SMALL PUBLIC PROCUREMENT CONTRACTS

A commented comparison of the French, Dutch and Belgian legal treatment

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ABSTRACT

This paper compares the actual (new) rules on small contracts in France, the Netherlands and Belgium, and analyses the legal position of small contracts in EU law. It focuses further on the paradox that is the consequence of the legal obligation to publish small contracts and to organize competition.

OBSERVATION

Small public procurement contracts, with a value largely below the EU thresholds, are the subject of considerable different views in opinion and legal treatment: in some countries almost all contracts have to be published in official journals; in other countries, there is considerable discretionary power left to the public entities whether they publish these contracts, or even negotiate directly with the supplier they choose.

In Belgium part of the electronic public procurement publication platform can be used for publishing notices for contracts where according to Belgian public procurement legislation the publishing of a notice is not required. Some recommend even the publication of all the public procurement contracts, believing that the publication will also enhance the participation of SME's to public procurement. On the other hand, regularly, public officers of Belgian public entities mention the low participation, even of SME's, in the award procedures of small contracts. Particularly it seems that for small public works contracts, especially reliable and well performing contractors do not participate wholehearted in the public procurement award procedures.

Participation of SME's to public procurement is in the EU already quite a time a much discussed issue (EC, 2014), this is the case for contracts above as well as below the EU publication thresholds. The last category of contracts is still the largest category in terms of number of contracts and this category is in

value also very substantial. In terms of contract value awarded, estimations by extrapolation of contract value indicate that the ratio "value of contracts below EU threshold/ value above EU threshold" is very different from one EU country to another: see table 1.

Country (examples)	Above EU threshold in bn Euro	Below EU threshold In bn Euro	Ratio
Belgium	10.9	10.6	0,97
Germany	33,8	98,2	0,34
France	80,7	14,3	5,64
Netherlands	9,7	35,6	0,27

Table 1: Ratio value of contracts below EU threshold and value above EU threshold (Based on values from "Exhibit 2-16: Estimation of SMEs' share of contract value awarded in below-threshold public procurement (extrapolation method)", (EC, 2014), p.38)

At first glance the contracts below the EU thresholds are especially suitable for SME's, as the requirements for economic and financial standing and technical capacity can be set much lower.

So a right way of dealing with these contracts, and more specifically also the small contracts, is very important.

Small contracts

We define small contracts as contracts with an estimated value considerably lower than the EU thresholds. For ease of reasoning: we assume the following values: 30.000 Euro excl. VAT for supplies and services and 150.000 Euro excl. VAT for works.

Value	Classical sectors		
	Works	Supplies	Services
EU Thresholds as of 01 January 2016	5.225.000	209.000 135.000	209.000 135.000
Relative value of "small contracts" thresholds as defined in % of EU thresholds	2,87%	14,3% 22,2%	14,3% 22,2%

Table 2: EU- thresholds as of 01 January 2016 and relative value of the thresholds of small contracts

Why is the organization of an award procedure with competition for small contracts a problem?

Incompressible tendering costs of small contracts at the supplier's side: rules concerning technical specifications

Some tendering process costs at the supplier's side are quite different in a public procurement environment compared to a private sector procurement. Often the administrative burdens are higher: the so called "Red Tape". But the technical proposal of the tenderer requires also more effort, because of the specific public procurement rules on technical specifications.

According to the EU directives on public procurement, the technical specifications lay down the required characteristics of a works, service or supply. They have to afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. Unless justified by the subject-matter of the contract, technical specifications may not refer to a specific make or source, or a particular process which characterizes the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favoring or eliminating certain undertakings or certain products. Such reference is only permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible. Such reference shall be accompanied by the words 'or equivalent'. (EU, 2014, p.121)

The EU directives allow several ways to specify the subject of the contract, but in general it is a combination of functional and performance requirements and references to "standards", where each reference is accompanied by the words 'or equivalent

But applying these rules, any how the public entity specifies, the undertakings have to search for products that are compliant to these specifications, or searching for a product where it could be advocated that it is equivalent to what is required. This is much more demanding than preparing a quotation for a private sector procurement, where regularly a specific trade mark or origin of products is explicitly mentioned or suggested.

For example, construction cost estimates require much effort, even for small works due to the necessity of

- a careful search for compliant products

- calculation

- multiple contacts with suppliers and sub-contractors.

These efforts are hardly sensitive to administrative simplification.

Incompressible tendering costs of small contracts at the buyer's side.

The costs of preparing a tender at the side of the public entity are determined largely by the required efforts in market research, in preparing the content of the tender documents, and especially also in evaluating the tenders, avoiding litigation.

These costs are mostly "incompressible" content related costs and not very sensitive to measures of administrative simplification.

For example, there is little difference in the efforts required to evaluate insurance proposals correctly, whether the insurance policy concerns a contract of 30.000 euro for a small public entity or a contract of 300.000 euro, supposing we have three or four undertakings selected to submit an offer, either directly or in a negotiated procedure with prior publication.

Cost Estimates

The Netherlands made the effort to determine the costs for public entities as well as suppliers to participate in a negotiated procedure without prior publication with competition (Sira consulting, Significant, 2009, p. 48, 62, 76). These values may, according to our experience, be also considered as of an appropriate order of magnitude for the Belgian situation, but are surely no overestimation.

Some recurrent contracts require undoubtedly much more effort and cause much more costs: e.g. insurance contracts, telecom contracts, (internet, phone, ...), and inevitably also non recurrent contracts like specific works, combined maintenance and repair contracts, marketing and communication contracts.

As these cost estimates were calculated at the tariff of 75 euro pro hour, it is clear that the hypothesis in the Sira study is that there is no consultant input involved in the processes! But a lot of small private entities, that are functional public entities in the meaning of the EU directives, have not enough knowledge, human resources or competences available to apply the public procurement regulations and need to involve consultants, working at much higher rates (e.g. Belgian consultants at about 140 - 180 euro/pro hour, lawyers at about a rate of 400 euro/hour) , so those costs are generally much, much higher than the estimates in table 3!

	Costs Public Entity	Costs pro Tenderer
Works	1725	1600
Supplies / Services	1250	1120

Table 3 : Estimated Tendering Costs in Euro (Based on Sira consulting, Significant, 2009, the costs to establish/conclude the final contract with the chosen supplier are not taken into account)

Are the costs spend by the public entity justified?

As explained, often the costs spend by the public entity in a negotiated procedure without prior publication of a notice are much higher than those of table 3. What could be won by a competition in a small contract, is already clearly partly lost in tendering costs in a procedure where the final results are uncertain. So it is indeed very questionable if such a competition will deliver value for money, especially in circumstances where a good solution (experienced contractor with good references) is ready available at a correct price.

Can the tenderer win back the tendering costs?

We suppose that participating in an award procedure is an experiment with "p" the probability of winning the contract. And we suppose "n" independent trials. Although this seems a rather simplistic model, it is sufficient, as it is not the aim to proof but rather to illustrate the relevant issues in tendering for small contracts. We define the stochastic variable X as the probability of winning a contract.

In order to be able to win back the incurred costs within the portfolio of public procurement contracts, the tenderer has to win at least one of the n competitions. The probability p_{atl1} of at least winning one of the award procedures is given by 1 - the probability of winning not any competition or 1 - the probability of n failures.

As the probability of getting exactly k successes in n trials is given by:

$$\Pr(X = k) = \binom{n}{p} p^k (1-p)^{n-k}$$

Then:

$$p_{atl1} = 1 - \sum_{k=0}^{n} \binom{n}{k} p^k (1-p)^{n-k} = (1 - (1 - p)^n)$$

So we can find n by approximation if p_{atl} is given. The mean value is given by n.p.

	z = 5; p_{atl1} = 99%	z = 15; p_{atl1} = 99%	z = 5; p_{atl1} = 95%	z = 15; p_{atl1}= 95%
n =	21 (p_{atl1} = 1 - 0,0092)	66 (p_{atl1} = 1 - 0,0105)	13 (p_{atl1} = 1 - 0,055)	43 (p_{atl1} = 1 - 0,0515)
Costs (works) in euro (supplier side)	33. 600	105.600	20.800	68.800
Probability Winning exactly 1 contract	4,84 %	4,96%	17,87%	15,81%
Winning exactly 2 contracts	12,11%	11,52%	26,8%	23,71%
Winning exactly 3 contracts	19,17%	17,56%	24,57%	23,15%
Winning exactly 4 contracts	21,56%	19,76%	15,35%	16,54%
Winning exactly 5 contracts	18,33%	17,50%	6,9%	9,21%
Winning exactly 6 contracts	12,22%	12,71%	2,3%	4,17%
Winning exactly 7 contracts	6,55%	7,78%	0,58%	1,57%
Winning more than 7 contracts	4, 31%	7,16%	0,12%	0,7%

Table 4 : Number of tenders necessary to be able to win at least one tender and probability of winning exactly x tenders

If we assume that in award procedure without publishing an notice, z = 5 undertakings are invited to participate in an award procedure and we assume for simplicity, although strictly not necessary, that a contractor has a probability of winning a

competition of 1/z, all of the competitors being experienced contractors, well aware of procurement rules and with equal chances. In order to be in a position to be compensated for the incurred costs, a tenderer has to win at least one tender. Indeed, in general, there is no compensation of the incurred tendering costs given by the public entity to the tenderers.

The number of 5 tenders may be assumed as an adequate number of participants a public entity invites to submit an offer in a negotiated procedure without prior publication, as to guarantee a suitable number of offers.

It is also not unrealistic to suppose that the average number of undertakings submitting a tender for a contract of works in a geographical region is, although a high number, z = 15 when contracts are published in the official journal.

If the probability of winning at least one contract is set at around p_{atl1} = 99%, respectively 95%, then an undertaking has to participate in "n" award procedures, considered as independent trials, given by table 4.

It is clear that a tenderer, depending on the situation, has to participate in many procedures to have a reasonable probability to win back the high tendering costs.

From the model (see results table 4), we can derive that a tenderer has to win back for example 33.600 euro spend for the participation in 21 award procedures for works in only a few contracts (the most probable event being winning exactly 4 contracts with a probability of 21,56%.) It is clear that if it concerns small contracts, this is virtually impossible.

Is there room in the EU legal framework for specific rules for small contracts?

Competition and publicity

The obligation for a public entity to organize a public procurement procedure with competition and with a suitable publicity (e.g. publishing a notice) is according to the EU case law and the interpretation of the EU commission a logical consequence of the principles of transparency, equal treatment, non-discrimination and proportionality.

Fundamental rules and the general principles of the EU Treaty

The thresholds for small contracts previously suggested are largely below the EU thresholds, so the EU directives do not apply.

From EU case law it appears that the fundamental rules and the general principles of the EU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency apply, provided that the contract concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is carried out[i].

EU-case law provides also indications that help to determine if a contract has a certain cross-border interest. This certain cross-border interest has to be verified "in concreto" by reference to the particular contract characteristics e.g.: its estimated value in conjunction with its technical complexity or the fact that the works were to be located in a place which is likely to attract the interest of foreign operators. If a complaint is brought before the ECJ, the cross border interest may not be presumed. A mere statement, that a complaint was made in relation to a contract is not sufficient to establish that the contract was of certain cross-border interest[ii].

But the possibility of such an interest may also be excluded where the economic interest at stake in the contract in question is very modest.[iii] The court held up[iv] that if a very modest economic interest is at stake, it could reasonably be maintained that an undertaking located in another Member State would have no interest in the contract and that the effects on the fundamental freedoms of the Treaty concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed.

There is as far as we know no court case where an amount has be determined deciding on what contract is of little economic interest. But it is already clear that the European Court of Justice (ECJ), although not excluding the cross border interest, considered a value of 58.600 Euro for a contract of supplies as a low value contract[v,vi]!

Ways of handling small contracts in French, Belgian and Dutch public procurement legislation

Oral contracts or contracts in writing?

The EU directive rules define a public procurement contract as a contract for pecuniary interest to be concluded in writing.

However, below the EU thresholds and some nationally defined threshold (see table 4), Belgium and France[vii] still allow an "oral contract", where the only written evidence of the contract is the invoice (Belgian (Dutch) terminology: "aanvaarde factuur" translated as "accepted invoice"). It must be said however that at least in Belgium, even small public procurement contracts are seldom awarded orally (e.g. only by phone).

The Netherlands

In the Dutch legal framework, contracts of very low value may be excluded from the public procurement rules. The procedure is called "één op één" (one on one).

The legislator has not fixed thresholds, but the Guide of Proportionality (Ndl, 2013), the official guideline with quasi - reglementary character[viii], put forward with some reserve that it is realistic in general that the contract is considered a "bagatelle" when the value of the contract is lower than:

- 40.000 à 50.000 Euro, ex. VAT for supplies and services A

- 150.000 Euro ex. VAT works

A circular (Ndl, 2015) of the Ministry of the Interior and Kingdom Relations harmonizes the practice in the public entities of the State by establishing the following thresholds:

- works: 150.000, excl.VAT

- supplies and A services: 33.000 euro, excl.VAT

Although normally it is required to motivate if a contract is awarded outside the procurement legislation, a simple reference to the circular is considered a sufficient motivation for contracts below the referred thresholds.

The publicity rules defined in the circular lead to much higher thresholds than the competition thresholds.

	General rule of publishing of a contract notice
Works	> 1.500.000 euro >= EU threshold: also in Official Journal of the European Union
Supplies / A Services	When cross border interest or >= EU threshold >= EU threshold: also in Official Journal of the European Union

Table 5: Publishing of contract notices in classical sectors in the Netherlands

France

In the actual French legal framework, that came into force on April 1, 2016, for the contracts below the threshold of 25.000 euro, it is possible to award these contracts without publishing a notice and without competition. For books not meant for schools the threshold is 90.000 euro.

These contracts can be oral contracts.

The public entity defines on its own a "procedure adaptée" .

The buyer has however the legal obligation[ix] to choose an appropriate offer, to use the public money well and to avoid to award systematically such contracts to the same contractor, when there are more possible offerings that are responding to the need.

Even above that threshold, it is allowed to award a contract without competition when the value of the contract is lower than the EU threshold and the competition is impossible or clearly unuseful, because of the subject of the contract or the weak level of competition.

The principles of equal treatment, free access to public contracts and transparency are applicable[x], as well as the provisions related to the technical specifications.

The publicity rules defined in the decree lead to higher thresholds than the competition thresholds.

	General rule on publishing of a contract notice
State, territorial collectivity, ...	Free choice by the entity if below <= 90.000 euro) >= 90.000 euro publishing in French official journal >= EU threshold: also in Official Journal of the European Union
Other	(Below EU threshold: No threshold, free choice by the entity) >= EU threshold: Official Journal of the European Union

Table 6: Publishing of contract notices in classical sectors in France

Belgium

Actual legislation on small contracts.

The principles of equal treatment, non-discrimination and transparency are applicable, as well as all the provisions related to the technical specifications.

Contracts with an estimated value of 8.500 euro or less may be concluded orally with competition, otherwise such contracts have to be awarded in competition without publishing a notice. The rules on technical specifications are applicable and a motivated award decision has to be made. The decision has to be communicated in writing to the tenderers and the motivation of the decision has to be communicated to the tenderer on its simple written request within 15 days of his request. Contracts above the threshold of 8.500 euro and with a value of 85.000 euro (or < 209.000 euro for B services) or below are treated in the same way.

Above the threshold of 85.000 (>=209.000 euro for B-services) unless a few specific exceptions, contracts have to be published in the Belgian official journal.

	General rule on publishing of a contract notice
All entities	>= 85.000 euro (209.000 B services) publishing in Belgian official journal >= EU threshold: also in Official Journal of the European Union

Table 7: Publishing of contract notices in classical sectors in Belgium (actual legislation)

New Belgian draft law

The principles of equal treatment, non-discrimination and transparency apply also on the contracts with an estimated value lower than or equal of 30.000 euro, but no other provisions of the public procurement draft law apply, unless the rules to estimate the value of the contract. But derived from the aforementioned principles, the contracts have to be awarded with competition and although few other provisions apply, the competent courts, in the absence of a clear provision, will be able to derive from these principles case law that will reduce the flexibility the law suggests.

Oral contracts are allowed until the threshold of 30.000 euro. No formal motivation of the award decision is required.

Overview

	Belgium (actual)	Belgium (Future)	France (actual)	Netherlands (actual)
Thresholds (Euro)	8.500	30.000	25.000 (90.000)[xi]	33.000 Supplies/ Services 150.000 Works
EU Treaty principles apply?	Y(es)	Y	Y	N(o)
Regulated by PP legislation	Y	Y	Y	N
Exempted from competition (1 on 1)?	N	N	Y	Y
Do the (EU) rules regarding technical specifications apply	Y	N	Y	N
Oral Contract allowed?	Till 8.500 euro	Till 30.000 euro	Under 25.000 Euro	?
Motivation in writing of (award) decision	No obligation of formal motivation when "accepted invoice" (oral contract)	No obligation of formal obligation below the threshold of 30.000 euro	Apparently not	Reference to the circular is sufficient

Table 8: Summary table : Small contracts in French, Belgian and Dutch public procurement legislation in classical sectors

Discussion

Market paradox

It is a large spread belief that publicity of public procurement contracts (publishing notices in official journals) and lowering all kinds of so called "barriers" will ensure a larger participation to public procurement tendering, especially for SME"s (EU (2014), p. p. 80, 81). This belief is for example used as justification for the limitations put forward in the EU directive 2014/24 concerning

certain minimal requirements regarding for example technical capacity and economic and financial standing. The results of table 4 illustrate however that for small contracts this reasoning does not suit, as the transaction costs of the normal procedures with competition even without publishing the contract are out of proportion when compared to the objective value for money.

Indeed, the costs related to a tendering process with competition make that in small contracts, it is almost impossible for a tenderer to win back incompressible costs. The more undertakings participate, the less a tenderer will be able to win back the costs.

So it is clear that the actual strategy that is based on "reducing barriers" by enlarging publicity and improving the opportunities to participate will not lead to more participation, especially not in small contracts, on the contrary! What is needed is that the probability of winning the contract must be enhanced, and this can be done by relaxing the competition and publicity obligations for these contracts and relaxing the rules on technical specifications. The saying attributed to Pierre de Coubertin that participation is more important than winning is clearly not relevant!

This argument is further reinforced by the costs useless spend by a public entity when a ready good solution is available.

From the analysis of the procurement legislations it is clear that France and the Netherlands have a legal framework where the opportunity exists to avoid the counterproductive effects of competition in small contracts. In both countries exist thresholds below it is not required to organize a competition.

At first glance the publicity threshold in the French legal system seems quite similar to the actual Belgian publishing threshold. In reality the difference is substantial. In France it is allowed to award a contract below the EU threshold but above the threshold of 25.000 euro without competition (and therefore also without publicity), when this competition is clearly unuseful. This provision does not exist in Belgian law. For private entities considered as functional public entities in the meaning of the directives, they are allowed in France to choose the publicity of their contracts freely below the EU thresholds, taking into account the value and the amount of the contract.

Especially in the French legal framework, it was necessary to mention explicitly the exemption from competition as in general the principles of non discrimination, and transparency apply also for small contracts and these principles have publicity and competition as logical consequences.

In the Netherlands the small contracts are awarded "outside the public procurement regulations", as the procedure "one on one" is not regulated, thus assuring the same flexibility for the small contracts as in private sector. The Dutch framework takes also clearly into account that the works contracts merit a much higher threshold. The Dutch competition threshold for works is even higher than the Belgian publication threshold of 85.000 euro. An acceptable legal explanation is that the Dutch administration has decided pragmatically and with some save guarding but unambiguously on the values it assumed a contract of being of little economic interest. Confronted with the results of table 4, this seems also economically justified. In France, the legislator has implicitly given a concrete meaning to the notion "little economic interest". In doing so, France has created legal certainty for the buyers by clearly stating that competition is not required for its small contracts. This puts an end to the endless but completely unfruitful and sterile discussions between lawyers whether and when a small contract is of cross border interest and requires competition.

The Dutch publicity threshold is also quite high compared to the general Belgian publication threshold of 85.000 euro for works supplies and A services. The Dutch thresholds are not illogical taking into account that the publication of a notice will normally lead to even much higher number of participants and have similar counterproductive effects as the competition obligation.

On the contrary in Belgium, there is no such relaxation of the competition obligation, also the provisions in the draft law do not take into account the particularities of the works contracts. In absence of a clear exemption from competition and in the presence of the obligation to apply the general principles of non-discrimination, transparency, equal treatment, ..., irrespective of the value of the contract, the Belgian new draft law leaves much room to the courts to fill in the legal framework.

In contrast to France, there is no formal obligation in the Belgian draft law to spend the public money well, neither to verify if prices offered are correct in these contracts. This can probably be explained by a strong belief in the benefits of competition.

In such a system however, it may be expected that tenderers for small contracts will, after learning that it is not possible to win back their costs,

- either abstain from participation

- or make unlawful agreements with competitors

- or try to impose much higher prices.

In any case, measures taken to reduce so called "barriers", or to reduce the administrative burden or to relax minimal requirements will not change this reality and will leave the tenderers, SME's in particular, frustrated.

So we believe that it is illustrated by this paper that France and the Netherlands are showing the right way to tackle the problem of awarding the small contracts, even having substantial different ratio values of contracts below EU threshold and value above EU threshold.

In the France regulations it is expressly mentioned that the purchaser takes into account in his procurement of books, the necessity to maintain on the French territory a tight network of small retailers (SME's) to assure diversity in editorial creativity and the open access of all to this creations. The threshold of contracts without competition is in that case not 25.000 but 90.000 euro. The regulation expresses clearly the conviction in France that "no competition" is the right way to maintain the network of small retailers of books.

Although maybe some more concrete obligations like the obligation to execute a sound verification of the price(s), could improve the correct spending, their systems seem more productive for awarding small contracts, than the overstretched Belgian belief in the beneficences of competition and publicity.

Notes

[i] ECJ: case C-159/11, par. 23, Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others.

[ii] ECJ: C-507/03, par. 34

[iii] ECJ: Joined Cases C-25/14 and C-26/14, par.20

[iv] ECJ: Case C-231/03, par. 20 (Coname)

[v] ECJ: Case C-278/14, par. 5 (SC Enterprise Focused Solutions SR)

[vi] It must be said that in this court case the ECJ paid much effort to give the Romanian referring court, the Curtea de Apel Alba Iulia, a useful answer but under reserve that the referring court verifies in a detailed assessment all the relevant facts to determine if a certain cross border interest really exists.

[vii] Art.15 CDMP (2016)

[viii] If the public entity does not apply the provisions of chapter 3 and 4 of the Guide, it has to document the reasons in the contract files. There is at least an obligation of material motivation.

[ix] Art. 30 CDMP (2016)

[x] Art. 1 Ordonnance n° 2015-899 July 23, 2015 on public procurement contracts, JORF n°0169 of July 24, 2015, p. 12602, text n° 38, NOR: EINM1506103R

[xi] The threshold of 90.000 Eur is applicable for some entities and under certain conditions for supply of books not meant for schools: (Art. 30 CDMP (2016)

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