NautaDutilh

5 things you need to know about public procurement in 2022

Intro

In 2022, we expect the following five topics to be particularly relevant to procurement professionals:

#1 transfer of public contracts in the context of M&A transactions

#2 transparancy obligations in connection with an assignment of public land

#3 higher supply prices

#4 sustainability and ESG

#5 equal treatment of bidders by private parties

#1

Transfer of public contracts in the context of M&A transactions

In the context of an M&A transaction, it is important to pay attention to the consequences of the deal for existing contracts (e.g. possible change-of-control clause, etc.). As far as public contracts are concerned, this issue is specifically regulated by public procurement law.

In an *asset* deal, the original contractor can be replaced by another economic operator that meets the initially established qualitative selection criteria, without the need for a new tender, through universal or partial succession into the position of the initial contractor following a corporate restructuring, including a takeover, merger, acquisition or insolvency, provided this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of public procurement legislation[1]. A transfer of assets requires in principle the consent of the contracting authority.

In general, *share* deals do not produce effects under procurement law, as the contractor remains the same. Indeed, the Court of Justice of the European Union (CJEU) has ruled that changes to a company's shareholder structure will not, as a rule, result in the need for material contractual amendments.[2]

#2

Transparancy obligations in connection with an assignment of public land

In principle, the sale of land by a public authority to an undertaking does not constitute a public procurement contract.[3]

Thus far, it has therefore been considered that, in the absence of a statutory provision to this effect, a public authority is not obliged to organise a tender procedure for or advertise an assignment of immovable property.[4]

The case law on this issue is nevertheless evolving. On 26 November 2021, the Dutch Supreme Court ruled that a public authority that wishes to sell immovable property must in principle offer (potential) candidates the opportunity to bid for it.[5] The principle of equal treatment implies that the buyer must be selected based on objective, verifiable and reasonable criteria. This principle also requires that, in order to create a level playing field, the public authority must ensure an appropriate degree

1 In the Netherlands, Article 2.163f of the Public Procurement Act 2012; in Belgium, Article 38/3 of the Royal Decree of 14 January 2013 establishing general rules for the performance of public contracts; in Luxembourg, Article 43(1)(d) of the Public Procurement Act 2018.
2 CJEU, 19 June 2008, C-454/06, pressetext.
3 CJEU, 25 March 2010, C-451/08, Helmut Müller.
4 In Belgium, see e.g. Council of State judgment no. 239.913 of 20 November 2017.
5 Dutch Supreme Court, 26 November 2021, ECLI:NL:HR:2021:1778 (the "Didam ruling").

of publicity with regard to (i) the availability of the immovable property, (ii) the selection procedure, (iii) the timetable, and (iv) the applicable selection criteria. However, is not necessary to ensure competition if it is established in advance or can reasonably be assumed based on objective, verifiable and reasonable criteria that there is only one serious candidate. It is generally assumed that this judgment also applies to the grant of a long lease or building rights as well as to the conclusion of lease (or similar) agreements by a public authority after its date.

This judgment will certainly have repercussions outside the Netherlands, given the attention Benelux administrative courts pay to case law in neighbouring countries.

#3

Higher supply prices for raw materials and energy

Recent crises have highlighted the tension between the rapid increase in supply costs borne by companies and the impossibility to pass on this increase, in whole or in part, to their co-contracting parties, unless the contract includes a price revision clause.

In most jurisdictions, *force majeure* can traditionally not be invoked in this situation, as performance of the obligation is not impossible, only more onerous. However, the distinction between *force majeure* and hardship has come under pressure, as some courts do not interpret the impossibility required for *force majeure* in an absolute manner. It is therefore worth trying to rely on force majeure to address an unforeseen situation that reasonably requires an adaptation of the contract terms.

In some jurisdictions, such as Belgium, a statutory hardship regime applies by default to public contracts, allowing the private party to request a revision of the contract terms even when it is not absolutely impossible to perform the contract at its original terms.[6]

#4

Sustainability and ESG

Three decades ago, there was uncertainty as to whether a contracting authority could take non-economic criteria into account when awarding public procurement contracts. In this regard, guidelines were set by the CJEU[7], which were then consolidated in European directives of 2004 and 2014, confirming the right of contracting authorities to include environmental, social and ethical criteria in their procurement policies and practices. Several sets of guidelines issued at the European, national and

6 Article 38/9 of the Royal Decree of 14 January 2013 establishing general rules for the performance of public contracts.
7 CJEU, 17 September 2002, C-513/99, Concordia Bus; 4 December 2003, C-448/01, EVN & Wienstrom.

regional levels set out the opportunities thus created and encourage contracting authorities to make use of them. However, the climate emergency has given rise to a new trend: contracting authorities are no longer simply encouraged to include green public procurement criteria (GPP) in their tenders but increasingly obliged to do so. This requirement can take the form, for example, of an obligation to designate a contact person specialised in environmental and social clauses within each contracting authority and to report on the inclusion of such clauses in procurement contracts.[8]

These initiatives are currently national or regional in scope but are likely to be reinforced at the European level. The EU Green Deal foresees that the Commission will propose "minimum mandatory green criteria or targets for public procurement in sectorial initiatives, EU funding or product-specific legislation".[9]

This trend illustrates the need for contracting authorities to learn about environmental and social issues related to their procurement policies and practices and for suppliers to become more aware of the ESG aspects of their activities.

#5

Equal treatment of bidders by private parties

It is well known that public procurement law applies not only to public authorities but more generally to "contracting authorities", including certain persons under private law. Questions arise, however, with regard to private companies that are not contracting authorities but that still decide to put all or some of their contracts out to tender.

The principle of freedom of contract could lead to the conclusion that a private company can negotiate as it pleases. However, the case law is more nuanced on this point, given the duty – applicable in all Bene-lux countries – to negotiate in good faith.

Dutch case law goes even further. The Dutch Supreme Court has ruled that if a private party puts out a contract to tender, it may be bound by procurement law principles. In this regard, it must be examined whether (potential) suppliers can reasonably expect, based on the wording of the tender, that the contracting authority is obliged to respect the principles of equal treatment and transparency. Whether this expectation arises will depend on the tender conditions and other circumstances of the case. A private party may stipulate in its tender conditions that the principles of equal treatment and transparency do not apply. However, in certain circumstances, it may be contrary to the general principles

8 In Brussels, see e.g. the Decree of 8 May 2014 on environmental and ethical clauses.
9 Sustainable Europe Investment Plan – European Green Deal Investment Plan, 14 January 2020, COM(2020) 21 final, 12.

reasonableness and fairness to exclude these procurement principles.

Companies should therefore be careful about how they procure goods and services, as the mere act of putting a contract out to tender could create an expectation amongst suppliers that the principles of equal treatment and transparency will be respected. In this regard, a well-worded provision can help to clear up any misunderstandings.

About the team

NautaDutilh's Public Procurement Team is one of the largest in the Benelux, with the ability to advise on the full range of complex procurement cases. The team acts for both contracting authorities and bidders and is thus able to understand and anticipate the needs and strategies of the other side. The team combines in-depth knowledge of public procurement law with expertise in related fields such as construc-tion law, transport, healthcare, regulated markets and state aid. The members of the team are skilled at organising tender procedures, drawing up tender documentation, and litigating before the national and EU courts. They belong to various procurement law associations and publish and lecture regularly on selected topics in their areas of expertise.

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