.[24]

2.2. Is the average processing time determined for public procurement cases? Do you have specific data by type of proceedings and juridical level (level of the court)? If so, specify.

If no statistics are available regarding the average duration of these types of proceedings, would it be possible to have an average for the cases dealt with by the Supreme Administrative Court?

For the reasons explained in the answer to question 1.1.1, public procurement law is governed by private law in the Netherlands. The Administrative Law Division of the Dutch Council of State, which is the Supreme Administrative Court of the Netherlands according to the definition given in this questionnaire, therefore does not play a role in public procurement proceedings in the Netherlands. We therefore have no data on the average duration of cases dealt with by our court.

The Supreme Court (Hoge Raad) had two proceedings each concerning public procurement in 2013 and 2014, two normal ones in 2013 and two interim ones in 2014.
The average duration of the proceedings in 2013 was 518 working days.
The average duration of the interim proceedings in 2014 was 392 working days.

[21] HR 28 March 2014, ECLI:NL:HR:2014:736.
[22] ABRvS 29 January 2014, ECLI:NL:RVS:2014:188.
[23] Such deadlines will not be introduced in the abovementioned bill KEI either.
[24] Article 80a Wet op de Rechterlijke Organisatie (Judiciary Organisation Act).

To clarify the statistics for public procurement proceedings before the Hoge Raad, it is important to know that interim proceedings are handled like normal proceedings before the Supreme Court, unless one or both parties specifically request accelerated proceedings.[25] In the proceedings in 2013 and 2014 mentioned above, no request for acceleration of the proceedings was expressed. This can be explained by the amount of time that had passed up to that point. By the time a public procurement case winds up before the Hoge Raad, the urgency of the proceedings has usually ceased. In most cases, the contract has already been awarded or the contracting authority has started a new procurement procedure at this point.
Some categories of proceedings are accelerated by default (such as debt repayment, bankruptcy, certain juvenile matters and forcible admissions). 'National' preliminary references are handled with urgency as well. In proceedings concerning public procurement, the acceleration needs to be requested and is not applied by default.
In cases in which the Hoge Raad does not apply the acceleration of proceedings by default, the acceleration was requested by parties in less than 10% of the cases in 2013, 2014 and 2015 (to date).

While we unfortunately have no current statistics at our disposal, we do have general statistics concerning the duration of public procurement proceedings in first instance in 2008 and 2009. In these years, the average duration of interim proceedings in first instance concerning public procurement was six to eight weeks. The average duration of normal proceedings in first instance concerning public procurement was 18 months.[26]

2.3. Can the parties in litigation request acceleration of proceedings? If so, does this apply to all the courts or only to the Supreme Administrative Court? If so, how often has this been applied?

The Aanbestedingswet 2012 (Public Procurement Act 2012) does not contain specific provisions for the acceleration of proceedings in public procurement cases. Parties can, however, rely on the general rules of Dutch civil procedural law that apply to all civil law cases which include interim proceedings for urgent claims[27] and accelerated proceedings in cases before the Hoge Raad.

Interim proceedings
In cases concerning urgent claims, the parties to public procurement proceedings may start interim proceedings. Interim measures can be asked for in first instance after which parties can request a summary appeal (*spoedappel)*. Public procurement cases in first instance concerning the awarding decision of the contracting authority are considered to

[25] On basis of Article 17 Rolreglement van de civiele kamer van de Hoge Raad der Nederlanden (as of 12 July 2012).
[26] Lower House of Parliament TK 2008-2009, 32 027, no. 3, p. 19.
[27] Article 254 *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedural Law). For a more elaborate discussion on interim proceedings, see the answer to question 4.3 &4.4.

be urgent. In 2014, 91% of public procurement proceedings were interim proceedings.[28] The measures and decisions that the court can grant in such proceedings are of a provisional nature. The interim proceedings do not affect the outcome of the proceedings on the merits, whereas the outcome of the proceedings on the merits may nullify the effect of the decision in the interim procedure. In contrast to administrative law, in civil law cases, interim proceedings can be asked for without starting proceedings on the merits. In principle, all proceedings before the Hoge Raad are dealt with according to regular terms (including interim proceedings), unless parties request urgency (separately or together).

Acceleration

At the Supreme Court (Hoge Raad) the parties can ask for the acceleration of the proceedings, separately or together.[29] Interim procedures are very common in public procurement proceedings. In 2014, 91% of public procurement proceedings were interim proceedings.[30] In the past 15 years, about 50% of the public procurement proceedings before the Supreme Court were interim proceedings.

3. Dialogue between the Supreme Administrative Court and the CJEU

3.1. How many requests for preliminary rulings relating to public procurement cases has your Supreme Administrative Court made to the CJEU?

The Supreme Administrative Court itself is not competent in public procurement proceedings and therefore has not made any preliminary references to the CJEU on this topic. It has, however, made a preliminary reference concerning the transparency principle.[31]

The Hoge Raad has recently referred its first question concerning public procurement to the CJEU.[32] Before this three referrals were made about public procurement by the Netherlands, all referrals by lower courts.[33]

3.2. Is there a documentation department that systematically analyses the judgements of the CJEU and informs the members of the Supreme Administrative Court about these judgements?

[28] Aanbestedingsrechtspraak in Nederland 2012 en 2014, eindrapport Ministerie van Economische Zaken, Kamerstukken II 2014/15, 34252, no. 1.

[29] Article 17 Rolreglement van de civiele kamer van de Hoge Raad der Nederlanden (as of 1 July 2012).

[30] Aanbestedingsrechtspraak in Nederland 2012 en 2014, final report Ministry of Economic Affairs, Kamerstukken II 2014/15, 34252, no. 1.

[31] CJEU, June 3, 2010, C-203/08, ECLI:EU:C:2010:307, Betfair, paragraph 38-51; final judgement: ABRvS 3 March 2011, ECLI:NL:RVS:2011:BP8768.

[32] HR 27 March 2015, ECLI:NL:HR:2015:757, NJ 2015/169; CJEU C-171/15.

[33] CJEU 9 DDecember 2010, C-568/08 (Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others); CJEU 10 November 1998, C-360/96 (Gemeente Arnhem and Gemeente Rheden v BFI Holding); CJEU 20 September 1988, C-31/87 (Beentjes v State of the Netherlands).

Within the Dutch Council of State, there is a special European Law Commission (CrEU) that advises and makes recommendations about the effective application of European Law within both Divisions of the Council of State. State Councillors with expertise in European Union Law are appointed as members of the CrEU. The CrEU meets every two weeks. The Commission is supported by a secretariat that systematically analyses the judgements of the CJEU. Most relevant case law is furthermore discussed every two weeks in a small circle of State Councillors and staff members that focus on European Union Law.

The Hoge Raad (Supreme Court), which is the highest court in public procurement proceedings, has its own documentation department. The procurator general, the advocates general and the judges are supported by the scientific office (Wetenschappelijk bureau). The office draws the attention of the members of the court to jurisprudence that might be relevant to specific proceedings in concrete cases.

Judges of both the Dutch Council of State and the Hoge Raad, take part in the Eurogroep; a network of judges of different courts (general courts, courts of appeal and supreme court) in the Netherlands. The Eurogroep members meet once every three months and discuss relevant cases in their courts concerning European Union Law.

3.3. Does the Supreme Administrative Court quote the jurisprudence of the CJEU in its decisions or does it make material references to its jurisprudence?

In public procurement cases the Supreme Court (Hoge Raad) applies the legal essence relevant to the proceedings and makes material reference to the jurisprudence of the CJEU.[34]

4. Implementation of the remedies laid down in Directives 89/665/EEC and 92/13/EEC

4.1. Is it possible for the Supreme Administrative Court (or a lower-level court) to declare a public contract ineffective and/or impose alternative or other remedies in accordance with Directives 89/665/EEC or 92/13/EEC) *ex officio* or only if it is required?

The legal doctrine of Dutch private law posits a distinction between defeasible contracts and void contracts. Void contracts are regarded to have never existed and the court may declare them void ex officio.[35] Defeasible contracts, on the other hand, need a request by one of the parties to the procedure for them to be annulled. The Dutch legislator has chosen to implement the declaration of ineffectiveness as required by Directive 2007/66/EC as the public contract being defeasible.[36] Public contracts can therefore not be declared void, but only defeasible. Before the entry into force of Directive

[34] For examples, see HR 27 March 2015, ECLI:NL:HR:2015:757; HR 9 May 2014, ECLI:NL:HR:2014:1078.
[35] Article 3:40 Burgerlijk Wetboek (Civil Code).
[36] Kamerstukken II 2008/09, 32027 Implementatie van de rechtsbeschermingsrichtlijnen aanbesteden (Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden) no. 3, page 10.

2007/66/EC, the Supreme Court (Hoge Raad) had already ruled that the violation of European procurement rules did not lead to the contract being declared void.[37]

Article 4.15 Aanbestedingswet 2012 (Public Procurement Act 2012) stipulates that a public contract that is not in accordance with Dutch public procurement law, is defeasible. This article implements the three criteria provided for in Article 2d of Directive 2007/66/EC and provides that a public contract may in any case be annulled if the contract was awarded without the necessary tendering procedure; if the contract was awarded in violation of the standstill-period or in violation of a suspension period within a dynamic purchasing system.[38] Dutch case law in the appeal courts shows that this list of reasons for annulment is not exhaustive and public contracts can be annulled on other grounds than the three mentioned above.[39] Since the annulment of a contract has to be requested by one of the parties to the proceedings, ineffectiveness of the contract cannot be declared by the court ex officio.

However, by virtue of article 4.18 Aanbestedingswet 2012, the court may decide (ex-officio) not to annul the contract on compelling grounds of general interest. If the court decides to do so, article 4.19 Aanbestedingswet 2012 gives the court the possibility of shortening the duration of the contract, either on request or ex officio.

A fine is imposed on the contracting authority as an alternative sanction in the case of the court deciding not to declare the contract ineffective. The Dutch legislator has opted for an administrative fine so that the court is not competent to decide on it. The competent authority is the *Autoriteit Consument en Markt* (Dutch Competition Authority), a special authority.[40] An appeal can be launched against this fine at the general court of Rotterdam.

4.2. Who can seek a declaration of ineffectiveness? Has the jurisprudence of the CJEU judgement dated 18 July 2007, Commission v/FRG, C-503/04 been incorporated into national law?

General Dutch procedural law stipulates that parties must have a legitimate interest in all private legal claims.[41] Article 4.15(2) of the Aanbestedingswet 2012 (Dutch Procurement Act) furthermore provides that every economic operator that considers itself disadvantaged by the outcome of the tendering procedure can seek a declaration of ineffectiveness from the civil court. The Dutch legislator has chosen to define the concept of applicant for the declaration of ineffectiveness in a broad way to guarantee effective legal remedy.[42]

---

[37] HR 22 January 1999, ECLI:NL:HR:1999:ZC2826, NJ 2000/305; HR 4 November 2005, ECLI:NL:HR:2005:AU2806, NJ 2006/204.

[38] Based on Article 2d Directive 2007/66/EC and implemented in Article 8 Wira and later in Article 4.15 Aanbestedingswet 2012 (Public Procurement Act 2012).

[39] Gerechtshof (Appeal court) Arnhem-Leeuwarden 17 September 2013, ECLI:NL:GHARL:2013:6838; Gerechtshof Den Haag 15 July 2014, ECLI:NL:GHDHA:2014:2675; Gerechtshof 's Hertogenbosch 17 February 2015, ECLI:NL:GHSHE:2015:479; Gerechtshof Amsterdam 17 March 2015, ECLI:NL:GHAMS:2015:812 and recently Gerechtshof Den Haag 7 July 2015, ECLI:NL:GHDHA:2015:1863 and ECLI:NL:GHDHA:2015:1864. To date, the Supreme Court has not ruled on this topic.

[40] Article 4.21 Aanbestedingswet 2012 (Public Procurement Act 2012).

[41] Article 3:303 Burgerlijk Wetboek (Civil Code).

[42] *Kamerstukken II,* 2008/09, 32027, no. 3, p. 10.

Article 4.18 Aanbestedingswet 2012 gives the court the discretion not to annul a defeasible contract. The court may only use this discretion if there are compelling grounds of general interest.

Dutch legislation does not give an exhaustive list of such grounds. Nor does the law specify whether the principles of legal certainty and of the protection of legitimate expectations can be considered as such, as was the case in C-503/04. Dutch Legislation only provides specific limits in the case of economic interest.[43] The Dutch legislator has considered in the memorandum to article 4.18 Aanbestedingswet 2012 that the compelling grounds of general interest are to be interpreted in the light of the jurisprudence of the CJEU.[44] To date, there has been no Dutch case law in public procurement proceedings that further defines the limits and content of the compelling reasons of general interest.

4.3. &

4.4. In how many cases has the balance of interests procedure been implemented for not formulating the interim or suspension measures? Is national jurisprudence subject to the balance of interests under certain conditions?

In the Netherlands, interim measures in civil proceedings can be requested in so-called *kort geding* proceedings (interim proceedings), a special kind of proceedings that the claimant has to request. In these special proceedings the court always has to consider all the interests of all parties involved before granting or rejecting interim measures. The Dutch legislator regards article 254 of the civil procedural code[45] (Rv), which regulates interim proceedings, as sufficient implementation of the requirement of possible interim measures in procurement proceedings contained in article 2(1)(a) of Directive 2007/66/EC.[46]

Article 254 of the Code of Civil Procedural law (*Wetboek van Burgerlijke Rechtsvordering*) provides that interim measures can only be taken if there is a balance of the interests of all the parties involved. This also includes the possibility of the court rejecting interim measures that would have normally been awarded if there are other interests at stake. Jurisprudence of the Supreme Court (Hoge Raad) stipulates that the court should take into account the provisional nature of the interim measures and the intrusiveness of the consequences of the measures as well as the damage that might occur if the interim measures are not granted. The list is not exhaustive.[47]

Since interim measures are no longer relevant for the parties in cassation given the time that has elapsed since the beginning of the dispute, the Supreme Court has never decided on the balance of interest mechanism in proceedings concerning public procurement.

[43] For a more elaborate discussion of this, see the answer to question 4.3 & 4.4.
[44] Kamerstukken II, 2008/09, 32027, no. 3, page 12.
[45] *Wetboek van Burgerlijke rechtsvordering* (Code of Civil Procedural law).
[46] Kamerstukken II, 2008/09, 32027, no. 3, p. 3.
[47] HR 15 December 1995, ECLI:NL:HR:1995:ZC1919, r.o. 3.4, m.nt. D.W.F. Verkade (Procter & Gamble/Kimberly Clarke).

The balance of interest mechanism is not often explicitly used in interim proceedings regarding public contracts.[48] In the view of some courts, the fact that the contracting authority has violated public procurement rules is so serious that a balance of interest mechanism cannot lead to a different outcome.[49] It is not often that the court establishes a violation of public procurement rules while still rejecting interim measures because of a balance of interests. The court usually takes into account circumstances such as the claimant's option to resort to other legal remedies,[50] an inactive attitude of the claimant,[51] the contracting authority's own fault[52] and the public interest in the quick execution of the contract.[53] If the execution of the contract has already begun, the chances of the award of interim measures decrease.[54]

The Dutch legislator has also made special provision in the event of a concluded public contract being annulled on the basis of article 4.15 Aanbestedingswet 2012, see the answer to question 4.1. In such cases the civil court may decide against annulling the contract for compelling reasons of general interest.[55] This is therefore a limited balance of interests mechanism. However, the memorandum of the Aanbestedingswet 2012 (Dutch Procurement Act 2012) shows that the concept of general interest can be interpreted broadly. The Dutch courts must follow the jurisprudence of the CJEU in the interpretation of general interest.[56] Of course, the court may only decide against the annulment of a public contract if it finds that the reasons of general interest outweigh the interest of the claimant in the specific case at hand. Article 4.18(2) Aanbestedingswet 2012 limits the possibility of economic interests being taken into account. An economic interest may only be considered a pressing reason of general interest if there are special circumstances through which the annulment of the contract would have unreasonably disadvantageous consequences. Economic interests that are directly linked to the concluded contract may under no circumstances be taken into account.

As far as our findings go, the possibility of article 4.18 Public Procurement Act 2012 leaving an existing public procurement contract intact as a result of compelling reasons of

[48] I.J. van den Berge, M.J. Mutsaers, T.G. Zweers-te Raaij en A.B.B. Gelderman, 'Kroniek Jurisprudentie aanbestedingsrecht 2013', *TAAN* 2013/02, SDU 2013, p. 36.

[49] S. Evers, 'Grenzen aan de belangenafweging door de – nationale – rechter ?', *TAAN* 2008, Sdu 2008, p. 227; Rb. Rotterdam 10 May 2012, ECLI:NL:RBROT:2012:BW5760 and ECLI:NL:RBZUT:2008:BC4993.

[50] Gerechtshof 's-Hertogenbosch 17 July 2007, ECLI:NL:GHSHE:2007:BB1674; Rechtbank 's-Hertogenbosch 21 January 2008, ECLI:NL:RBSHE:2008:BC2464.

[51] Gerechtshof 's-Hertogenbosch 17 July 2007, ECLI:NL:GHSHE:2007:BB1674.

[52] Rechtbank Arnhem 19 January 2011, ECLI:NL:RBARN:2011:BP1188; Gerechtshof Arnhem-Leeuwarden 17 September 2013, ECLI:NL:GHARL:2013:6838; Rb. Arnhem 15 July 2011, ECLI:NL:RBARN:2011:BR4958 and Rb. Leeuwarden 29 July 2010, ECLI:NL:RBLEE:2010:BN5172.

[53] Rb. 's-Hertogenbosch 21 January 2008, ECLI:NL:RBSHE:2008:BC2464; Rb. Zeeland-West-Brabant 27 May 2014, ECLI:NL:RBZWB:2014:3579 (rectified by ECLI:NL:RBZWB:2014:3962); Rb. 's-Gravenhage 24 January 2010, ECLI:NL:RBSGR:2012:BV1636 and 1638; Rb. 's-Gravenhage 21 May 2010, ECLI:NL:RBSGR:2010:BM5875; Gerechtshof 's-Hertogenbosch 17 July 2007, ECLI:NL:GHSHE:2007:BB1674; Rechtbank Arnhem 19 January 2011, ECLI:NL:RBARN:2011:BP1188.

[54] Rechtbank 's-Gravenhage 18 September 2007, ECLI:NL:RBSGR:2007:BB5302; Rb. 's-Gravenhage 21 May 2010, ECLI:NL:RBSGR:2010:BM5875; Gerechtshof 's-Gravenhage 2 November 2010, ECLI:NL:GHSGR:2010:BO5060 and Gerechtshof 's-Hertogenbosch 17 July 2007, ECLI:NL:GHSHE:2007:BB1674.

[55] Article 4.18 Aanbestedingswet 2012 (Public Procurement Act 2012).

[56] Kamerstukken II, 2008/09, 32027, no. 3, p. 12.

general interest has not been used once in the Netherlands. For that reason there are no criteria to be found in Dutch case law for using the balance of interests procedure

4.5. Directives 89/665/EEC and 92/13/EEC stipulate that when a first instance court, independent of the contracting authority, is reviewed by an appeal dealing with the contract award decision, the member states ensure that the contracting authority cannot conclude the contract before the appeal authority gives its judgement based either on the request for interim measures or the appeal.
Is it possible to have this suspension lifted automatically by your court? If so, under what conditions?

The Dutch standstill rule can be found in article 2.127 Aanbestedingswet 2012 (Public Procurement Act 2012). It guarantees an automatic standstill-period after the award decision has been taken. The contracting authority is obliged to suspend the actual conclusion of the public contract for at least 20 days after announcement of the award decision. By virtue of article 2.127(4) Aanbestedingswet 2012, there is no need for the suspension period in certain cases.
A suspension period is not necessary by virtue of the article if

a) The Aanbestedingswet 2012 does not require a notice via the electronic tendering system
b) The only tenderer in the tendering procedure is the one that is being awarded the contract and there are no other parties concerned
c) The public contract in question is a framework agreement or a specific contract based on a dynamic purchasing system

In all of these cases, the contracting authority is not obliged to suspend the contract. The suspension therefore does not occur automatically and it therefore does not need to be lifted by the court. There are no other conditions under which the suspension can be lifted.

If interim measures are requested during the stand-still period, the contracting authority is obliged by article 2.131 Aanbestedingswet 2012 (Public Procurement Act 2012) to suspend the award of the contract until the court has decided on the request for interim measures. In principle, there is no possibility for the court to lift this suspension (other than deciding on the request for interim measures).

5. Division of the award criteria into award sub-criteria, balancing the award sub-criteria, criteria for assessment and a scoring method for the tenders (case law references: CJEU, C331/04 ATI EAC and others; CJEU, 24 January 2008, Lianakis, C-532/06)

5.1. How does your Court implement this jurisprudence in its everyday practice?

For the reasons explained in the answer to question 1.1.1, public procurement law is governed by private law in the Netherlands. The Administrative Law Division of the

Dutch Council of State, which is the Supreme Administrative Court of the Netherlands according to the definition given in this questionnaire, does not play a role in public procurement proceedings in the Netherlands. The Dutch Supreme Administrative Court therefore does not implement these judgements in its everyday practice.

Dutch courts respect the CJEU's considerations in the judgements ATI EAC[57] and Lianakis.[58] Another judgement that is often referred to in this context is the judgement Succhi di Frutta.[59] In Dutch case law in general, these judgements are interpreted as containing an obligation for contracting authorities not to apply sub-criteria or assessment criteria that have not been stated in the tendering documents.[60] In national case law, the application of (sub-) criteria that differ from the stated criteria is regarded as a violation of the principles of transparency and equal treatment.[61] Later specification of the sub-criteria and the weighting is only permitted if the specification does not change the criteria, does not contain elements that could have affected the preparation of the tenders if known earlier and does not discriminate against one of the tenderers.

To date, the Hoge Raad has not ruled on the use of sub-criteria or assessment criteria specifically. The Hoge Raad has implemented these European judgements in a judgement concerning exclusion grounds.[62] In this judgement, the Supreme Court applied the doctrine that a contracting authority may not make use of sub-criteria or assessment criteria that were not explicitly stated in the tendering documents, and applied this doctrine in an analogous way to exclusion grounds.

The College of Appeal for Trade and Industry (*Het College van Beroep voor het Bedrijfsleven)* has made a judgement according to which the principles of public procurement are not violated in the event of the tendering documents clearly stating which award (sub-)criteria will be applied in the assessment of the tenders, which conditions the tenderers need to fulfil per sub-criterion and the individual importance of every sub-criterion and its weighting.[63]

The jurisprudence mentioned in question 5 is mostly referred to by Dutch courts in cases where the question is whether the weighting criteria have been made sufficiently clear in the tendering documents. As discussed above, Dutch case law often quotes the conditions for specifying criteria after the expiry of the deadline for submitting tenders, as set out in the ATI EAC judgement.

[57] Rb,'s-Gravenhage 5 December 2007, ECLI:NL:RBSGR:2007:BC9314, r.o. 3.2.

[58] HR 7 December 2012, ECLI:NL:HR:2012:BW9233, r.o. 3.6.2; Rb. Noord-Nederland 9 April 2014, ECLI:NL:RBNNE:2014:1937 and 1938, r.o. 5.9.

[59] CJEU 29 April 2014, C-496/99 P, ECLI:EU:C:2004:236 (Succhi di Frutta); see for examples Hof 's-Hertogenbosch 12 February 2013, ECLI:NL:GHSHE:2013:BZ1714, r.o. 4.9 and Rb. Rotterdam 10 May 2012, ECLI:NL:RBROT:2012:BW5760.

[60] See for examples Rb. Noord-Nederland 9 April 2014, ECLI:NL:RBNNE:2014:1937 and 1938, r.o. 5.9; Rb. Limburg 22 August 2013, ECLI:NL:RBLIM:2013:4922, r.o. 3.5; Rb. Den Haag 24 September 2013, ECLI:NL:RBDHA:2013:15878, r.o. 4.10; Rb. Zeeland-West-Brabant 30 January 2013, ECLI:NL:RBZWB:2013:BZ0480, r.o. 3.6; Rb. Rotterdam 10 May 2012, ECLI:NL:RBROT:2012:BW5760.

[61] Rb. Noord-Nederland 9 April 2014, ECLI:NL:RBNNE:2014:1937 and 1938, r.o. 5.9 and 5.11.

[62] HR 7 December 2012, ECLI:NL:HR:2012:BW9233, r.o. 3.6.2 and 3.6.3.

[63] CBB 12 January 2010, ECLI:NL:CBB:2010:BM0099, r.o. 6.7.

The Dutch courts usually assess the weighting of criteria used by the contracting authority in the light of these conditions. Whether knowing the specific weighting could have affected the preparation of a tender is reviewed on a case-by-case basis.[64]

These conditions are furthermore applied in an analogous way to the use of (not explicitly stated) exclusion grounds. Not explicitly stated exclusion grounds may not be applied in the tendering procedure.[65]

The judgment Lianakis is also often quoted in cases in which the court needs to review whether the contracting authority was allowed to use a certain criterion. Contracting authorities enjoy a broad discretion in establishing award criteria, sub-criteria and assessment criteria.[66] The court may only exercise a marginal review of the validity of the criteria.[67]

In Dutch case law, certain rules regarding the validity of criteria have been established in the interpretation of the Lianakis-judgement:

'It is important that (i) such criteria are formulated in a way that for a tenderer it is sufficiently clear which conditions must be met, (ii) the tenders are assessed on the basis of a system that is as objective as possible, and (iii) the contracting authority motivates its eventual decision in a way that makes it possible for the rejected tenderers to (a) review the way in which the assessment has been made and (b) to verify whether the assessment justifies the (provisional) award decision.'[68]

5.2. Does the jurisprudence or legislation allow the use of sub-criteria that are not explicitly stated, and if so, under what conditions? Does the jurisprudence or legislation determine the sub-criteria? Does the jurisprudence or legislation differentiate between the sub-criteria and the assessment criteria?

General remarks

Directive 2004/18/EC gives the contracting authority the choice of basing its award decision on either the most economically advantageous tender ('MEAT-criterion') or on the lowest price only.[69] Dutch legislation prescribes as its basic premise the award of public contracts based on the 'MEAT-criterion'. The contracting authority may also award the contract on the basis of the lowest price but it then needs to provide reasoning for its decision in the tendering documents.

If the MEAT-criterion is used as the award criterion, article 2.115(1) Aanbestedingswet 2012 (Public Procurement Act 2012) stipulates that the contracting authority should state in the contract notice which sub-criteria it intends to apply. The contracting authority is furthermore obliged to state the relative weighting of the sub-criteria in the contract notice or in the tendering documents.[70] This weighting may be expressed by means of a

[64] For example, see Hof Arnhem 6 April 2010, ECLI:NL:GHARN:2010:BM0044, r.o. 12; Vzr. Rb. Rotterdam 10 May 2012, ECLI:NL:RBROT:2012:BW5760.

[65] For examples, see HR 7 December 2012, ECLI:NL:HR:2012:BW9233 and BW9231, r.o. 3.6.2 and 3.6.3.

[66] Rb. Zeeland-West-Brabant 9 October 2013, ECLI:NL:RBZWB:2013:7760, r.o. 3.4; Hof Leeuwarden 5 June 2012, ECLI:NL:GHLEE:2012:BW7551, r.o. 9; Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7367, r.o. 4.3.

[67] Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7367, r.o. 4.3.

[68] Rb. Noord-Nederland 19 March 2014, ECLI:NL:RBNNE:2014:1363, r.o. 6.9.

[69] Article 53 Directive 2004/18/EC.

[70] Article 2.115(3) Aanbestedingswet 2012 (Public Procurement Act 2012).

margin, containing an appropriate distinction between minimum and maximum. In the event of the contracting authority considering the weighting to be impossible for verifiable reasons, it names the criteria in the contract notice or the tendering documents in descending order of importance.[71] The weighting system[72] or the relative weighting of the sub-criteria are not allowed to be changed during the tendering procedure.[73]

Does the legislation or jurisprudence allow for sub-criteria not explicitly mentioned and under what conditions?
The Aanbestedingswet 2012 recognizes the possible use of sub-criteria in article 2.115(1). However, sub-criteria may only be used if they have been defined in the contract notice or the tendering documents. There is no scope for using sub-criteria that have not been explicitly stated in the contract notice in Dutch case law either.[74]

Does the legislation or jurisprudence determine the content of possible sub-criteria?
Article 2.115(2) gives examples of sub-criteria, but it is a non-exhaustive list. Dutch case law gives the contracting authority a wide discretion in establishing sub-criteria.[75] The court may only exercise a marginal review of the validity of the sub-criteria, as explained in the answer to question 5.1.[76]

Does the jurisprudence or legislation differentiate between sub-criteria and assessment criteria?
Assessment criteria are not mentioned in Dutch public procurement legislation. However, Dutch case law makes a distinction between assessment and sub-criteria, although the concept of 'assessment criterion' is usually not explicitly mentioned.[77] The contracting authority is not expected to give very detailed assessment criteria but it does need to give a rough indication of how it is generally going to assess the sub-criteria in the contract notice or the tendering documents.[78]

Particular aspects can play a role in the assessment of sub-criteria, if these aspects are merely an elaboration of criteria that have been explicitly stated in the contract notice or the tendering documents. These aspects may only be used in the tendering procedure if they meet the criteria of the doctrine set out in the judgements ATI EAC and Lianakis (see answer to question 5.1).[79]

---

[71] Article 2.115(4) Aanbestedingswet 2012 (Public Procurement Act 2012).
[72] Rb. Rotterdam 10 May 2012, ECLI:NL:RBROT:2012:BW5760.
[73] Rb. Den Haag 24 April 2014, ECLI:NL:RBDHA:2014:5696, r.o. 4.6.
[74] Rb. Noord-Nederland 19 March 2014, ECLI:NL:RBNNE:2014:1363, r.o. 6.9; Rb. Noord-Nederland 9 April 2014, ECLI:NL:RBNNE:2014:1937 en 1938, r.o. 5.9; Rb. Amsterdam 8 February 2011, ECLI:NL:RBAMS:2011:BP5163, r.o. 4.4.
[75] Rb. Zeeland-West-Brabant 9 October 2013, ECLI:NL:RBZWB:2013:7760, r.o. 3.4; Hof Leeuwarden 5 June 2012, ECLI:NL:GHLEE:2012:BW7551, r.o. 9; Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7367, r.o. 4.3.
[76] Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7367, r.o. 4.3.
[77] For example, see Rb. Leeuwarden 15 December 2010, ECLI:NL:RBLEE:2010:BO7618, r.o. 4.33; example of notion of assessment criteria, whereas the concept is not explicitly mentioned: Rb. Limburg 22 August 2013, ECLI:NL:RBLIM:2013:4922; r.o. 3.9 and 3.12; Rb. Arnhem 15 July 2011, ECLI:NL:RBARN:2011:BR4958; r.o. 4.6.
[78] Rb. Zeeland-West-Brabant, 9 October 2013, ECLI:NL:RBZWB:2013:7760, r.o. 3.9; Vz. Rb. Arnhem, 4 April 2008, ECLI:NL:RBARN:2008:BC9094, r.o. 4.6 and 4.8; Rb. Den Bosch 29 November 2010, ECLI:NL:RBSHE:2010:BO5244, r.o. 4.7.
[79] Rb. Den Haag 27 November 2014, ECLI:NL:RBDHA:2014:16579, r.o. 4.2 and 4.4; Rb. Den Haag 6 May 2014, ECLI:NL:RBDHA:2014:7084, r.o. 4.12.

5.3. What are the consequences of the jurisprudence using sub-criteria that are not explicitly stated? Does the same question apply to the assessment criteria?

To date, the Supreme Court (Hoge Raad) has not ruled on the consequences of the use of sub-criteria that have not been explicitly mentioned. It has, however, ruled on the question of whether exclusion criteria may be used even though they have not been explicitly stated in the contract notice or in the tendering documents.[80] The point of departure of this judgement is that a contracting authority may not use sub-criteria or assessment criteria that have not been explicitly mentioned in the contract notice or in the tendering documents. According to the Hoge Raad, this rule can be applied to exclusion grounds in an analogous way.[81] Consequently, the contracting authority had to retract its award decision.[82]

Sub-criteria that were not explicitly stated

In the case law of the lower courts the order to reassess the tenders seems to be the main approach to tendering procedures in which sub-criteria have been used that were not explicitly stated in the contract notice or in the tendering documents.[83] This reassessment is usually ordered to be executed by a new assessment commission.[84] Other case law exists where the contracting authority did not make the (sub-)criteria to be applied sufficiently clear or applied sub-criteria not mentioned in the tendering documents or changed during the procedure. In some cases like these the court decided that a new tendering procedure was needed.[85]

Assessment criteria that were not explicitly stated

The consequences of a contracting authority using assessment criteria that were not stated in the contract notice or tendering documents can be the order to reassess the tenders,[86] but there has also been a case in which the contracting authority was ordered to start a new tendering procedure.[87]

Insufficiently clear criteria

Furthermore, case law exists where the court has regarded the sub-criteria as well as the assessment criteria insufficiently clear even though they were explicitly stated in the tendering documents. In this specific case, the court ordered the contracting authority to

[80] HR 7 December 2012, ECLI:NL:HR:2012:BW9233, r.o. 3.6.2 – 3.6.4.
[81] HR 7 December 2012, ECLI:NL:HR:2012:BW9233, r.o. 3.6.3.
[82] Rb. 's-Gravenhage 11 January 2011, ECLI:NL:RBSGR:2011:BP0315, r.o. 5; Hof 's-Gravenhage 12 April 2011, ECLI:NL:GHSGR:2011:BQ0942 (appeal); HR 7 December 2012, ECLI:NL:HR:2012:BW9233, r.o. 4.
[83] Rb. Amsterdam 8 February 2011, ECLI:NL:RBAMS:2011:BP5163, r.o. 4.5.
[84] Rb. Den Haag 3 december 2014, ECLI:NL:RBDHA:2014:16365, r.o. 4.3-4.5 and Vzr. Rb. Amsterdam 5 augustus 2013, ECLI:NL:RBAMS:2013:5345, r.o. 4.8.
[85] Hof Arnhem-Leeuwarden 6 May 2014, ECLI:NL:GHARL:2014:3665, r.o. 4.7; Rb. Overijssel 28 March 2014, ECLI:NL:RBOVE:2014:1601, r.o. 4.9; Vzr. Rb. Zeeland-West-Brabant 30 January 2013, ECLI:NL:RBZWB:2013:BZ0480, r.o. 3.7; Rb. Maastricht 27 February 2012, ECLI:NL:RBMAA:2012:BV7037, r.o. 4.8; Rb. Arnhem 15 July 2011, ECLI:NL:RBARN:2011:BR4958, r.o. 4.22.
[86] Rb. Noord-Nederland 9 April 2014, ECLI:NL:RBNNE:2014:1938, r.o. 5.13.
[87] Rb. Limburg 22 August 2013, ECLI:NL:RBLIM:2013:4922; r.o. 3.13.

retract its award decision and to start a new tendering procedure with adjusted sub-criteria and assessment criteria.[88]

5.4. Does the national legislation or jurisprudence require any prior communication as regards the assessment method for the tenders?

Assessment methods are not a distinct concept in Dutch legislation.
To date, the Supreme Court (Hoge Raad) has not ruled on this topic.

Case law of the lower courts on this matter determines that, for reasons of transparency, the assessment methods also need to be sufficiently clear from the contract notice or the tendering documents.[89] The assessment method should be reviewable, transparent and objective.[90]

Lower courts have furthermore determined that the award (sub-)criteria should be phrased in a way that every reasonably informed tenderer can interpret them in the same way and therefore knows what is expected.[91]
This raises the question of whether the assessment method needs to be explicitly stated if the (sub-)criteria are already sufficiently clearly phrased.
A dispute before a lower court questioned whether the use of an assessment method unstated in the contract notice or in the tendering documents is a violation of the transparency principle. The lower court determined that the CJEU-doctrine as established in the ATI EAC-case (see the answer to question 5.1) is applicable to the use of the assessment method as well.[92] The court found that the contracting authority may use an assessment method not explicitly stated only if the method does not change the award criteria, does not contain elements that would have affected the preparation of the tenders if they had been known earlier and does not discriminate against one of the tenderers. The lower court found that, in principle, the assessment method can have an impact on the preparation for a tender. Whether an assessment method should be stated in the contract notice or in the tendering documents therefore needs to be established on a case-by-case basis.[93] According to case law of the lower courts, a factor in this case-by-case assessment may be whether the (reasonably informed) tenderers could have expected the application of the assessment criterion in question.[94]

[88] Rb. Zutphen, 01 March 2012, ECLI:NL:RBZUT:2012:BW5058, r.o. 4.3 and 4.4.
[89] Hof Arnhem 6 April 2010, ECLI:NL:GHARN:2010:BM0044, r.o. 12; Rb. Leeuwarden 15 December 2010, ECLI:NL:RBLEE:2010:BO7618, r.o. 4.16 t/m 4.20; Rb. Noord-Nederland 19 March 2014, ECLI:NL:RBNNE:2014:1361, r.o. 6.9.
[90] Rb. Almelo, 27 February 2006, ECLI:NL:RBALM:2006:AV2994, r.o. 4.2.
[91] Hof Amsterdam, 23 March 2006, ECLI:NL:GHAMS:2006:AX6777, r.o. 4.9.
[92] Rb. 's-Gravenhage 5 December 2007, ECLI:NL:RBSGR:2007:BC9314, r.o. 3.2.
[93] Rb. 's-Gravenhage 5 December 2007, ECLI:NL:RBSGR:2007:BC9314, r.o. 3.3; Vzr. Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7367, r.o. 4.11.1 – 4.11.3.
[94] Rb. Amsterdam 7 June 2012, ECLI:NL:RBAMS:2012:BW7787, r.o. 4.3; Vzr. Rb. Rotterdam 10 May 2012, ECLI:NL:RBROT:2012:BW5760; Rb. Arnhem 3 February 2012, ECLI:NL:RBARN:2012:BV6312; r.o. 4.5 - 4.7; Vzr. Rb. Den Haag 24 September 2013, ECLI:NL:RBDHA:2013:15878, r.o. 4.10 and Vzr. Rb. Limburg 22 August 2013, ECLI:NL:RBLIM:2013:4922, r.o. 3.10.

However, other case law exists in which a lower court decided that the complete assessment method did not need to be stated in the contract notice or the tendering documents.[95]

In existing case law, a violation of the transparency principle has been established in the event of the assessment method for a single sub-criterion varying from the familiar assessment method for all other sub-criteria without any explicit mention of this fact.[96]
In a case in first instance the court ruled that no violation of the transparency principle occurs if the contract notice or the tendering documents do not explicitly state whether the criteria will be assessed in accordance with a relative or an absolute assessment method.[97]

The Supreme Court (Hoge Raad) has ruled that a relative assessment method cannot be declared in violation of the equality and transparency principle just because of its relative nature. A contracting authority is not obliged to reassess all tenders if the highest ranking tenderer retracts its tender but may directly award the contract to the second-highest ranking tenderer.[98]

Correcting a mistake in the assessment method for the tenders is permitted before the deadline because all tenderers still have equal opportunities to make changes.[99]

General concluding remark
As a result of the detailed publication of the sub-criteria and the weighting system in the contract notice or tendering documents, a lot of strategic tendering has occurred in the Netherlands. Tenderers have designed tenders aiming for the best score to win, offering zero sums for certain parts of the tender, for example. This has led to unpredicted and disadvantageous results for the contracting authorities.

6. In-house horizontal cooperation [CJEU cases, C-15/13, Technische Universität Hamburg-Harburg; C-386/11, Piepenbrock Dienstleistungen; C-159/11, Azienda Sanitaria Locale di Lecce and C-480/06, Commission v. Germany (Grand Chamber)].

6.1. Did your Supreme Administrative Court face any difficulties as regards the procurement contracts in the cooperation proceedings?

Horizontal in-house cooperation
Horizontal in-house cooperation is is a concept that has been codified as an exemption from the application of the Public Procurement Directives in article 12(2) of Directive 2014/24/EU and in article 17(2) of Directive 2014/23/EU. Even though these new directives have not entered into force yet, they give a clear answer to the question of whether a horizontal in-house situation constitutes an exemption under public procurement law. In the past the exemption of horizontal in-house construction was the subject of some case law (see the judgements mentioned under question 6).

[95] Rb. Den Bosch 29 November 2010, ECLI:NL:RBSHE:2010:BO5244, r.o. 4.7.
[96] Vzr. Rb. Leeuwarden, 16 February 2007, ECLI:NL:RBLEE:2007:AZ8860, r.o. 4.11.
[97] Rb. Amsterdam 19 December 2014, ECLI:NL:RBAMS:2014:9336, r.o. 4.2 – 4.7.
[98] HR 9 May 2014, ECLI:NL:HR:2014:1078, r.o. 3.7.
[99] Vzr. Rb. Noord-Nederland 29 November 2013, ECLI:NL:RBNNE:2013:7367, 4.11.

Public-public cooperation

The new public procurement directives clear up public-public cooperation exemption as well. Even though the existence of this exemption was confirmed in 2009 by the CJEU in its judgement C-480/06 (Commission v. Germany), [100] there was a lot of confusion about the exact conditions for this exemption. The conditions have now been codified in article 12(4) of Directive 2014/24/EU and in article 17(4) of Directive 2014/23/EU.

The Administrative Law Division of the Dutch Council of State, which is the Supreme Administrative Court of the Netherlands according to the definition given in this questionnaire, is not competent in public procurement proceedings in the Netherlands. For this reason, the Administrative Law Division of the Dutch Council of State has not ruled in disputes concerning horizontal in-house exemption or public-public cooperation exemption. (See answer to question 1.1.1.)

To date, the Supreme Court (Hoge Raad) has not ruled in disputes concerning horizontal in-house exemption or public-public cooperation exemption either.

As far as our findings go, no national case law exists to date concerning horizontal in-house exemption.

However, a limited amount of case law does exist concerning public-public cooperation as established in judgement C-480/06.[101]
A court of first instance notably ruled in a dispute on a public contract without a prior tendering procedure that the criteria for the vertical in-house exemption had been met. The court also ruled that if they had not been met, the criteria for public-public cooperation as in judgement C-480/06 would have been met.[102] This consideration was not clarified or mentioned in the appeal to the judgement of the lower court.[103]

6.2. In concrete terms, how is compliance checked?

Since as far as our findings go no Dutch case law exists concerning the horizontal in-house exemption, there is no record either of how the 'similar control' criterion is tested in disputes concerning a horizontal in-house situation.

7. Confidentiality of the documents upon judicial review (case law references: CJEU, 14 February 2008, Varec, C-450/06)

7.1. Is the confidentiality of the documents frequently invoked in litigation concerning public procurement that you deal with?

The Administrative Law Division of the Dutch Council of State, which is the Supreme Administrative Court of the Netherlands according to the definition given in this

[100] CJEU 9 june 2009, C-480/06, ECLI:EU:C:2009:357 (Commission v. Germany, 'Stadtreinigung Hamburg').
[101] Rb. Leeuwarden 27 January 2010, ECLI:NL:RBLEE:2010:BL0852, r.o. 4.32-4.35; Hof Den Haag 25 November 2014, ECLI:NL:GHDHA:2014:3702, r.o. 28.
[102] Rb. Leeuwarden 27 January 2010, ECLI:NL:RBLEE:2010:BL0852, ro. 4.24 - 4.35.
[103] Hof Arnhem-Leeuwarden, 3 September 2013, ECLI:NL:GHARL:2013:6675, r.o. 4.20.

questionnaire, is not competent in public procurement proceedings in the Netherlands. (See answer to question 1.1.1.)

To date, the Supreme Court (Hoge Raad) only once made a judgement on the confidentiality of documents concerning public procurement.[104]
The confidentiality of documents is, however, regularly invoked in proceedings concerning public procurement before the lower courts.

7.2. How does national legislation or jurisprudence deal with confidentiality and the reasons for the decisions of the contracting authorities and the courts?

The main provision concerning the confidentiality of documents with reference to public procurement can be found in article 2.57 Aanbestedingswet 2012 (Public Procurement Act 2012). The contracting authority is obliged to keep information confidential if it has been provided by the tenderer as confidential information or if the information could be used to distort competition. This provision is the implementation of article 6 of Directive 2004/18/EC.

Contracting authorities are obliged by article 2.103(1) Aanbestedingswet 2012 (Public Procurement Act 2012) to inform unsuccessful tenderers as quickly as possible of the reasons for their rejection or exclusion from the tendering procedure. However, the contracting authority may not provide certain information if the release of the information would violate legal provisions, be contrary to the public interest, possibly prejudice the legitimate commercial interests of economic operators, or possibly prejudice fair competition between them.[105]
The Aanbestedingswet 2012 (Public Procurement Act 2012) contains a similar provision concerning the award decision.[106]

The *Wet openbaarheid van bestuur* (Transparency of Administration Act) contains provisions on the obligation of public bodies to provide certain information to applicants in general and is therefore also applicable to some situations concerning public procurement. Under the Transparency of Administration Act a party to a tendering procedure may request the release of certain information from the contracting authority that is also a public body. However, the provisions in the Aanbestedingswet 2012 (Public Procurement Act 2012) constitute a lex specialis to the Transparency of Administration Act.[107] Before the Aanbestedingswet 2012 (Public Procurement Act 2012) entered into force on April 1st 2013, the provisions of the Transparency of Administration Act were considered to have precedence over the provisions of the public procurement law. Since the entry into force of the Aanbestedingswet 2012 (Public Procurement Act 2012), the relation between general and public procurement provisions has changed: the request to release certain information based on the Transparency of Administration Act still needs to be examined in the light of the provisions of the Wet openbaarheid van bestuur (Transparency of Administration Act) only in situations in which the release of documents by the

[104] HR 22 January 1999, ECLI:NL:HR:1999:ZC2826, r.o. 3.5.3.
[105] Article 2.104 Aanbestedingswet 2012 (Public Procurement Act 2012), implementing article 41(3) of Directive 2004/18/EC.
[106] Article 2.138 Aanbestedingswet 2012 (Public Procurement Act 2012).
[107] ABRvS 28 August 2013, ECLI:NL:RVS:2013:888, r.o. 3.1.

contracting authority is not prohibited by the Aanbestedingswet 2012 (Public Procurement Act 2012).[108] In the Netherlands, economic operators who participate in tendering procedures usually classify all information they provide to the contracting authority as confidential.[109]

The memorandum to article 2.57 Aanbestedingswet 2012 (Public Procurement Act 2012)[110] demonstrates that it is the legislator's intention to implement the CJEU's considerations in the Varec judgement.[111] It is therefore the task of the contracting authority to strike a balance between the protection of the confidentiality of that information and the applicant's right to information and effective legal protection.

For a detailed answer on the balance between the confidentiality of documents and the right to a fair trial inter partes by the court, see the answer to question 7.5.

7.3. Is the question of access to confidential documents during the jurisdictional phase regulated by specific legislation in your country? Are there general rules and/or specific rules for public procurement documents?

There is no special legislation regulating the access to confidential documents concerning public procurement during the jurisdictional phase. Article 2.57 Aanbestedingswet 2012 (Public Procurement Act 2012) is also applicable to all requests made to the contracting authority during the proceedings.

Article 843a *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedural Law) allows parties to civil proceedings to request the release of certain documents regarding a legal relation that the requester is part of during the proceedings. The person requested to release the documents may reject the request if there are significant reasons and fair proceedings can still be guaranteed without the release of the documents. The court supervises whether these conditions are met.

Based on article 22 Code of Civil Procedural Law, during civil proceedings the court can request the parties to release documents concerning the proceedings at hand. The requested party may refuse for compelling reasons. The court decides whether the refusal is justified.

7.4. Does the national judge rule on the confidentiality of the documents? Must he/she refer to a specific instance in the matter? What criteria does jurisprudence use to authorise or deny access to documents that are classified as confidential? Is there a difference depending on whether accelerated proceedings are applied or not?

Does the national judge rule on the confidentiality of the documents?

[108] *Kamerstukken II* 2009/10, 32 440, no. 3, p. 69-70.
[109] *Kamerstukken II* 2009/10, 32 440, no. 3, p. 69-70.
[110] *Kamerstukken II* 2009/10, 32 440, no. 3, p. 70.
[111] CJEU 14 February 2008, C-450/06, ECLI:EU:C:2008:91 (Varec).

Confidentiality and the contracting authority
In accordance with article 2.57 Aanbestedingswet 2012 (Public Procurement Act 2012), the documents have to be requested from the contracting authority and the contracting authority itself rules on the confidentiality of the documents.

Confidentiality and the judge
If the confidentiality of documents is invoked during the proceedings before the court, the judge is competent to decide on the validity of the request. In accordance with the CJEU-judgement Varec, the national judge may not blindly release the documents to guarantee fair proceedings inter partes when all parties have all the relevant information, but he must weigh the confidentiality of the documents and the interests tied to this confidentiality against the interests of fair proceedings for the requesting party.[112]

There are two legal bases to be found in Dutch legislation concerning the competence of the judge to decide on the confidentiality of the documents in civil proceedings.

First, the authority of the judge to decide on the validity of the claim that certain documents are confidential, can be found in Article 843a *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedural Law) if one of the parties to the proceedings requested the release of the documents.

Furthermore, the judge may request the release of documents by one of the parties ex-officio based on article 22 Code of Civil Procedural Law. Should the party refuse, the judge decides on the validity of this refusal.

The judge may consider the reasons for confidentiality stated in the Aanbestedingswet 2012 (Public Procurement Act 2012) as factors in his decision on basis of article 843a or 22 Code of Civil Procedural Law. For further elaboration on the judge's authority, see the answer to question 7.3.

In most cases, a request based on article 843a Code of Civil Procedural Law is rejected in proceedings concerning public procurement.[113] Hardly any case law exists concerning the use of Article 22 Code of Civil Procedural Law.

Conduct of proceedings
Apart from these provisions, furnishing of proof and the conduct of proceedings also play a role in the judge's authority to decide on the confidentiality of documents.
If the adversary of the contracting authority claims certain facts, the contracting authority will have to provide evidence for its defence. If the contracting authority has to release confidential documents to prove certain facts claimed by the other party wrong, the contracting authority would usually lose the dispute if it refused to release the documents. The judge decides in this situation whether the documents need to be treated

[112] CJEU 14 February 2008, C-450/06, ECLI:EU:C:2008:91 (Varec), paragraph 39 – 51.
[113] See jurisprudence mentioned in footnote 116 and the note T.H. Chen concerning Vzr. Rb. Oost-Brabant 1 December 2014, ECLI:NL:RBOBR:2014:7463, JAAN 2015/21.

confidentially and whether the confidentiality of the documents is more important than the legal protection inter partes.

Is the judge obliged to refer the decision of confidentiality to a specific authority?

No, the national judge decides on the matter of confidentiality himself.

What criteria are used in the jurisprudence to authorize or deny access to documents that are (already) classified as confidential?

In a case in which the applicant was dissatisfied with the amount of information he had received from the contracting authority about the award decision, the Supreme Court (Hoge Raad) decided in 1999 that article 8 of Directive 92/13/EEC specified which information the applicant had to receive. The applicant therefore did not have the right to claim further information than the specified information.[114]

The case law of the lower courts often relates to the question of whether the contracting authority has provided sufficient reasoning for its decision, in the light of article 2.57 and in article 2.104 and 2.138 Aanbestedingswet 2012 (Public Procurement Act 2012).[115] The case law of the lower courts further outlines the criteria on the basis of which the judge makes his decision regarding a request based on article 843a *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedural law). In assessing whether certain information should be released during the proceedings, the judge takes into account all circumstances of the case, such as the effective legal protection of the parties, whether one of the parties has a significant interest in the release of the documents, the sensitivity of commercial information, the market conditions, the possible distortion of competition in the event of the release of the information, whether the information has been released in earlier proceedings, the award criterion (MEAT or lowest price), the information that has already been released, whether the public contract in question is a standard contract or a unique contract, the amount of time that has passed and whether there are significant reasons to doubt the decision of the contracting authority.[116]

Is there a difference in accelerated (or for the sake of the question interim) proceedings?

[114] HR 22 January 1999, ECLI:NL:HR:1999:ZC2826, r.o. 3.5.3.

[115] The following examples concern provisions from the past Dutch implementation of the public procurement directives, the Decision Procurement regulations for Public Contracts (*Besluit Aanbestedingsregels voor overheidsopdrachten*). However, the content of these provisions has been directly taken over in the new Public Procurement Act 2012 (*Aanbestedingswet 2012*). As an example for article 2.57 *Aanbestedingswet 2012*, see Vzr. Rb. Rotterdam 2 August 2012, ECLI:NL:RBROT:2012:BX3795, r.o. 4.13.5; as an example for 2.138 Aanbestedingswet 2012, see Rb. Zwolle-Lelystad 2 June 2010, ECLI:NL:RBZLY:2010:BM6522, r.o. 5.13 – 5.15.

[116] Among others, Vzr. Rb. Den Haag 11 August 2008, ECLI:NL:RBSGR:2008:BE8969, r.o. 3.4 and 3.5; Vzr. Rb. Rotterdam, 22 June 2010, ECLI:NL:RBROT:2010:BN2470, r.o. 4.3.1-4.3.3; Vzr. Rb. Arnhem 24 November 2010, ECLI:NL:RBARN:2010:BO9051; Rb. Utrecht 22 February 2012, ECLI:NL:RBUTR:2012:BV6410, r.o. 4.6; Rb. Den Haag 27 February 2013, ECLI:NL:RBDHA:2013:BZ3895, r.o. 2.5-2.12; Vzr. Rb. Den Haag 28 May 2014, ECLI:NL:RBDHA:2014:7930, r.o. 4.4; Rb. Oost-Brabant 1 December 2014, ECLI:NL:RBOBR:2014:7463, r.o. 4.5-4.9 and M. van der Velden en D. Radder, 'Tips en tricks voor een 'Wira-proof' aanbesteding', *Gemeentestem* 2013/9.

There are no differences in legislation or case law concerning the confidentiality of documents in accelerated/interim proceedings and normal proceedings.

7.5. When some documents are classified as confidential, how is the right to fair proceedings guaranteed?

By virtue of the case law of the Supreme Court (Hoge Raad), the judge may apply article 22 *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedural Law) and may request access to documents classified as confidential to decide whether significant reasons justify keeping the documents' contents secret.

If the judge decides that a claim of confidentiality of the documents is justified, the party that asked for confidentiality may decide that only the judge may inspect the documents. The other party is then asked for permission for the judge to base his judgement on these documents. If the party claiming confidentiality does not take this decision or the other party refuses to grant permission, the principle of proper judicial procedure requires that the judge who has ruled on the confidentiality of the documents will not be part of the chamber that will rule further in the proceedings. The documents will be returned. If, because of lack of information, the new chamber is planning to decide to the detriment of the party claiming confidentiality of the documents, the chamber will give that party a second chance to release the documents.[117]

In practice, parties to proceedings concerning public procurement do not often make use of the possibility that only the judge may inspect the confidential documents.[118]

[117] HR 20 December 2002, ECLI:NL:HR:2002:AE3350, r.o. 4.4.4-4.4.6; HR 11 July 2008, ECLI:NL:HR:2008:BC8421, r.o. 3.4.6-3.4.8 and HR 13 July 2012, ECLI:NL:HR:2012:BW3264, r.o. 3.6.2. The cases mentioned cases did not concern procurement. Nevertheless, the rule is applicable to public procurement proceedings as well.

[118] Vzr. Rb. Rotterdam, 22 juni 2010, ECLI:NL:RBROT:2010:BN2470, r.o. 4.3.3. There are examples for cases in which only the judge did inspect certain information: in Rb. Den Haag 4 april 2008, ECLI:NL:RBSGR:2008:BD3223, r.o. 1, certain documents were only shown to the court and in Rb. Den Haag 27 augustus 2010, ECLI:NL:RBSGR:2010:BN5931, r.o. 4.7, a name of a reference was only provided to the judge, with permission from the other party.