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Rechtsbescherming van ondernemers in aanbestedingsprocedures

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Summary

‘Legal protection of entrepreneurs in procurement procedures’

The subject of this research is legal protection of entrepreneurs in relation to procurement procedures. In this research two questions are paramount. The first one is whether the Dutch system of law with respect to legal protection meets the requirements set by European Union law. The second one whether the Dutch system of law with respect to legal protection is coherent. The membership of the Netherlands of the European Union demands national law to be in conformity with European Union law. Coherence serves material equality and legal certainty.

Chapter 2 is devoted to the framework under European law for legal protection in relation to procurement procedures. Procurement law has deep roots in European law, in the TFEU as well as in the Directives 2004/17/EC and 2004/18/EC. In Court of Justice case-law principles have evolved which influence the legal protection of entrepreneurs in relation to procurement procedures that fall within the European procurement regulations. A central principle is the principle of effective legal protection, which has meanwhile been laid down in Article 47 of the Charter of Fundamental Rights of the European Union. This principle sets preconditions to the national law of member states. Within the scope of these preconditions the member states enjoy procedural autonomy, which is limited by the principle of equivalence and the principle of effectiveness. Another major principle is member state liability, pursuant to which member states are liable for violations of European Union law.

In the Commission’s view the national law of the member states offered insufficient effective law protection in relation to procurement procedures. For this reason specifically in the field of procurement law two directives were established: Directive 89/665/EEC for procurement procedures that fall within the scope of Directive 2004/18/EC and Directive 92/13/EEC for procurement procedures that fall within the scope of Directive 2004/17/EG. It involves minimum harmonisation directives. The directives inter alia set requirements to the circle of persons who may be regarded as interested parties in the lawful execution of their duties and determine which provisions entrepreneurs must have at their disposal to challenge decisions made by the contracting authorities. Directives 89/665/EEC and 92/13/EEC give rise to questions about their relation to the general principles of effective legal protection, equivalence and effectiveness that have evolved from Court of Justice case-law.

The Directives 89/665/EC and 92/13/EEC were tightened in 2007 by means of Directive 2007/66/EC. Directive 2007/66/EC codifies and specifies Court of Justice case-law relating to suspense and expiry terms that must be observed by the

contracting authorities after the contract has been awarded. Moreover it introduces the sanction of ‘non-binding’ with regard to contracts that have been concluded without prior publication of a contract notice in the Official Journal of the European Union or in case the term of suspension has not been observed.

In chapter 3 the framework under national law is dealt with. Where legal protection of entrepreneurs is at issue the award decision plays a central role. Contrary to what is often generally assumed the award decision is not a decision in preparation of a legal act under private law within the meaning of Article 8:3 (2) of the General Administrative Law Act. The legal relationship between the contracting party and the tenderers is a precontractual legal relationship. The norms that govern this legal relationship may result in a duty for contracting parties that do not fall under the scope of the Directives 2004/18/EC or 2004/17/EC and the Public Procurement Act 2012 to observe the principles pertaining to procurement law. Apart from that the norms that govern the precontractual stage may limit the freedom of the contracting party to withdraw a procurement procedure or an award decision. Even though the legal relationship between the contracting party and the tenderer is a precontractual relationship, the contracting party is in principle at liberty to lay down aspects of the procurement procedure in a contract. The latter in this research shall be referred to as a ‘procurement contract’.

A lot of contracting parties are authorities. They are not only bound to the procurement rules and the private-law norms that govern the precontractual legal relationship between the contracting party and the tenderers, but also to the general principles of sound administration. The general principles of sound administration are the principles against which the acts of contracting parties can be tested directly, yet they can also colour private-law norms. In case-law with regard to procurement disputes the general principles of sound administration do not play a prominent role. Chapter 4 is about the claim for damages. Pursuant to Dutch law the basis for a claim for damages because of violation of the procurement rules is a tortious act, which is regulated in Article 162 of Book 6 of the Dutch Civil Code. As far as a procurement contract has been concluded, attributable failure to perform, as provided for in Article 74 of Book 6 of the Dutch Civil Code, may under circumstances serve as the basis. The stipulation as to the extent of the damages, applicable to tortious act as well as to attributable failure to perform, is provided for in Title 10, Part 10 of Book 6 of the Dutch Civil Code. The initial starting point is that the loss is fully compensated for. Should the contract have been awarded definitely, the disadvantaged tenderer claims lost revenue. Should the procurement procedure have been withdrawn, the disadvantaged tenderer claims costs incurred. In procurement disputes causation problems often occur. It may be difficult for a tenderer to prove that the contract should have been awarded to him whereas the procurement rules were not violated. Where appropriate the “loss of chance” doctrine offers the judge the possibility to allow damages in the form of a percentage of the loss incurred.

To claims for damages the ordinary evidence rules of the Code of Civil Procedure apply. For the major part the burden of proof lies with the disadvantaged entrepreneur. Supreme Court case-law offers judges the possibility to lighten the burden of proof of entrepreneurs or, in rare cases, to even reverse it.

Moreover entrepreneurs may avail themselves of a number of instruments to collect evidence. The court order under Article 22 of the Civil Code of Procedure, the duty to submit exhibits under Article 843 under a of the Civil Code of Procedure and the Public Access Act may come to mind in this respect. Application of these instruments is not an easy task. In *Varec* the Court of Justice decided that the body having appellate jurisdiction must dispose of all information required for a judgment to be pronounced with comprehensive knowledge of affairs, amongst which information of a confidential nature.¹ At the same time the judge must treat that information confidentially and parties must not be allowed to simply obtain knowledge thereof. This creates tension in relation to the right to a fair trial as legally enshrined in Article 6 ECHR (and Article 47 of the Charter of Fundamental Rights of the European Union). The relation between the various regulations with regard to publication is complex partly owing to the confidentiality rule pursuant to Article 2 paragraph 57 of the Public Procurement Act 2012.

The right to a reimbursement of the costs involved with preparing the tender as laid down in Article 2 (7) of the Directive 92/13/EEC has not been specifically provided for in Dutch law. With the aid of an interpretation of the “loss of chance” doctrine that is in conformity with the directive and considering Article 97 of Book 6 of the Dutch Civil Code, the judge may allow damages representing the costs of preparing the tender to disadvantaged entrepreneurs. In that case interpretation in conformity with the directive can merely be a temporary ancillary instrument. Legislation is required to restore the lack of implementation in Dutch legislation.

In Chapter 5 interim measures in interlocutory proceedings are discussed. In the system of Directives for legal protection and law practice they hold a central position. Within the scope of preconditions of equivalence, effectiveness and effective legal protection the conditions that must be met before interlocutory proceedings can be ordered and before decisions can be set aside are left to national law.

Compliance with the procurement rules can be enforced by means of a court order or ban. The court order and ban are provided for in Article 296 of Book 3 of the Dutch Civil Code. The conditions that apply to imposing a court order or ban are for a major part similar to those that apply to the granting of damages. The entrepreneur who claims an order or a ban on the basis of a legal obligation pertaining to procurement law is not obliged to prove that a loss has been suffered. He must make it plausible though that he may suffer a loss in the event that no court order or ban is given. In so far as the court order or ban is based on a contractual commitment lighter conditions apply. The entrepreneur claiming the order or ban, is in that case not obligated to make it plausible that the lack of a court order or ban implies that he may suffer a loss. A claim may under circumstances be rejected on the grounds of misuse of authority though.

Interlocutory proceedings are provided for in Part 14 of the Civil Code of Procedure. The nature of interlocutory proceedings allows a large degree of liberty to the judge hearing applications for provisional relief. Due process of law is the underlying principle.

1 Court of Justice EC 14 February 2008, C-450/06 (*Varec*), reason for judgment 53.

The interlocutory judge will weigh up the interests when judging an interim measure. This weighing of interests is generally first and foremost aimed at the aspect of efficiency, whereas in disputes regarding procurement procedures lawfulness is paramount. The judge hearing applications for provisional relief does not seem to be willing to dismiss a claim merely based on efficiency considerations other than under special circumstances. This approach benefits the effective legal protection of entrepreneurs and is in line with the Directives for legal protection. The judgment of the judge hearing applications for provisional relief is open to appeal. For judgment in appeal a matter of major importance is whether or not after the (favourable) judgment of the judge hearing applications for provisional relief the contract has been definitely awarded by the contracting party. In the event that the contract has not been awarded definitely, the framework judgment with regard to the claim of the disadvantaged tenderer remains unchanged. Should the contract for the work have been awarded definitely, the contracting party still can be forced to end it and to initiate a new procurement procedure, yet awarding in that case is subject to heavier requirements in respect of sustained damage and causation. Apart from that in review procedures the interests of the contracting party and the entrepreneur to whom the contract has been awarded may have in maintaining the contract carry much weight in the balancing of interests to be made.

In interlocutory proceedings between an entrepreneur and the contracting party often the interests of third party entrepreneurs are involved. The latter have the possibility to intervene as third parties in interlocutory proceedings between an entrepreneur and a contracting party. By means of intervening a third party may support the point of view of one of the two litigants and/or it may put forward a claim independently. The possibility of intervention is in actual practice often made use of. A third party entrepreneur may also choose to wait for the judgment in interlocutory proceedings between another entrepreneur and the contracting party and lodge an objection against it if it appears to be unfavourable to his regard. Where appropriate the entrepreneur does take the risk of misuse of authority being invoked against him though.

In chapter 6 attention is given to the regulation in the Public Procurement Act 2012 in which Directive 2007/66/EC has been implemented. The initial starting point of the Dutch legislator upon implementation of this directive was to go no further than strictly necessary. The obligatory term of suspension for example has been provided for, yet no expiry terms have been inserted in the Public Procurement Act 2012. On certain parts the implementation of Directive 2007/66/EG has not been thoroughly considered. This applies particularly to the circle of parties to whom the notice of the award decision must be sent. Apart from that the Dutch legislator seems to have forgotten to implement Article 2 (3) of the Directives for legal protection, in so far as the extension of the suspension term as required by this Article concerns voluntary publication of a direct award of a contract or the award of a contract based on a framework agreement or a dynamic purchase system. This lack of implementation can be remedied by legislation only. Direct applicability and interpretation in conformity with the directive do not produce a result.

The sanction of 'non-binding' is cast in the doctrine of nullification. Part 2 of Book 3 of the Dutch Civil Code is applicable where nullification of contracts on the grounds

mentioned in Article 4.15 of the Public Procurement Act 2012 is concerned. Nullification in principle has retrospective force, yet the judge may on the basis of Article 53 paragraph 2 of Book 3 of the Dutch Civil Code rule that nullification shall fully or partly remain inoperative.

The ordinary rules of the Dutch Civil Code apply to the consequences of nullification of contracts on one of the grounds mentioned in the Public Procurement Act 2012. Performances that have been delivered already must in principle be refunded by the receiving party. The opposing party of the contracting authority in a contract that has been nullified on one of the grounds mentioned in the Public Procurement Act 2012 has limited possibilities to claim damages. The opposing party of the contracting authority can at the most claim the costs incurred. Compensation of this loss however is in most cases already factored into the obligations to undo that arise because of nullification. Following Directive 2007/66/EC the judge by means of Article 4.18 of the Public Procurement Act 2012 is given the authority to maintain a voidable contract on the basis of compelling reasons of general interest. On occasion the Authority Consumer and Market must impose an alternative sanction to the contracting authority involved.

Chapter 7 is devoted to two doctrines which in disputes regarding procurement procedures are receiving a relatively great deal of attention: *locus standi* and the 'Grossmann-defence'. The Dutch legislator has not laid down particular rules for the implementation of Article 1 paragraph 3 of the Directives 89/665/EEC and 92/13/EEC, in which the right to seek review has been provided for. Sufficient interest of an entrepreneur to appear and be heard before a court must in procurement disputes be checked against the general Article 303 of Book 3 of the Dutch Civil Code. This stipulation does not constitute a major obstacle for entrepreneurs to gain access to the competent review body. The assumption of *locus standi* depends on whether or not adjudication of the claim would from a legal point of view benefit the entrepreneur who is the claimant. The entrepreneur is not required to show that he has been harmed or is running the risk of being harmed because of the alleged violation, since Article 303 of Book 3 of the Dutch Civil Code does not demand a causal link.

In *Grossmann* the Court of Justice judged that national stipulations that preclude an entrepreneur from access to review procedures, once a public contract has been awarded, if he did not participate in the procurement procedure for that contract on the ground that he was not in the position to supply all the services for which tenderers were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, while he did not seek review of those specifications before the contract was awarded either, are not incompatible with the Articles 1 paragraph 3 and 2 paragraph 1 under b of Directive 89/665/EEC. This judgment in review procedures, which in Dutch legal practice comes up regularly, offers contracting authorities reference points for a defence against entrepreneurs who in a procurement procedure have adopted a wait-and-see attitude. Such a defence requires a basis in the national legislation. In Dutch legislation this basis can be found in the doctrine of forfeiture of rights, the balancing of interests pursuant to Article 254 of the Dutch Civil Code by the judge hearing applications for provisional relief and in the obligation to complain timely as stipulated in Section 89 of Book 6 of the Dutch Civil Code.

Chapter 8 closes with concluding observations. In these observations, in the light of the subjects that have been dealt with, answers are given to the research questions. The first research question, i.e. does the Dutch system of legal protection meet the requirements set by European Union law, can for the major part be answered confirmatively. A few parts require implementation measures. This applies to the right in respect of reimbursement of the costs incurred in the preparation of the tender, granted by virtue of Article 2 paragraph 7 of Directive 92/13/EEC, and the extension of the suspension period in all cases within the meaning of Article 2 paragraph 3 of the Directives 89/665/EEC and 92/13/EEC.

As to the coherence of legal protection in relation to procurement procedures, which is the second research question, a number of comments must be made. First of all, under circumstances the Court of Justice case-law forces the Dutch Judge to apply national law differently. For example, this applies to Article 303 of Book 3 of the Dutch Civil Code. On other parts the lack of coherence can be attributed to the choices made by the Dutch legislator upon the implementation of the Directives 89/665/EEC and 92/13/EEC. This applies to Article 2.129 of the Public Procurement Act 2012, which is intended to prevent a contract from being considered to have been concluded merely by means of a notification of the award decision, and to the confidentiality rule of Article 2.57 of the Public Procurement Act 2012, the scope of which is, without justification, limited to European procurement procedures. Because, finally, a lot of contracting authorities, yet not all, are authorities, part of all contracting authorities is bound to the general principles of sound administration. For that reason, depending on the character of the contracting authority, to a certain extent different rules apply. Even though it is not a matter of incoherence, the limited scope of the general principles of sound administration is detrimental to the uniformity of legal protection.