Cases and questionnaire for the conference in Copenhagen 28. August 2009

The contracting authority had in all the cases initiated the procurement procedure according to the national implementation of Directive No 2004/18/EC on 31 March 2004.

Introduction

1. **Which venue?**

In Holland procurement law cases were brought before the Council of Arbitration for Construction till 2004, after which the ordinary court was appointed in the general conditions governing tenders. These general conditions are mandatory for the national procurement authorities, but not for the lower procurement authorities. Nevertheless since 2004 almost no procurement cases have been brought anymore before the Council of Arbitration. The reason for this switch is disputed among the procurement lawyers, but no longer relevant. Even in the new procurement legislation it will be determined that the venue will be the ordinary courts. With ordinary courts I mean the civil courts. There has been discussion in the past that with ordinary courts the administrative courts should be meant, since one of the contracting parties being a government authority, but in the Netherlands this has never been the general view.

Besides the ordinary courts complaints have been brought to the national Ombudsman. However this possibility is limited to specific situations and the remedy to be given is not comparable to those given in the past by the Council of Arbitration and at the moment by the ordinary Courts. As far as I know only 3 times was a complaint brought before the Ombudsman. I will leave this for at it is.[1]

Every now and again there is talk on a special complaint board, the most recent suggestion was made in the concept law on procurement. This time the suggestion was to erect a complaint board for and by businesses. This has been widely been rejected as not practical and not relevant since the procurement authorities are the ones to solve problems if things go wrong. The general expectation is that the new law, of which we do not know when it will be effective, will not contain a clause on this matter.

2. **What kind of compensation can be obtained if the award was unjust**

The starting point is for calculating compensation is:

Article 6:97 CC
The court shall assess the damage in a manner most appropriate to its nature. Where the extent of the damage cannot be determined precisely, it shall be estimated.

[1] The procedure was discussed in Tijdschrift Aanbestedingsrecht, 2007, p. 18 by A.GJ. van Wassenaer.

Furthermore an estimation will have to be made of the possibilities of getting the costs covered by replacement contracts since according to Dutch law, art. 6:101 CC, the tenderer is obliged to limit his damages as far as possible.

Article 6:101 CC

1. Where circumstances which can be attributed to the person suffering the loss have contributed to the damage, the obligation to repair the damage is reduced by apportioning the damage between the person suffering the loss and the person who must repair the damage, in proportion to the degree in which the circumstances which can be attributed to each of them have contributed to the damage, provided that a different apportionment shall be made or the obligation to repair the damage shall be extinguished in its entirety or maintained if it is fair to do so on account of varying degrees of seriousness of the faults committed or any other circumstances of the case.

The tenderer can ask to be brought in the situation that would have occurred would the contract have been awarded to him. We call this the 'positive interest'. He can also ask for his 'negative interest': than he asks to be brought in the position that would have occurred if the damages causing act would not have occurred.

A claim for the 'positive interest' requires
1) that the tenderer can prove the contract would have been awarded to him if the procurement law would have been applies properly and
2) that the contracting authority does not abandon the contract all together (remember: the contracting authority can always terminate a contract and is not under an obligation to award the contract). It is important to realise that the sole fact that a tender was organised does not mean that the expectation is justified that a contract will come into being, which fact is needed for a succesfull claim for the award of the ' positive interest'.[2]

If however the contracting authority decides to go ahead with the contract with the tenderer who should not have won or he starts a new procedure without fundamentally changing the specifications, the tenderer might successfully claim his 'positive interest'.

If the complaining tenderer could not have won the award than the most he might get is the 'negative interest', the costs for having participated in this procedure. In the Dutch literature sub clause 7 from art. 2 of the Council Directive 92/13/EEC is considered to be the starting point:

> Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement

[2] E.H. Pijnacker Hordijk, G.W. van der Bend, J.F. van Nouhuys, Aanbestedingsrecht, 2009, p. 648.

> of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.

The content of this article is deemed applicable to the classical sectors as well. It requires that the complaining tenderer proves a) that there is an infringement of community law and b) that there is a causal relationship between the infringement and the adversely affection of the chances. It is obvious that the last requirement is not easy to prove. As a rule of thumb it is suggested that compensation of these costs should be given if none of the tenderers is entitled to compensation of foregone profits[3]. If one of the tenderers is entitled to compensation of the foregone profit then none of the other tenderers will be able to prove that he would be entitled to the award in the absence of the irregular behaviour of the contracting authority. Because in that case the tenderer entitled to the foregone profits would have been awarded the contract.

If the contracting authority decides to abstain from the contract all together then there is no room for any compensation at all. This might be different if the contracting authority can be blamed for breaking off a procurement procedure and decides to start a new one.

Another general remark concerning damages: in Holland claims for damages are compared to other claims less often put to the courts[4], but they are not unknown[5]. Research seems to point to the fact that Dutch tenderers are not interested in damages but only in getting awards leading to getting the contract. Claims like these might have a negative effect on the future relationship with contracting authorities and/or might be considered too difficult from a burden of proof point of view.[6]

And finally one more general remark: it is possible to get an advance on damages in an interlocutory proceedings, and it is seen to be claimed more often but up to now an advance on damages has never actually been awarded in such proceedings. So these claims are, as a rule, subject to the normal procedures.

Case 1 – The floors

The procurement procedure concerned the floor in a big new collective housing building. The award criterion was the "cheapest tender". The contracting authority requested a price for a well-known floor product named "A" and another product named "B or a similar product". The total floor area was not specified. The bid schedule only had one blank space for the pricing.

[3] Pijnacker Hordijk c.s., 2009, p. 663.
[4] J.M.Hebly, E.T. De Boer, F.G. Wilman c.s., Rechtsbescherming bij aanbestedingen, 2007 p. 90.
[5] A few examples: District Court of Utrecht Juli 4th 2001, BR 2002, p. 91; Appeal Court The Hague April 28th 2005, Van der Stroom en Etesmi/Staat en NIC, TA 2005/56, p. 173 (100% of the forgone profits awarded for the first 3 years and 50% for the 2 years following the first 3); District Court of Zwolle April 28 th 2004, Van Camp/city Almere, TA 2004/12, p. 69 and Appeal Court Arnhem October 30th 2007, nr. 2004/632 (awarded damages up to 25% of the tender amount); District Court of Zwolle January 30th 2007, LJN: AZ7506 (follow-up proceedings for the determination of the damages); Supreme Court May 9th 2008, LJN: BC7679 (positive interest); District Court of Amsterdam June 18th 2008, LJN: BE9537 (follow-up proceedings for the determination of the damages); District Court of Rotterdam October 8th 2008, LJN: BG3796 (positive interest is awarded).
[6] Hebly c.s., p. 93.

Tenderer 1 only quoted a price for product A, whereas tenderer 2 gave the price for product "A" in the blank space and in handwriting added a reduced price per square metre for product "B or a similar product".
To compare the prices, the authority measured the floor area, calculated the price reduction for "B or a similar product" and asked tenderer 2 to confirm the calculation. The consequence was that tenderer 2's price was the lowest and the contracting authority accordingly awarded the contract to tenderer 2.
Tenderer 1 decided to challenge the decision. The owner of this small company was in charge of the administration himself and took part in the different administrative tasks. The company's organisation had made a report stating that the average margin for small companies similar to the claimant's had been 19.5% for the year prior to the relevant year.
The company's chartered accountant had calculated the average margin for the 3 previous years to be 13%. For the actual year the margin was -13%, which - due to the financial state-ment of the supervisory board - was a result of the loss of the contract of DKK 3.2 mill., in which an 18% margin was included. On basis hereof the claim was set at DKK. 575,000. As the company had expected to be awarded the contract and had thus started preparation of the work, no attempts were made to obtain other contracts. After the unjust decision by the contracting authority, the company had been unable to get other assignments for the relevant period.
The contracting authority claimed the company had not fulfilled its loss-reduction commitment (under Danish law an obligation to minimize the loss suffered)

Questionnaire[7]

1. *Did the Contracting Authority act in accordance with the national implementation of the EC directive no. 2004/18/EC on 31 March 2004? 2. If not- which articles in the national implementation of the EC Directive were not complied with?*
2. *If not - which articles in the national implementation of the EC directive were not com-plied with?*

There are several problems with the way the Contracting Authority acted.

a) The first problem concerns the matter of asking for a product named A. EU Directive 2004/18 art. 23, 3[8] gives the norm on technical specifications and does in principle not allow the mentioning of

[7] The author is very thankful for the help received from A.C.M. Fischer-Braams, from Bartels Sueters Fischer Aanbestedingsadvocaten and from J. Joling from NautaDutilh.
[8] 3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:
(a) either by reference to technical specifications defined in Annex VI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when these do not exist - to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words "or equivalent";
(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;
(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;
(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance

specific names or producers. The fact that 'product B or a similar product' was requested as an alternative does not correct this mistake according to Dutch law. According to Dutch law it is not allowed to point to specific brands in the technical specifications.[9] The assumption that this is allowed as long as the words 'or a similar product' are added, is considered to be an infringement of European law.
The same goes for the use of lists of producers, from which the tenderer can choose. The fact that there are several producers implies there are common technical factors and so these technical factors should (and obviously: can) be described without any need to point to specific producers. The addition 'or similar' in this case has no meaning, because there are differences between these producers and the tenderer will not be able to determine which functional demands the contracting authority wants. This way the procuring authority creates far too much room to reject similar products. Dutch courts have more than once ruled against this.

b) Than there is the matter of the bid schedule: it contained only one blank space for the pricing. Tenderer 2 filled in the blank space and added in handwriting an extra price. The fact that there was only one blank space suggests that only one price was to be offered. Proceeding from that assumption: by offering two prices B acted incorrectly. According to Dutch law this would be forbidden – being in contradiction of the transparency principle - and the offer would have to be rejected because of this reason.

There is another point to this matter.
The fact that there was only one blank space suggests, as I just said, that only one price was to be offered. However we cannot be sure of this because maybe we have to understand the mentioning of both the A and the B product that tenderers had to offer on both. The bid schedule is therefore ambigious and the judge would definitely explain this demand in a way detrimental to the procuring authority and in favour of the party objecting to it.

c) A third problem is that the contracting authority asked B to confirm the calculation after making a calculation itself based on the information of B. Is this to be called a clarification question, which would be allowed or does this go beyond that in which case it would be forbidden? The action of the contracting authority might be considered to go beyond what is allowed and seen as favoring tenderer 2.

d) Finally: in this case a variant was asked and according to art. 24 EU Directive 2004/18 this is not allowed when the award criterion is the cheapest price.

In conclusion: the Contracting Authority did not act in accordance with the national implementation of the EC-Directive 2004/18.

[9]Pijnacker Hordijk c.s. 2009, p. 225.

3. Which measures would be appropriate if the rules in the national implementation of the directive were not complied with?

In the following I assume that the contract has been awarded to tenderer 2.

There are two important points to be made before going into the remedies: according to Dutch law contracts can always be terminated by employers/client/contracting authority, in this case being the contracting authority[10]. And the general conditions on procurement procedures states explicitly that the contracting authority is under no obligation to award the contract.[11] Tenderer 1 can claim:

a) nullity of the contract
b) a ban on executing the contract or an order to terminate the contract.
c) damages (possibly in combination with the previous claims)

a) *Nullity of the contract*. Art. 2, 1 sub b[12] 1 says that Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to: '(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;'. This regulation leaves the status of a contract which is in contradiction to the procurement rules to be determined by the national legislation.[13] According to the present Dutch law the probability that a claim for nullity will be credited is at the moment very small. Considering the fact that the rules which have been broken did not contain a provision on the validity or non-validity of the contract violating these rules, the validity will be determined on the basis of art. 3:40 of the Civil Code. On the basis of this article a contract can be or become null and void if that is the intention of the rules which have been broken. The Dutch Supreme Court has decided in 1999[14] that since the specific rules on procurement do not stipulate that violation leads to nullity, the contract will be valid. And in its judgment of the 4th of November 2005, LJN AU2806, the Supreme Court decided once more that the sole violation of (European) provision does not void a contract.
The changes in the European Directive on review procedures will however lead to a change of the Dutch law on review procedures and give the judge the possibility to declare a contract

[10] Art. 7:764 CC.
[11] ARW 2005 art. 2.29.1.
[12] Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC) Requirements for review procedures (as changed by Directive 2007/66/EG, December 11th 2007, PB EU L335/31, December 20th 2007).
[13] M.J.J.M.Essers, Aanbestedingsrecht voor overheden, 2006, p. 320, Hebly c.s., p. 57, Pijnacker Hordijk c.s., p. 644.
[14] Uneto-De Vliert, November 4th 1999, NJ 2000, 305.

which has been concluded in violation of the procurement law null and void.[15] This judgement will have to be obtained by a normal procedure and cannot be asked in the form of an injunction. Therefore under the new law the claims to a ban on execution or an order to terminate the contract which claims can be rewarded as an injunction will probably remain the most important claims concerning.

In conclusion: the claim for nullity of the contract with tenderer 2 will fail at the moment, but after the law has been changed, might be awarded.

But this does not mean that the contract cannot be affected on other grounds. Other claims that might be tried, and as I just pointed out will be more important, are the following:

b) *A ban on executing the contract or an order to terminate the contract*

This claim can be combined with the following claims (or the following claims can be asked as an alternatively), which all have been awarded by Dutch courts:

- an order to re-evaluate the outcome of the procurement procedure
- an order to start a new procurement procedure (unless the contracting authority decides it has no further need for the contract);
- an order to award the contract to the plaintiff (unless the contracting authority decides it has no further need for the contract);
- a ban on awarding the contract to a third party.

First the matter of the ban on execution of the contract or the order to terminate the contract.

Art. 2, 6 of the Remedies Directive makes it possible for national legislation to determine that after a contract has been concluded there can only be a claim for damages.[16] In Holland no use was made of this possibility and therefore it is possible to ask for a contract not to be executed or for the contract to be terminated.

[15] Art. 8 WIRA: Artikel 8 1. De rechter kan besluiten een overeenkomst niet te vernietigen indien, alle relevante aspecten in aanmerking genomen, dwingende eisen met betrekking tot een algemeen belang daartoe aanleiding geven. 2. Economische belangen mogen alleen als dwingende eisen, bedoeld in het eerste lid, worden beschouwd indien vernietiging in uitzonderlijke omstandigheden onevenredig grote gevolgen zou hebben. Economische belangen die rechtstreeks verband houden met de betrokken overeenkomst, mogen evenwel geen dwingende eisen als bedoeld in het eerste lid vormen. Zodanige belangen omvatten onder meer de kosten die voortvloeien uit vertraging bij de uitvoering van de overeenkomst, de kosten van een nieuwe aanbestedingsprocedure, de kosten die veroorzaakt worden door het feit dat een andere onderneming de overeenkomst uitvoert, en de kosten van de wettelijke verplichtingen die voortvloeien uit de vernietiging. According to art. 6 WIRA annulment of the contract must be asked in court in a normal procedure and cannot be asked as an injunction.

[16] Art. 2, 6: 6. Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers. See: Essers, p. 321, Court of Appeal Amsterdam March 13th 2003.

Confronted with such a claim, without an accompanying claim for the voidance of the contract, the judge will have to weigh the interests of the contracting authority, its contracting party and the plaintiff[17]. The following interests[18] will be considered:

1) Has execution of the contract started? If so: is it nevertheless possible to terminate the executing without causing undue damages? This might in particular be possible in case of a continuing performance contract. The Dutch courts are not of one mind in this matter: there are judgements stating that the very fact that execution has started means that only damages are possible and that an order to terminate the contract cannot be entertained. But there also judgments in which the order to terminate the started execution of a contract is granted.
2) What does it mean if a contract has to be terminated and the contracting authority needs to start a new tender because it does need the contract (to which of course it is not obliged)? Is this causing a delay in the activities that is unacceptable for the contracting authority?
3) How long did the plaintiff wait with his demand to terminate the execution of the awarded contract? In this context there is abundant Dutch case law based on the Grossmann decision[19]. In general it can be said, that Dutch judges expect an 'active attitude' from tenderers and if they are tardy with their claims these will not be heard.
4) Did the party to whom the contract was awarded know or should have known of the violation of the procurement rules?

In conclusion:
The result of weighing these factors might be that the execution of the contract will be forbidden or an order to terminate the contract will be given.

As said before the claims for the ban to execute or the order to terminate can be combined with:

- an order to re-evaluate the outcome of the procurement procedure
- an order to start a new procurement procedure (unless the contracting authority decides it has no further need for the contract);
- an order to award the contract to the plaintiff (unless the contracting authority decides it has no further need for the contract);
- a ban on awarding the contract to a third party.

What are the chances to success for these claims?

[17] When confronted with a claim in an interlocutory procedure which is to be considered to be a start to a court case concerning the voidance of a contract, the interests of the third party (with whom the contract was made) are not allowed to be taken into consideration. The same goes for the economical interests of the contracting authority. See art. 8 WIRA and art. 2d or the remedies directive: Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.
[18] Pijnacker Hordijk c.s., 2009, p. 638, Essers, p. 321.
[19] C-230/2, April 12th 2004.

• an order to re-evaluate the outcome of the procurement procedure

This claim will only be credited if there is a real chance that the claimant will pass over the winning the party. The fact that the contract has been awarded already does not matter, since the court can order the nullification of the outcome of the award procedure (this is to be distinguished from the claim concerning the voidance of the contract itself, which is more complicated at present).

• an order to start a new procurement procedure (unless the contracting authority decides it has no further need for the contract):

this claim will be credited if the mistakes made in the tender procedure are so great that the result of the tender procedure cannot reasonably remain intact.[20] In the case of the Danish floors it might very well be possible that given the nature and the cumulation of mistakes this claim will be awarded.
It is up to the contracting authority to decide whether it still needs the contract. The contracting authority is under no obligation to start a new tender procedure if it decides it does not want the service anymore.
It is sometimes suggested in the Dutch literature[21] that Dutch judges award this claim less often than arbitrators, who till a few years ago dealt with procurement law mainly for work contracts, but there is no study as yet that proves this statement to be true.

• an order to award the contract to the plaintiff (unless the contracting authority decides it has no further need for the contract):
In general this claim will not be awarded, because of the freedom of contract and the right of the contracting authority not to award a contract (codified in the general conditions for procurement, art. 2.29.1, ARW 2005). But there are cases[22] where both arbitrators and judges have awarded this claim, usually under the condition that the contracting authority still wants the job to be done.

• a ban on awarding the contract to a third party: this claim is regularly credited by both judges and arbitrators when the mistakes made during the tender procedure are of a fundamental nature[23].

The third possible claim concerns damages and will be dealt with under question 4.

[20] Essers, p. 324, Pijnacker Hordijk c.s., p. 625. Examples:
[21] Essers, p. 324.
[22] Hoofdstukken Bouwrecht, deel 18, nr 994.
[23] Hoofdstukken Bouwrecht, deel 18, nr 994.

4. Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".

Which damages can a tenderer who has been wronged ask for?

It is possible the tenderer can ask to be brought in the situation in which he would have been, would the contract have been awarded to him ('positive interest'). This requires 1) that the tenderer can prove the contract would have been awarded to him if the procurement law would have been applies properly and 2) that the contracting authority does not abandon the contract all together (remember: the contracting authority can always terminate a contract and is not under an obligation to award the contract). It is important to realise that the sole fact that a tender was organised does not mean that the expectation is justified that a contract will come into being, which fact is needed for a succesfull claim for the award of the ' positive interest'.[24]
If however the contracting authority decides to go ahead with the contract with the tenderer who should not have won or he starts a new procedure without fundamentally changing the specifications, the tenderer might successfully claim his 'positive interest'.

The starting point is for calculating the 'positive interest' is:

Article 6:97 CC
The court shall assess the damage in a manner most appropriate to its nature. Where the extent of the damage cannot be determined precisely, it shall be estimated.

Furthermore an estimation will have to be made of the possibilities of getting the costs covered by replacement contracts since according to Dutch law, art. 6:101 CC, the tenderer is obliged to limit his damages as far as possible.

6:101 CC

2. Where circumstances which can be attributed to the person suffering the loss have contributed to the damage, the obligation to repair the damage is reduced by apportioning the damage between the person suffering the loss and the person who must repair the damage, in proportion to the degree in which the circumstances which can be attributed to each of them have contributed to the damage, provided that a different apportionment shall be made or the obligation to repair the damage shall be extinguished in its entirety or maintained if it is fair to do so on account of varying degrees of seriousness of the faults committed or any other circumstances of the case.

[24] Pijnacker Hordijk c.s., 2009, p. 648.

As for forgone profits the leading rule is not the profit that could have been made, but the profit which can reasonably be assumed to have been made if the damaging act had not taken place.[25] What matters in other words is the real situation: if there are replacement contracts, there will be no or less turnover loss and therefore no or less damages. The Supreme Court in the Netherlands had decided in this way in the seventies of the last century and the lawyers do not seem to disagree with this decision. I will come back to foregone profits in the answer to case 2.

Let us look into the calculation method in procurement cases more detailed.

In the procurement cases – mainly concerning the realisation of construction contracts - in which judges/arbitrators had to determine what the lost profit was, the damages are in general determined as the sum of:

a) foregone net profits
b) overheads left uncovered
c) other losses such as purchasing losses (e.g. quantum discounts).[26]/[27]

As for the foregone profits: the Council of Arbitration does not seem to accept the budget calculated by the tenderer for his offer. The leading rule is that arbitrators look at the average profit of a business before taxes over the complete turnover in the past several years. The accuracy of this approach is discussed in the literature, because profits may vary depending on the particular contract but that does not seem to be of interest to arbitrators.[28] It is up to the party claiming the profits were higher to prove that fact.

As for the overheads concerning general costs, personnel and machinery left uncovered: the Court of Arbitration makes compensation of these damages dependent on the question if the tenderer has gotten replacement orders. If this is the case than the main rule is that these damages will not be compensated, because there are in fact no damages/damages do not exist in that case. Of course with specialised personnel and machinery this will be different.

Finally: considering that contracting authorities are always entitled to terminate a contract and to terminate a procurement procedure there will be no room for compensation of foregone profits if indeed the procurement procedure is cancelled.

In conclusion: whether or not tenderer 1 will get any compensation is dependent on a) the answer to the question if he can prove the contract would have been awarded to him b) what his profits were in general in the past years and 3) if the contracting authority still is in need of the contract.

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[25] J. Joling, De vaststelling van vermogensschade wegens gederfde winst of geleden verlies, NTBR, 2007/10, p. 462.
[26] Pijnacker Hordijk c.s., 2009, p. 650.
[27] Most case law comes from the Court of Arbitration for Construction and is followed by the government courts. Arbitrators have often experience themselves with determining the price of contracts and what we see is, that they usually themselves determine what the outcome of these estimates will be. The burden of proof is more or less turned around in this approach: the tenderer can prove that these hypotheses of the arbitrators is not correct.
[28] Pijnacker Hordij c.s., 2009, p. 652.

Case 2 – The waterfront

The procurement procedure concerned a major construction of apartments. Part of the works was the construction of a waterfront, including major dredging works in the sea. According to the announcement, "no bid containing major reservations would be considered". The award criterion was "the most economically advantageous tender".
One tenderer's bid included a reservation in respect of winter measures concerning the dredging works. The contracting authority found that it could calculate the economical consequences of this reservation. Having added the value of the reservation to the tenderer's bid, the tenderer could still be awarded the contract as it was the economically most advantageous bid. This decision was challenged by another tenderer who argued that it was a major reservation since it was not possible to foresee the costs of winter measures within an acceptable degree of certainty.
The company's bid for the contract was approximately DKK 190 mill. The costs to carry out the contract were in the bid calculated to approximately DKK 170 mill. Consequently the loss was estimated at DKK 20 mill. The contracting authority claimed that a margin of 10% was unrealistic compared to the financial statement for the previous years. Furthermore, as contracts involving work in nature or at sea will always includes an unforeseeable risk, the result will often be a smaller profit than calculated or perhaps even a loss. This risk, however does not exist any-more. Accordingly, the claim must be reduced.

Questionnaire

1. Did the Contracting Authority act in accordance with the national implementation of the EC directive no. 2004/18/EC on 31 March 2004?
2. If not - which articles in the national implementation of the EC directive were not com-plied with?

Although the case implies that the contracting authority realised it was making a mistake by awarding the contract to the tenderer whose bid the authority itself went through at great lengths to understand/complete as it did, the case does not stipulate why this is wrong from a procurement law point of view.

Let me make a few remarks.

1) What is a major reservation? This is the first problem with this case. If the contracting authority gave no description of the term major nor made clear on the basis of which criteria it would determine a reservation to be major or not it acted in violation of the transparency principle. [29] The chance of favouring a particular party is obviously present due to the room the contracting authority has created for itself.

[29] See Succhi di Frutta April 29th 2004, zaak C-496/99.

2) What to think of the reservation in this particular case, which was not specified? As I see it, it goes without saying that the procuring authority is allowed to make certain calculations and interpret an offer to a certain extent as long as these calculations or interpretations are obvious. Estimating the economical consequences of the reservation for winter measures and adding these to the price of the offer of this particular tenderer seems to go beyond what is obvious. There are two unknowns in this case: a) on the basis of which criteria were the calculations made and b) were these criteria made public beforehand. Assuming these unknowns (or at least one of them) to be true I have to conclude that the calculations made by the contracting authority were not obvious, that the contracting authority created too much room for a possibly arbitrary decision and therefore violated the transparency principle. It is basically the same problem as under point 1.

2) Should the contracting authority have rejected the offer on the basis that it was not complete, because the tenderer did not translate his reservation into a price? Or should the contracting authority have asked to complete the bid with a financial calculation or clarification of the reservation?

The starting point of the answer to these questions is that according to (some) Dutch case law the contracting authority on the one hand is under no obligation to ask for missing information or to ask for a clarification. On the other hand: the contracting authority is allowed to ask for clarification or missing information in case it is obvious a party has made a mistake or if it is clear there is an ambiguity which can be clarified after a question by the contracting authority. This is not necessarily in contradiction to the principle of equality.
As a matter of fact: not asking a clarification or asking for the missing information might be considered a violation of the general principles of good governance and of the principle of proportionality. In other words: the starting point that the contracting authority is under no obligation to ask a clarification is no more than that: a starting point.
Under certain circumstances the contracting authority may be required to ask for more information or a clarification. The Dutch regulations do not have a provision obliging the contracting authorities to ask for clarifications or giving the tenderers a right to do so. This is left to the parties involved and afterwards open to procedures.

3. Which measures would be appropriate if the rules in the national implementation of the directive were not complied with?

Considering the answer given in case 1 I limit my answer to the matter of the extent of the damages.

As I see it in this particular case the contracting authority is trying to persuade the judge to first dismiss with the 10% profit margin because based on the profits made in the past 10% is unrealistic and secondly to correct the percentage that should be used by reducing it with an amount for unforeseeable risk. This seems to me to be a case of wanting your cake and eat it too.

If one uses as a guideline the realised profit of the past years: any loss due to unforeseeable risk has actually already been taken into account. Reducing that profit with the unforeseeable risk means that this will be done twice. So that argument according to the general Dutch way of calculating foregone profits fails.

This is not to say that unforeseeable risk can never be taken into account in a concrete case: that is possible if the calculation of the foregone profit is based solely on the profit of this contract that should have been awarded to this tenderer. As I have said earlier on the foregone profit: the injured party is not entitled to the profit he could have made, but to the profit of which it can be reasonably assumed it would have been made, would the damage causing act not have taken place. That means that we will have to know if indeed the profit included a part for unforeseeable risk: which risks are these, and can it be reasonably assumed they would have occurred? All of this now would have to be proven by the contracting authority. I have serious doubts if this can be proven since it is their argument. If the contracting authority succeeds in proving both points, than I think the contracting authority has made its case.

4. *Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".*

The decisive factors determining whether or not loss would be compensated I have dealt with under question 1.

Case 3 The carpets

The procurement procedure concerned the supply and installation of carpets for an office build-ing. The tenderer was required to document his ability to supply the material in the proper quantities and install it in accordance with the time schedule fixed by the contracting authority.
The award criterion was "the most economically advantageous tender". Furthermore, it was stated that the final decision regarding the award would be taken on the basis of an "overall estimate of the tender".
One of the unsuccessful tenderers, who only had very few employees, decided to challenge the award arguing that the contracting authority had not complied with the principle of transparency. Furthermore, the claimant referred to the fact that the quality of the material submitted by the winning tenderer to some extent deviated from the specifications for the material that should be supplied, but not to any considerable degree.
The contracting authority argued that the claimant could never have been awarded the contract since he only had very few employees and therefore had not been able to document that he would be able to supply the required quantities in the required quality and be able to observe the time schedule.
The company's bid for the contract was approximately DKK 1.3 mill, specified as consumption of material 40%, wages for the employees 30%, subcontractors 10%, margin 20%. Consequently the loss was calculated to be DKK 260,000. The claim was substantially documented and supported by an evaluation by

a neutral expert witness. Furthermore, it was substantiated that the performance of the contract would have had none or only very little impact on the company's fixed costs.

Questionnaire

1. *Did the Contracting Authority act in accordance with the national implementation of the EC directive no. 2004/18/EC on 31 March 2004?*
2. *If not - which articles in the national implementation of the EC directive were not com-plied with?*

There seem to be 3 problems with the way the contracting authority acted.

1) The first problem is the matter of the 'overall estimate of the tender'. It is unclear what is meant by this criterion, in other words we are faced with a violation of the transparency principle. This criterion creates a serious possibility of arbitrariness and favouritism, see Succhi di Frutta. Put differently: the contracting authority has an unconditional freedom of choice which reminds us of the cases Finnish busses and Wienstrom[30].
2) The deviation from the specifications regarding the material to be supplied: assuming that this is indeed the case, this is not allowed because it contravenes the equality principle. In the Netherlands a tender containing deviations, whether or not minor of the required specifications will have to be left aside.
3) The contracting authority argued the claimant would not have been awarded the contract because he had too few employees etc. It is unclear in the description of the facts if this was a requirement set in advance or only mentioned after the complaints were made: an obligation put on the tenderer after the call for tenders has been made is not allowed. In general if no requirements were set to the opposite, the tenderer is allowed to use third parties for doing the job provided the contracting authority is able to check the technical ability and financial standing of these third parties.[31]

[30]ECJ December 4th 2003,C-448/01 (Wienstrom) and ECJ September 17th 2002, C-513/99 (Concordia Bus Finland).
[31] Pijnacker Hordijk c.s., p. 308; Supreme Court June 22nd 2007, C06/063HR, LJN BA1828, TA 2007, p. 418, BR 2007, p.. 895, m.nt. S. Brackmann; European Court of Justice C 314/01, 24th march 2004: '.42 It must be borne in mind in this regard that Directive 92/50, which is designed to eliminate obstacles to the freedom to provide services in the award of public service contracts, expressly envisages, in Article 25, the possibility for a tenderer to subcontract a part of the contract to third parties, as that provision states that the contracting authority may ask that tenderer to indicate in its tender any share of the contract which it may intend to subcontract. Furthermore, with regard to the qualitative selection criteria, Article 32(2)(c) and (h) of Directive 92/50 makes express provision for the possibility of providing evidence of the technical capacity of the service provider by means of an indication of the technicians or technical bodies involved, whether or not belonging directly to the undertaking of that service provider, and which the latter will have available to it, or by indicating the proportion of the contract which the service provider may intend to subcontract. 43 As the Court ruled in paragraphs 26 and 27 of Holst Italia, it follows from the object and wording of those provisions that a party cannot be eliminated from a procedure for the award of a public service contract solely on the ground that that party proposes, in order to carry out the contract, to use resources which are not its own but belong to one or more other entities. This means that it is permissible for a service provider which does not itself fulfil the minimum conditions required for participation in the procedure for the award of a public service contract to rely, vis-à-vis the contracting authority, on the standing of third parties upon whose resources it proposes to draw if it is awarded the contract. 44 However, according to the Court, the onus rests on a service provider which relies on the resources of entities or undertakings with which it is directly or indirectly linked, with a view to being admitted to participate in a tendering procedure, to establish that it actually has available to it the resources of those entities or undertakings which it does not itself own and which are necessary for the performance of the contract (Holst Italia, paragraph 29). 45 As the Commission of the European Communities has correctly pointed out, Directive 92/50 does not preclude a prohibition or a restriction on the use of subcontracting for the performance of essential parts of the contract precisely in the case where the contracting authority has not been in a position to verify the technical and economic capacities of the subcontractors when examining the tenders and selecting the lowest tenderer. 46 It follows that the premiss on which the second question is based would prove to be accurate only if it were to be established that Point 1.8 of the invitation to tender prohibits, during the phase of the examination of the tenders and the selection of the successful tenderer, any recourse by the latter to sub-contracting for the provision of essential services under the contract. A tenderer claiming to have at its disposal the technical and economic capacities of third parties on which it intends to rely

In conclusion: the contracting authority did not act according to European nor Dutch rules.

3. Which measures would be appropriate if the rules in the national implementation of the directive were not complied with?

Considering that the rules have not been complied with the unsuccessful tenderer will most likely ask for a ban on awarding the contract to anyone else than himself (the complaining tenderer) and in the second place an order to re-evaluate the outcome of the tender procedure or start a new tender procedure (provided that the contracting authority still wants the contract). I refer to my answer in case 1.

4. Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".

I assume that the complaining tenderer could not have won the award. That means that the most he might get is the 'negative interest', the costs for having participated in this procedure. In the Dutch literature sub clause 7 from art. 2 of the COUNCIL DIRECTIVE 92/13/EEC is considered to be the starting point:

> Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.

The content of this article is deemed applicable to the classical sectors as well. It requires that the complaining tenderer proves a) that there is an infringement of community law and b) that there is a causal relationship between the infringement and the adversely affection of the chances. It is obvious that the last requirement is not easy to prove. As a rule of thumb it is suggested that compensation of these

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if the contract is awarded to it may be excluded only if it fails to demonstrate that those capacities are in fact available to it. 47 Point 1.8 of the invitation to tender does not appear to relate to the examination and selection phase of the procedure for award of the contract, but rather to the phase of performance of that contract and is designed precisely to avoid a situation in which the performance of essential parts of the contract is entrusted to bodies whose technical and economic capacities the contracting authority was unable to verify at the time when it selected the successful tenderer. It is for the Bundesvergabeamt to establish whether that is indeed the case. 48 If it were to transpire that a clause in the invitation to tender is in fact contrary to Directive 92/50, in particular inasmuch as it unlawfully prohibits recourse to subcontracting, it would then be sufficient to point out that, under Articles 1(1) and 2(7) of Directive 89/665, Member States are required to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible in the case where those decisions may have infringed Community law in the area of public procurement. 49 It follows that, in the case where a clause in the invitation to tender is incompatible with Community rules on public contracts, the national legal system of the Member State must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665. 50 The answer to the second question must therefore be that Directive 89/665, and in particular Articles 1(1) and 2(7) thereof, must be construed as meaning that, in the case where a clause in an invitation to tender is incompatible with Community rules on public contracts, the national legal systems of the Member States must provide for the possibility of relying on that incompatibility in the review procedures referred to in Directive 89/665.'.

costs should be given if none of the tenderers is entitled to compensation of foregone profits[32]. If one of the tenderers is entitled to compensation of the foregone profit then none of the other tenderers will be able to prove that he would be entitled to the award in the absence of the irregular behaviour of the contracting authority. Because in that case the tenderer entitled to the foregone profits would have been awarded the contract.

If the contracting authority decides to abstain from the contract all together then there is no room for any compensation at all. This might be different if the contracting authority can be blamed for breaking off a procurement procedure and decides to start a new one.

In conclusion: there is not enough information to answer the question if there is room in this case to award damages.

Case 4 - The Cleaning

The procurement procedure concerned the cleaning of office buildings. The award criterion was "the most economically advantageous tender".
The contracting authority presumed, without any substantive reason, that the most economi-cally advantageous tenderer would not be able to fulfil his obligations. On this basis the tender procedure was annulled.
This annulment was challenged as well by the winning tenderer as by other tenderers on grounds of the annulment being unjustified. The winner sought "full compensation for the loss of profit". The others claimed compensation of the costs stemming from the preparation of their respective tenders.
However, the contracting authority now argues that the procedure could have been annulled due to a general reorganisation of the public authorities that had been established after the ini-tiation of the procurement procedure, but before the annulment. The reason being, that reor-ganisation has "changed the face" of the contracting authority, as it in general has lead to the contracting authorities becoming larger entities
The bid for the contract was approximately DKK 70 mill, the second lowest bid approximately DKK 100 mill. The bid was specified as consumption of material, wages for the employees and subcontractors, unforeseen problems and a margin of 13%. The loss was calculated at DKK 9 mill.
The company's organisation had made a report stating the average margin for the industry in the previous years had varied from 3% to 7%, the last year. The company's financial statement for the same period showed a margin between 1.3% and 4.5%. Furthermore, it was alleged by the company that the performance of the contract for this large company would have had no or only very little impact on the company's fixed costs. If this should be the case, no large com-pany would be able to claim compensation on a bid only sufficient to cover fixed costs.

[32] Pijnacker Hordijk c.s., 2009, p. 663.

The contracting authority claimed that the bid was "unreasonably low" and consequently could have been "set aside" according to Article 55 in the directive, as implemented in the national legislation. Furthermore, the bid in itself would entail no margin to the company, and the em-ployees could have been employed in other activities.

Questionnaire

1. Did the Contracting Authority act in accordance with the national implementation of the EC directive no. 2004/18/EC on 31 March 2004?

2. If not - which articles in the national implementation of the EC directive were not com-plied with?

Three aspects arise from the behaviour of the contracting authority.

1) The rejection of the economically most advantageous tenderer without any substantive reason is a violation of the obligation to motivate its decision. For the Dutch procurement regulation (ARW 2005) see 2.29.5. 'The procuring authority informs the tenderers as soon as possible in writing and at the same of its decisions concerning the award. This announcement contains at least the grounds of the award decision, among which the characteristics and the advantages of the winning bid and the name of the tenderer.' [33]The Dutch procurement regulation itself does not contain a sanction for the violation of this rule, so it is left to the discretion of judges and arbitrators. And they have judged that non compliance with this rule *can* lead to a ban on the conclusion of a contract following an award decision since it cannot be checked if the contracting authority came to its decision in a reasonable way; it was left to the contracting authority to see how to go on after this, by re-evaluating the bids or by starting a new tendering procedure or by abstaining from the contract[34].
   So this might very well be the outcome of this case: the rejection of the bid might be declared null and void, and how to proceed from here is up to the contracting authority.
2) The annulment/termination of the procurement procedure is allowed according to Dutch law because as said before the contracting authority is not obliged to award any contract. However if the grounds for this decision do not justify the decision than the termination might be declared void.[35]

   In conclusion: Depending upon the way the decision was motivated and assuming the contracting authority cannot be blamed for the reorganisation or for not informing the tenderers at an earlier stage, this is acceptable.

[33] This regulation (ARW 2005) is only mandatory for the national tenders, but tenders from lower government contracting authorities (like cities) are very often based on this regulation as well.
[34] District Court of Amsterdam, August 28th 2003, BR 2004, p. 438.
[35] E.g. Court of Arbitration January 14th 2000, BR 2001, p. 620 and for Holland: District Court of Haarlem November 23th 2007, LJN: BB9853.

3) The setting aside of an 'unreasonably low bid' (which I understand to mean the same as the term 'abnormally low bid', this being the Dutch terminology) is considered to be in accordance with Article 55 of the directive in the Netherlands and is codified in art. 2:27 of the General Conditions on Procurement as well as in art. 56,1 BAO. The regulation requires the contracting authority to ask the tenderer for an explanation before rejecting the offer.[36]/[37] The contracting authority is at liberty to award the contract to the tenderer with the abnormally low bid; an abnormally low bid is not per se invalid[38].

When is it assumed a bid is abnormally low according to the Dutch case law? There is an abnormally low bid when the price is so low that a mistake might be in play or dumping prices have been used creating the risk that the contractor might not be able to live up to his contractual obligations. Predatory pricing can also constitute an abnormally low bid that can be rejected by the contracting authority.[39]

In conclusion: assuming the contracting authority can prove the price is indeed unreasonably low, it has the right to reject the bid but only after it allowed the tenderer to give an explanation for his low bid.

One more remark to this matter: does it make a difference the award criterion is the economically most advantageous offer? No I don't see why that would have to make a difference. Also in that case the contracting authority has valid reasons not to be confronted with a price which will cause difficulties during the execution of the contract.

3. Which measures would be appropriate if the rules in the national implementation of the directive were not complied with?

See the above answers.

4. Would the contractor be awarded any kind of compensation? In the affirmative, please state the legal "frame of the compensation" and "the amount awarded".

I limit my answer to the point of the fixed costs. In the case it is said:

> 'Furthermore, it was alleged by the company that the performance of the contract for this large company would have had no or only very little impact on the company's fixed costs.

[36] 2.27.1. Indien een inschrijving is gedaan die in verhouding tot de te verrichten werken abnormaal laag lijkt, verzoekt de aanbesteder, voordat hij deze inschrijving kan afwijzen, schriftelijk om de door hem nodig geachte verduidelijkingen over de samenstelling van de inschrijving. De aanbesteder onderzoekt in overleg met de inschrijver de samenstelling aan de hand van de ontvangen toelichtingen.
[37] Court of Arbitration 6th of January 2006, nr 70.977, BR 2006, p. 374, m.nt. M.A.B. Chao-Duivis.
[38] District Court The Hague, 20 June 2008, KG ZA 08/510, LJN BD5333.
[39] There is one case in which it was said predatory pricing was used, but this claim was rejected by the District Court of The Hague August 13th 2007, KG 07/700, LJN BB1626.

> If this should be the case, no large company would be able to claim compensation on a bid only sufficient to cover fixed costs.'

I understand these two sentences as follows: the company states that the performance of the contract has no or little impact on the fixed costs. I assume this is the case, because the company has a lot of contracts going, so losing one contract will not affect the coverage of the fixed costs very much. So if the company should have been awarded the contract and is entitled to the positive interest, we calculate as follows:
turnover minus the costs (being: the fixed costs that can be attributed to this contract and the variable costs) that are being saved by not having to perform. If these costs are very little, so the damages (positive interest) are almost equal to the turnover.

It seems that the author of the case deduces from this way of determining the positive interest/foregone profit that this is a wrong approach, because no large company would be able to claim compensation on a bid only sufficient to cover fixed costs.

It seems to me that this deduction is not correct: the positive interest is again to be calculated as follows: turnover minus costs (being: the fixed costs attributable to this contract and the variable costs) that are being saved by not having to perform. If a company has a bid only sufficient to cover fixed costs, it will probably have very few other contracts (and is desperate to get the contract) and the fixed costs attributable to this contract are much larger.

So the assumption no large company would be able to claim compensation on a bid only sufficient to cover fixed costs seems unlikely to me.