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European and Finnish Public Procurement Law and Experience

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I will first describe in this paper the legal structure of European public procurement. The system is rather clear but it is evident that the diversity of different goods and constructions works auctioned has created additional complexity and legal risk for public authorities.

After that, I will show how the Commission monitors the performance of member states on public procurement. Member state performance does not really tell us if the public procurement law and procurement procedure are reaching the goals. However, measurement shows how the procedure is working in general. If there are problems in some area, there is a chance for improvement.

I will shed some light to Finnish experience on public procurement from lawyer's perspective. Observations may be cautiously generalized concerning other member states because the legal framework is similar inside European Union. I will try to illuminate why public procurement legislation is seen cumbersome although it has goals that are understandable.

This paper concerns European Union and Finnish law but the real life phenomenon of public procurement is global. All over the world, there is a need for public authorities to buy different goods from private markets using public funds. There are different legal solutions to this task and in this paper I will explain the European approach.

View on procurement legislation in EU

European public procurement legislation is harmonized by Procurement Directive in 2014².

Purchases over certain threshold value must be auctioned in an open procedure. In general, public authorities must arrange open competitive bidding when they are purchasing goods, services or construction works from markets outside their own organization. The aim is to get better value for public money, to give equal opportunities for cross border sellers and to improve economic growth. European commission supervises compliance and European court has the ultimate power

¹ The paper was first presented in the Sino-Finnish Bilateral Seminar on Comparative Law on 28th of August 2017 in Helsinki, Session III Public Procurement. The Author is pleased with valuable comments from commentator Professor Tian He, Institute of Law, CASS and the audience but the views are own.

² The latest directive is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, OJ L 94, 28.3.2014, pp. 65–242.

to interpret the procurement directive in detail. National courts have jurisdiction on national procurement law. In Finland, that is Procurement Act on 2016 (1397/2016).

The goals of European procurement directives since 1990 have been to achieve transparent, fair and competitive public procurement across the EU's Single Market thus generating business opportunities, driving economic growth and creating jobs. EU directives are by nature minimum regulation which refers to that member states have an opportunity to enact more strict rules.

The directive regulates only the auction procedure so the law does not tell what should be bought. Instead, it orders one to buy with the certain open procedure. That principle is weakened a little by the latest reform trying to make public procurement a stronger policy instrument.

The effects of the legislation are not always as expected so there is lively academic discussion on the real effects of the procurement law.³ Also best practices are eagerly looked after.⁴ Over the years the European legislator has made changes to the procurement directives in order to develop the law and to respond to the main concerns. These are the complexity of the rules, high administrative costs, the fear of clustered markets, and modest share of cross border procurement deals.

The procurement performance of the member states is well documented by the commission but real economic effects on costs or on markets is not explicit though they are considered positive. Discussion in member states can be skeptical against the effectiveness and costs of public auctions.

Legal principles in Procurement Law

Public procurement law in Europe is about the formal process by which public authorities, such as government departments or the local authorities, purchase goods, services or constructions works from private companies.

General legal principles guiding decision making under procurement law can be found in the Procurement Directive (paragraph 1) and they are used in Union Court decisions as a guiding rule. Member states may have their own additional principles but they may not contradict EU-principles. Key Principles in the EU can be expressed in many ways but in general they are as follows.

³ See for example Journal of Public Procurement. Emerald Publishing Limited.

⁴ Communication from the Commission to the Institutions: Making Public Procurement Work in and for Europe, COM(2017) 572 final, Strasbourg, 3.10.2017, page 5.

Equal treatment and Non-discrimination mean that discrimination against bidders from other Member States or on some other grounds is not allowed. Furthermore, discrimination against bidders from another area inside a member state is not allowed.

Court of Justice of the European Union (CJEU) has stated that "the equal treatment principle requires that comparable situations are not treated differently and that different situations are not treated similarly unless such a difference or similarity in treatment can be justified objectively"⁵. Furthermore, the contracting party is not allowed to plan auctions in a way that only certain firms are able to make offers.

On an individual tender level, it is still possible to try to shape the selection criteria favoring some predetermined firms. If this is suspected and demonstrated before a national court, the tender has failed. Selected technical criteria may also bring up equality problems although public authors are free to decide what to buy.⁶

However, in general the low volume of cross border deals is not a consequence of discrimination but normal market conditions, meaning higher costs.⁷

The principle of transparency means in practice that information on coming tenders must be available to all potential bidders in Europe in a transparent form and language.⁸ Directive sets out step-by-step procedures related to the notice and advertisement of tenders, leaving little choice as to when, where, and how to advertise procurement events. The general idea includes also that impartiality of the contracting authorities' decision can be reviewed.

The Procurement Directive (for example articles, 2, 42) requires that all performance and/or functional requirements should be sufficiently precise as to allow the tenderer to determine the subject matter of the contract. Reasonably well informed and normally diligent tenderer must be able to interpret the notice in the same way.⁹

Special standards (for example environmental standards or labels) in contract notices may be used but there must be an option available to tenderers to show that required equivalent standards are

⁵ Case C-21/03 and C-34/03, *Fabrimcom v Belgium* [2005] ECR I-1559.

⁶ Case C-448/01, *EVN AG and Wienstrom GmbH v Austria* [2003] ECR I-4527 at paragraph 69.

⁷ See closer for example *Public procurement in Europe - Cost and effectiveness. A study on procurement regulation*. Prepared for the European Commission, March 2011, pages 95–102.

⁸ <https://ted.europa.eu/TED/main/HomePage.do>.

⁹ Case C-19/00 *SIAC Construction v County Council of Mayo* [2001] ECR I-7725, paragraph 42.

met. This may be cumbersome for small firms. Highly technical tender documents create misunderstandings and legal disputes.

Member State public procurement policies must comply with *the principle of proportionality*. The CJEU has consistently defined the principle of proportionality as one of the general principles of EU law, which requires that measures implemented through EU provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.¹⁰

All above threshold tenders must be carried out through the open procurement process even if this would not create any economic benefits. Open tender may in some cases cost more than is gained by the lower price.

Procurement process

The purchasing process is ordered by the European Union directive, which means that member states must implement the rules into their own national laws. The basic feature of the directive is an open invitation to take part in the public tender process. All European firms have an equal right to make offers. The winner is chosen according to predetermined, open and nonrestrictive criteria. The simple idea is that with this procedure the public purchaser finds the best deal and the best provider.

In general, the rules are meant to achieve the efficient use of public resources and enhance competition in European Union thus generating economic growth. From that perspective it is perhaps surprising that some public authors in member states and member states themselves have found it sometimes uncomfortable to play along the public procurement directives and rules.¹¹

Slight unwillingness to comply is the most significant in local administrative levels in the member states. This is seen for example in Finland where local level officials sometimes try to find ways not to comply with procurement laws. These attempts are however stopped by rival tenderers complaining to the Finnish Market Court. Firms are eager to take unlawful practices to the court. Both the European and Finnish legislators have seen these compliance problems and the new procurement legislation tries to make the procurement process easier and more flexible.

System description, procurement market

¹⁰ Case No. C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR ('British American Tobacco') at paragraph 122; see also cases cited therein.

¹¹ Christopher Bovis (2005). *Public Procurement in the European Union*. Palgrave MacMillan, GB, page 1.

There are over 250 000 individual public authorities in the EU to spend around 14% of GDP on the purchase of services, works and supplies. Total annual value is nearly 2000 billion euro. In Finland, the total value of public tenders is about 35 billion euro per year. Purchasing volume under the directives is lower, about 400 billion euro per year and about 3.6 percent of the EU's GDP because of the threshold values.¹²

The volume of award notices is high in Europe reaching over 140 000 notices in 2010. In Finland, there are over 17 000 award notices per year. The number of notices is not rising rapidly as it did during the last decade.

The procurement market in Europe is vast in monetary terms, in terms of number and variety of different parties like public authorities and private firms, and in terms of variety of different goods, services or construction works.

This immediately creates a problem for the legislator and for procurement authorities. The same law must be applied to all tenders with some exceptions. In order to solve the problem, the legislator has made the law quite complex. The public author must in turn try to find the most advantageous solution when arranging a separate tender. The law itself does not say what option would be the best.

The large monetary value of procurement induces politicians and legislator to use public procurement as a strategic tool for different policies. Currently the rules emphasize policies aimed at creating a more innovative, green and socially inclusive economy, as well as those boosting jobs, growth and investment. However, the real effect of procurement on public policies depends heavily on the actual design of awards, competence of public authorities, market share of public authorities, and bidders desire to take part in tenders including strategic elements. Changing policy recommendations may create uncertainty within public authors and firms.

Performance analysis¹³

In European Union there is a Commission driven initiative to assess the effectiveness of the public procurement system in all member states.¹⁴ One major task is to evaluate how different EU countries are performing on the public procurement process. That does not however describe

¹² http://www.eipa.eu/files/topics/public_procurement/cost_effectiveness_en.pdf.

¹³ http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm.

¹⁴ See more analysis on Anthony Flynn, (2018) "Measuring procurement performance in Europe", *Journal of Public Procurement*, Vol. 18 Issue: 1, pp. 2–13.

directly how efficient the system is ensuring the best value for money in individual procurement awards or how procurement can be used as a policy instrument.

The success of the public procurement system is evaluated with nine indicators. The information assessing indicators comes from notices published in the Tenders Electronic Daily (TED) where all above threshold auctions are published. Performance indicators are expressed below. Commission experts have made the qualitative policy judgement on what is good or bad practice. The bold indicators picture the competitiveness of the procurement system. Indicators 7 to 9 indicate transparency. Indicators 4 to 6 indicate mainly the expertise of public authors in procurement.

Indicator	Good performance	Bad performance	
1. One Bidder Auctions	$\leq 10 \%$	$> 20 \%$	competitiveness
2. No Calls for Bids	$\leq 5 \%$	$\geq 10 \%$	competitiveness
3. Publication Rate	$> 5 \%$	$< 2.5 \%$	competitiveness
4. Cooperative Procurement	$\geq 10 \%$	$< 10 \%$	expertise
5. Award Criteria in auctions, lowest price	$< 80 \%$	$\geq 80 \%$	expertise
6. Decision Speed	≤ 120 days	> 120 days	expertise
7. <i>Missing Values (Bad info)</i>	$\leq 3 \%$	$> 3 \%$	transparency
8. <i>Missing Calls for Bids (Bad info)</i>	$\leq 3 \%$	$> 3 \%$	transparency
9. <i>Missing Registration Numbers (Bad info)</i>	$\leq 3 \%$	$> 3 \%$	transparency

Explanation¹⁵:

One bidder auction (No. 1) means that there is only one offer delivered to the auction. This indicates that lively competition does not exist and best value for money is perhaps not achieved. The more bidders are participating the better results are expected.

No calls for bids (No. 2) means that procurement is done without prior notification. Only private negotiation between a public purchaser and a firm is carried out. In this case, there is no competition between bids or bidders and the best value for money is not guaranteed by competition.

The publication rate (No. 3) illustrates the monetary value of published auctions compared with Gross Domestic Product (GDP) where GDP is the denominator. The larger value means a larger share of published auctions in domestic economy, which is considered advantageous.

The cooperative procurement indicator (No. 4) tells how often public authors cooperate with each other when they engage in procurement. Cooperation may involve purchasing on behalf of other public author or joint procurement, or even using central purchasing body. Cooperation gives public authors the stronger market position and is thought to lead to lower prices and better value for money. Cooperation also gives an opportunity to exchange expertise for good procurement practices and for different markets.

Award criteria indicator (No. 5) tells how public buyers choose the companies they award the contract to. This indicator measures whether decision is based on the price alone, or if also the quality is taken into account. The over-reliance in price suggests better criteria could have been used.

Decision speed (No. 6) measures the mean length of the decision-making period. This is the time between the deadline for receiving offers and the award of the contract. Lengthy procedures are considered expensive and causing unnecessary uncertainty for both the public buyers and private companies.

Missing Values (No. 7) illustrates transparency and tells that public buyers provide insufficient information on their procurement. The indicator measures the proportion of contracts awarded without full information about the expected value. A lower "Missing Values" indicator score is

¹⁵ European Commission, DG GROW G4. TED CSV open data. Advanced notes on methodology. http://data.europa.eu/euodp/repository/ec/dg-grow/mappps/TED_advanced_notes.pdf.

better, as it means companies can make better bidding decisions and citizens know how their money is spent.

Missing Calls for Bids (No. 8) tells that public buyers provide insufficient information about their procurement. The indicator measures the proportion of contract awards for which a call for bids took place, but it is not evident what the name of the call was or what the conditions were. A lower "Missing Calls for Bids" indicator score is better, because it means businesses and citizens can understand how contractors have been selected.

Missing Registration Number (No. 9) tells that public buyers provide insufficient information about their procurement. The indicator measures the proportion of procedures where the business registration number was not included meaning that it is not easy to identify the buyer or the seller.

Procurement risk – material and legal risk

There is always a risk in public procurement. Risk can be separated at least into internal, commercial, and legal risks. Internal risk refers to the public author's ability to buy right commodities in right time. Commercial risk means the probability that the winner does not deliver the goods as promised. Legal risk means a threat that the procedure goes wrong and public author's procurement decision is overruled by the court. There may be even economic penalties on unlawful conduct. Legal risk in public procurement is perhaps more severe than in private procurement.

Law on public procurement is procedural in nature. It is not possible or reasonable to dictate what should be bought. Of course, the procedural nature of the law creates an administrative burden to the buyer and to the seller.¹⁶ Another consequence is increased legal risk. The bidder treated in an illegal manner is entitled to compensation if there is a reason to believe that the bidder would have won the auction.

Legal risk has unfortunate effects on procurement practices. The public author may want to avoid risk. This is done for example by relying on conventional technology and on large established providers, or by arranging larger auctions. Risk may be avoided by cooperating with other public institutions. This may lead to market concentration on buyers' side but also on sellers' side.

¹⁶ See for example European Commission. Evaluation Report. Impact and Effectiveness of EU Public Procurement Legislation. SEC(2011) 853 final, Brussels, 27.11.2011, page 148.

Procurement law has changed a few times in Europe and in member states. The general aim of these changes has been a more flexible and simpler procurement procedure. Judicial safeguards for sellers are made stronger and strategic procurement is encouraged.

An open and straight forward bidding procedure is not ideal for buying complex services. It is considered for example troublesome to use auctions for buying services that include long and personal care relations in social and health care sectors. In addition, demanding building projects are not easy for procurement authorities. Problems emerge usually in the difficulty of drafting reasonably clear procurement documents.

Failed procurement process opens an opportunity for competitors to take the public author to the national court. Opportunity is usually open to firms that have participated in the auction and are treated unequally. Legal risks are additional risks above normal commercial risks.

In Finland, the procurement procedure fails most often in the phases of preparing procurement documents and selecting the winner. An invitation for a bid must be so exact that firms can make comparable offers. If the invitation is not exact, bids will not be comparable and the best offer is not found. Then the firms have an interest to take the decision to the court if they have lost the auction. If the court annuls the decision, a new auction has to be organized.

The most advantageous offer has to be chosen according to predetermined rules. When final bids are delivered, the public author cannot change the rules any more. In cases where the winner is chosen not only by the lowest price but also by the best quality, there is a high probability to make mistakes. In Finland, unclear selection criteria are a common ground to take the decision to the court.

For the competitors court proceedings give a possibility to get the deal or harm competitors. If the procurement decision goes to the court, it means delay and an additional cost. Public authors of course avoid court cases for example by using cautious procurement strategies that are however thought to have negative consequences to innovation.

Although the possibility to take procurement decision to court may cause additional costs to auctions, it is considered highly necessary both at EU and at the national level.

Summary

There is a lot of information on how procurement process works in Europe and in Member States. However, there is not a sound picture on what are the effects of procurement law compared with

a state without mandatory legislation. So, one cannot without question be convinced that the law has only beneficial effects. The administrative cost and legal risk are identified and they are taken into account in legal reforms.

When one considers experience by now, it may be pointed out that procurement costs do not always allow cross border procurement where competitiveness is weaker anyhow. Furthermore, market reactions are not perhaps what expected since concentration has been noticed and prices can go up or down. In some fields of operations, procurement may hurt customers. Legal risk increases costs and has other negative effects in public procurement.

Country performance is analyzed by the Commission according to the success of the procedure. It does not tell how markets and prices are behaving neither what are the administrative costs. Assumption is that the more competitive and transparent procurement process is the better is the price and quality. Real changes in prices are harder to find out.

It is not easy to say if the awarded contract really is the best there is. The reason is imperfect information. One cannot for example compare the results of competitive bidding with the results of private negotiations. There is lack of imaginative surveys measuring the impact of procurement rules on economy in general and on specific markets. However, general understanding is that competitive bidding gives economic benefits.