The Netherlands

Recent Developments in Dutch Procurement Law

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I. Introduction

This country report will discuss three recent developments in Dutch procurement law. The first concerns the pending legislative proposal that aims to introduce time-limits for the discretionary exclusion grounds regarding misrepresentation and improper behaviour. It is argued that this proposal alters the current view on the impact of misrepresentation or improper behaviour on future procurement procedures. Secondly, the national rules for sub-threshold procurement are discussed. Under Dutch law, it is required to base the decision on who is invited for a sub-threshold procedure on objective criteria, but it is unclear whether experience with a specific economic operator could be such a criterion. The third development is the recent infringement procedure that the European Commission launched because it believes that the Dutch housing corporations are contracting authorities. The Dutch government opposes that view.

II. Time-Limits for Misrepresentation and Improper Behaviour

The European Procurement Directive states that exclusion is possible if the economic operator has been guilty of serious misrepresentation or if the economic operator has undertaken steps to unduly influence the decision-making process of the contracting authority.[1] The Directive requires Member States to determine the maximum period of exclusion, which for these exclusion grounds shall not exceed three years from the date of the relevant event.[2]

When implementing the Directive, the Dutch government did determine time-limits for some discretionary exclusion grounds, but not for both grounds mentioned above. For the exclusion ground for 'serious misrepresentation', this seemed to confirm the view that exclusion was only possible in case of such misrepresentation in the specific procurement procedure at hand. This means that a misrepresentation in a previous procurement procedure could not result in exclusion on this ground.

That view was confirmed early 2017 by the Dutch Commission of Procurement Experts, a complaints board that was installed by the Dutch Procurement Act 2012 and publishes non-binding opinions.[3] The commission stated that a tenderer does not have to notify that it had been guilty of serious misrepresentation in a previous procurement procedure. Another example can be found in a more recent court case, where the discussion included the question whether serious misrepresentation in a previous procurement procedure qualified as grave professional misconduct and would therefore have to result in exclusion of the tenderer.[4] This discussion would have been unnecessary if that previous misrepresentation as such would have been a ground for exclusion under the current procurement procedure. Therefore, the parties apparently also believed that the exclusion ground for misrepresentation only covers the current procurement procedure.

However, the Dutch government has now published a legislative proposal that will include a time-limit of three years for both abovementioned discretionary exclusion grounds (i.e. misrepresentation and improper behaviour).[5] In the Explanatory Memorandum, the government states that these time-limits were not included earlier in the Dutch Procurement Act 'by mistake'.

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1 Article 57(4)(h) and 57(4)(i) of Directive 2014/24/EU.

2 Article 57(7) of Directive 2014/24/EU.

3 Opinion 386 dated 3 February 2017, para. 5.11.2.

4 Preliminary proceedings, District Court Gelderland 5 September 2017, ECLI:NL:RBGEL:2017:4947.

5 *Kamerstukken II* 2017/18, 34 860, nr. 2.

With regard to the exclusion ground for misrepresentation, this is remarkable, as it goes against the current view described above: the introduced time-limit implies that previous misrepresentations can be taken into account up until three years and can therefore result in exclusion from future procurement procedures.

Also with regard to the exclusion ground for improper behaviour, the introduction of a time-limit is remarkable. The exclusion ground states that the economic operator "has undertaken to unduly influence the decision-making process of **the** contracting authority". It is argued that this exclusion ground therefore only concerns the specific procurement procedure at hand and not previous procedures.[6]

Hopefully the Dutch Parliament will notice this impact of what at first sight seems to be a merely technical legislative proposal. It should be debated whether these implications are desirable and in line with European law.

III. Criteria for Invitation below Threshold

The Dutch Procurement Act 2012 states that a contracting authority or a contracting entity must decide on the basis of objective criteria (i) which procurement procedure it chooses and (ii) which economic operators will be invited to that procedure.[7] This provision is particularly relevant for contracts which fall below the EU procurement thresholds and have no cross-border interest. As regards the question of what criteria are suitable to decide who to invite (and who not), there is an ongoing debate. Although there are many sub-threshold contracts awarded in practice, there is very little jurisprudence on this matter.

In 2016, the highest Dutch civil court (*Hoge Raad*) held that a contracting authority was allowed to invite only those companies that had shown interest for the contract during a series of conferences (where that interest was subsequently registered by the contracting authority).[8] The District Court of Zeeland West-Brabant stated later that year that a contracting authority was allowed to invite three companies based on its previous experience with those companies and on the fact that it was aware of those companies' experience and references.[9]

However, the Commission of Procurement Experts recently stated in an opinion that the good experience that a contracting authority has with a specific economic operator is *not* an objective criterion.[10] The commission does not clarify whether this means that previous experience as such is not an objective criterion, that 'good' experience cannot be determined objectively or that the problem was that this specific economic operator was not the only one the contracting authority had good experience with. Notwithstanding the non-binding character of the commission's opinion, it points out that there is a lack of clarity on what can qualify as an 'objective criterion'. More debate is therefore to be expected.

IV. Housing Corporations Infringement Procedure

In December 2017, the European Commission sent a letter of formal notice to the Netherlands concerning its approximately 350 housing corporations.[11] The Commission believes that they qualify as bodies governed by public law and should therefore follow the rules laid down in the Procurement Directives and the Dutch Procurement Act 2012. The Dutch government however stands by its view that the Dutch situation is different from the French one,[12] that the Dutch housing corporations are not subject to management supervision by contracting authorities and that they therefore cannot be qualified as bodies governed by public law.[13] To strengthen that view, already in 2015 a provision was added into the Dutch Housing Act (*Woningwet*) stating that an instruction by the Minister to a housing corporation cannot regard the award of contracts by that corporation. The core of the discussion with the Commission will arguably be whether that is enough to avoid qualification as a body governed by public law. In Dutch literature, authors are divided about the outcome.

6 See also S Arrowsmith, *The Law of Public and Utilities Procurement* (2014), Volume 1, 1297.

7 Article 1.4 Dutch Procurement Act 2012 (*Aanbestedingswet 2012*).

8 Hoge Raad 25 March 2016, ECLI:NL:HR:2016:503.

9 Preliminary proceedings, District Court Zeeland West-Brabant 1 December 2016, ECLI:NL:RBZWB:2016:7571.

10 Opinion 419 dated 3 November 2017, para. 6.5.3.

11 Press release 7 December 2017, IP/17/4771.

12 Which led to the Case C-237/99 *Commission v France* [2001] ECLI-70.

13 *Kamerstukken II* 2017/18, 29 453, nr. 468.