

European Parliament

Committee on the Internal Market and Consumer Protection

**Public Hearing on Review of the workings and effectiveness of the
Public Procurement Directives**

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Contribution of Mr Drs L.C. Brinkman

Mr Chairman,

As a representative of the European Construction Industry Federation (FIEC) and the Dutch Construction Industry (Bouwend Nederland) I highly appreciate the opportunity to contribute to this day.

I will address the topic “In-house procurement” as this is the subject of the second session of today and as I was asked to speak on this topic.

But allow me to make some broader remarks on the workings and effectiveness of the Public Procurement Directives for the classic sectors as “Review of the workings and effectiveness of the Public Procurement Directives” is the Theme for today. My remarks with regard to in house procurement I will save for last.

Workings and effectiveness of the Directive

About the workings and the effectiveness of the Directive the following. An initial observation is that this directive has been in existence for only a very short time, so apparently this Directive may enjoy your undivided attention. The Directive was implemented in Dutch Law within the required time on December 1, 2005, so we have had only a brief experience with it.

I hope that this Directive will be with us for quite some time and that it will not be amended in the near future. That would be quite undesirable! Contracting Authorities are obliged to apply the rules correctly and sensibly. And precisely that often leaves a lot to be desired, as good public procurement is quite complicated and the authorities involved often do not possess the required expertise. The last thing to do then, is to change the rules after a short while. This will only confuse contracting authorities.

With regard to the effectiveness of the procurement Directives I am of the opinion that they have not lead to a noticeable increase in cross border activity in the construction industry. This has nothing to do with a possible disregard for the Directives but much more so with the nature of the construction industry and its product. Even if a construction company is aware of a project to be let in another member state, there are many obstacles to effectively execute a project in another country. Language, culture (local customs and methods of the industry), the absence of a network of subcontractors and suppliers as well as differences in public regulations are such important obstacles.

Added to that is that on average the construction companies in the various member states possess the same or similar abilities. Operating in another member state only makes sense, and will only be successful, when foreign construction companies have added value, a certain ability that is not available on the local market of that member state. A great example is tunnel boring in the soft Dutch soil by foreign (German and French) contractors who had an opportunity because the Dutch contractors did not have the necessary know how.

All this does not mean that Dutch contractors would not be interested in foreign construction markets. They certainly are, but this interest usually results in the take over of a construction company by a Dutch contractor, which company will then continue to operate on their own market, knowing the language and the customs of such market.

The Directives have certainly had their impact on the national market. They have lead to a great attention for the phenomenon of public procurement. The effect of the European Procurement Directives has predominantly been that national construction companies and national contracting authorities address each other on compliance with the Directives.

Procurement under the EU threshold

We are all aware that the EU Commission is making an effort to give additional regulations on the procurement of projects of which the estimated value is below the thresholds of the Directive.

The Commission is making a case for maintaining a sufficient amount of the “public spirit” of the Treaty and the Directive.

Apart from the question what that really means, I wonder what is exactly that the Commission aims to achieve. I indicated before that the Directive with regard to the procurement of construction projects hardly leads to an increase in cross border activity. That effect will be even less when it entails smaller projects. It is therefore my opinion that the Commission should not involve itself with procurement below the thresholds. The thresholds are not there without reason.

Do not think that award of public projects below the thresholds in The Netherlands happens in a non-transparent way. Almost every contracting authority has taken the obligation upon itself to apply a public or restricted procedure for works of a certain size. Only the very small projects may be awarded directly or after a negotiated procedure.

Complex projects

At the other end of the spectrum, with regard to the procurement of complex projects the Directive still seems inapt. Though the Directive does contain the “Competitive Dialogue” procedure, the application of that procedure is very limited and it seems its application is even more constricted by the interpretative announcement by the European Commission on that procedure. All in all this could cause that modern contract forms will be applied less than is desirable because they cannot be procured in a responsible way in compliance with the Directive. My suggestion is that we take another good look at the applicability of the competitive dialogue procedure.

Innovation

It has been said that the construction industry generates too little innovation. I disagree with that. Construction companies do a lot of innovation, and that is not surprising: construction companies are commercial enterprises and entrepreneurs know that innovation allows them to take a bigger share of the market and that will lead to a bigger turn over. Innovation happens in many fields in construction: in applied materials, in the optimal tuning of work method, planning or a material in a contractor's (part of the) design. Unfortunately, contractors are not always in the forefront bringing their innovations under the attention of the general public.

All too often, we do not realise that it is primarily the procuring agency that decides whether or not contractors can offer innovative solutions. The procuring agency decides whether or not it will describe the works in a detailed design or in predominantly functional specifications. When a detailed design is put on the market the procuring agency decides whether or not the tenderers will be allowed to offer alternatives. I frequently hear contractors state that procuring agencies offer them too few chances for innovation.

In-house procurement

Finally on in-house procurement. Allow me to be brief. As I believe that the essence of the Directive is to enhance competition, it should be so that employing in-house procurement should be limited to an absolute minimum.

I am not going to discuss with you the criteria as laid down in the Teckal ruling establishing under which conditions in-house awards need not be publicly tendered. My point of view is of a more principal nature: I am not at all in favour of awarding in-house assignments e.g. a local authority giving a design works to a private company formed by that same authority. We need to be aware that public money will pay for these assignments and that there is no guarantee that the price to be paid is market conform, which would be the case if the works were to be publicly procured.

Thank you for your attention!
