

Estimating illegitimacy of public procurement spend

Author: Jefry H. Heddema
University of Twente
P.O. Box 217, 7500AE Enschede
The Netherlands

This thesis will focus on estimating the amount of illegitimate spend in public procurement. The regulation relating to public procurement is analysed on issues where illegitimacy could occur. Those issues that are applicable to a spend analysis are further developed in order to make an estimation on the illegitimacy of public procurement spend.

Supervisors: Prof. Dr. Jan Telgen

Keywords

Public procurement, Illegitimacy, Legislation, EU procedures, Procurement, Spend analysis

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7th IBA Bachelor Thesis Conference, July 1st, 2016, Enschede, The Netherlands.

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1. INTRODUCTION

Public procurement is purchasing performed by organizations that have ties to the government. It differs from purchasing in private organizations in that these public entities are bound by rules and regulations that are not applicable to private organizations. These rules and regulations cover a wide range of documents, from EU legislation to internal policies. This constitutes a vast landscape where potential problems might occur in public procurement. Any spend made by a public organisation not adhering to these rules and regulations can be classified as spend that is made in an illegitimate way. In order to make the landscape manageable, illegitimacy can be estimated using readily available data from a spend analysis. This ex post evaluation gives organisations a good starting point in estimating the total illegitimacy of procurement of the organisation.

1.1 Problem statement

Main research question: How can a good estimation be made of illegitimate public procurement spend in a public organisation based on spend analysis data?

- What issues can be found that cause illegitimate spend?
- What are the limits for illegitimate spend on these issues?
- What could calculation rules for illegitimacy look like based on these issues and limits?

1.2 Rules and regulations

To understand where illegitimacy starts, the underlying ideas behind the rules and regulations concerning public procurement have to be made clear.

Private institutions are free to decide the content and proceeding of a purchase, as long as it follows relevant contracting and criminal laws. In public procurement a whole different set of rules and regulations also needs to be adhered to. This set of rules and regulations follow a hierarchy, where the European Union (EU) legislation is on top. The treaty on the functioning of the EU sets out the scope of the EU's authority to legislate on public procurement matters. Key in the development of these matters is the provisions related to free movement, prohibiting measures that discriminate against firms/products from other member states of the EU. Examples of cases that are not allowed are; Reserving contracts for domestically made products or protecting national employment. The free movement rules also require a degree of transparency in awarding contracts to help monitor that the restrictions on discrimination are observed (Arrowsmith et al; 2010).

In the table below the main sources of regulation for public procurement are listed, sorted by hierarchy;

Type of law:	Used regulation:
EU treaties	TFEU ¹
EU Directive	2014/24/EU, 2009/81/EC
Dutch law	"Aanbestedingswet 2012"
"Algemene maatregel van bestuur" (amvb)	"Gids proportionaliteit"

¹Specifically, Art. 34, 49 & 56 TFEU

1.2.1 EU directive

Directives are legal acts of the EU which requires the member states to achieve a result without dictating the means of achieving that result. It is not a law by itself but must be implemented by member states as a separate national law. The directives concerning public procurement aim to clarify and put into writing the stance of the EU. Its content consists of detailed regulation on what public procurement entails and details of the procuring process. For example, the directive states that if a product is bought with a value higher than a certain threshold. That product must be procured according to a certain procedure. The exact steps of this procedure are also outlined in the directive (Schütze, 2012).

The EU procedures are the most often used procedures in public procurement due to a strong trend across public procurement markets towards the aggregation of demand by public purchasing organisations. Advantages are the ability to obtain economies of scale, which include lower prices and transaction costs, and to improve and professionalise the management of public procurement do to the availability of more resources.

1.2.2 Dutch law

The directive requires transposition into Dutch law for it to have effect in the Netherlands. The directive states by which date the member states must have transposed it into national law. The latest directive has been applied to Dutch law by the modification of the "aanbestedingswet 2012" in July of 2016. This law is almost identical to the directive, as it takes the EU regulation and makes it national. It does leave room for the national lawmaker to add, where the EU regulation leaves room.

1.2.3 "Algemene maatregelen van bestuur" & "ministeriële regelingen"

In the Netherlands the government can add regulation based on an existing law if it offers the possibility to do so. This regulatory mechanism is called an "algemene maatregel van bestuur" (amvb) and it allows for quick adaptive regulation to be made without having to go through the normal legislative procedures. The main regulation that has risen from through the use of the "amvb" is the "gids proportionaliteit". It offers insight into how Dutch government views that the "aanbestedingswet 2012" should be interpreted. It serves as an obligatory guideline for best practices concerning governmental procurement and gives practical examples and guidance. This guide is made by industry experts, both from private market firms and contracting authorities.

1.2.4 Internal policy

Where the law does not provide regulation the option is open for contracting authorities to create their own. This is done internally in the public organisation and used as a management tool to keep purchasing in line with policy. It is usually applied in order to require more environmentally friendly procurement, requiring suppliers to use less well-off people in society or have suppliers create innovative solutions. The directive gives options on ways how to apply this, but not when. Ethical behaviour is also often regulated through internal policy. Examples are that it is generally accepted that the highest ethical standards must be observed at all times and purchasers should not put themselves in situations whereby it could be construed that their impartiality is questioned. Purchasers should not derive any personal advantage from purchases. Purchasers must act fairly and objectively and in the best interests in conducting business with suppliers. Purchasers involved in purchasing decisions who have outside interests which are in conflict with the interests of the contracting

authority, or who have close family members with such interests, must withdraw from participation in purchasing decisions.

1.3 Procurement process

The actual procurement involves a number of stages. There is a distinction between the tactical and the operational procurement stages. The former consists of the search, negotiation and the eventual deal. The latter of physically ordering the product, monitoring the deliveries and supplier relations.

In public procurement the product is specified according to requirements. This will ordinarily be done by the purchasing department with input from internal customers and possibly suppliers. The selection stage consists of request for tender, this involves possible suppliers that can confirm to these specifications with the procurement. The tender process is a very formal and organised method designed to select the best possible supplier. After selection, contracts are signed agreeing on terms, like delivery and distribution.

Actions taken in each stage differ when relating procurement to a public or private organisation. All of the stages in public procurement are bound and regulated by public procurement rules and regulations in some form. The tactical procurement stages are most heavily regulated as these stages offer the most opportunity for fraud, bribery and nepotism to corrupt procurement.

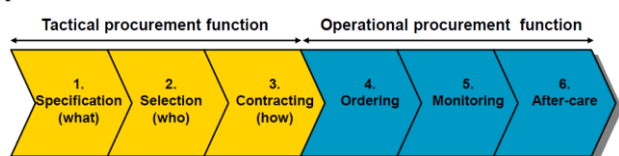


Figure 1. Procurement process (van Weele, 2009)

Procurement is performed to obtain goods and services as needed. There is a difference between doing what is most efficient and correctly applying all rules and regulations. This is the gap between legitimacy and efficiency. A procurement can be very efficient but not very legitimate, but also completely legitimate and not very efficient. These two aspects are always present in public procurement and good public procurement will find a balance between them. What is efficient or not are matters related to political and managerial decision making. An example is the case in which a procuring organisation receives a bid which does not comply with some formal requirement of the tendering process – for example, is late or not in the required form. In this case the aspect of legitimacy might suggest that the bid should be rejected, but if the bid is the best one submitted the aspect of efficiency might indicate that it should be accepted, as it will provide better value for money.

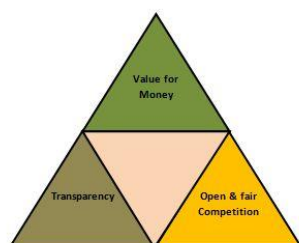


Figure 2. Legitimacy efficiency triangle

1.4 Spend analysis

The estimation of illegitimate spend will be done applying calculation rules on the combination of the spend analysis, contract register and TED. A spend analysis provides a summary of all procurement done by an organisation. Procurement is classified as everything for which an invoice is received. These invoices will be received and paid for by the financial department and end up in the administration as accounts payable. In order to make a spend analysis all accounts payable records are gathered and analysed. Essential for a proper spend analysis are 4 data points that must be available for every invoice (Telgen; 2004);

- Amount paid:
 - The amount that is paid to the supplier.
- Supplier:
 - The name or code of the supplier.
- Cost category:
 - A designated type that can be coupled to an invoice.
- Cost centre:
 - The department, project, business unit the invoice can be coupled to.

A spend analysis however show nothing of the content of a contract or the purchase it just shows the volume. The numbers in a spend analysis must be compared to something on which laws are applicable.

1.5 Contract register

Tenders are complete when a contract is made concerning the required products, services or works. These will be gathered in a contract register. All current and in some extent the expired contracts will be available from here. This is important for illegitimacy because it is required for matching spend to contracts. Also spend that should have been matched to a contract but has not influences illegitimacy. Where the spend analysis deals with the raw data the contract register gives the underlying authority for the spend made. Contract registers can differ between companies as some registers offer information that others do not. To make generalizable conclusions the register will be looked at in its most basic form. As only offering insight into whether there is a contract available or not.

1.6 Tender database

European tenders are registered through the use of an electronic marketplace, tender electronic daily (TED) or the Dutch equivalent Tenderned. Contract notices and contract award notices are published electronically on the TED. This can be used to find proof of the use of European procedures for specific contracts or spend. For the same reasons as with the contract register the Tender database will be looked at as only showing the availability of a contract in the database.

2. PROBLEM STATEMENT & METHODOLOGY

The aim of this paper is finding a way to estimate illegitimacy of public procurement in a way that is usable in practice. Consideration of other aspects of public procurement, like efficiency and politics is out of the scope of this document.

The procurement process will be used as the framework to categorise the stages where illegitimacy can occur. Within each of these stages the applicable rules and regulations will be listed. Issues that could possibly cause illegitimate spend are summarized and valuated on the applicability. This applicability is the way in which issues dealing with legitimacy are possible to calculate through the use of data from the:

- Spend analysis
- Contract database
- TED/Tendered

The useful issues are then further analysed to find the limits of illegitimacy. This will be supported by the use of;

- Jurisprudence, the appropriate court rulings.
- Purpose of the articles, which can be found in the explanatory memorandum of the law.
- Previous opinions expressed in reports by consultancy firms and the “Algemene rekenkamer”.
- Reports issued by the Dutch government about adherence to EU procurement regulation.

When the limits of illegitimacy are known, suggestions for calculation rules can be made. These will offer guidelines for calculating illegitimacy of public procurement spend using a spend analysis.

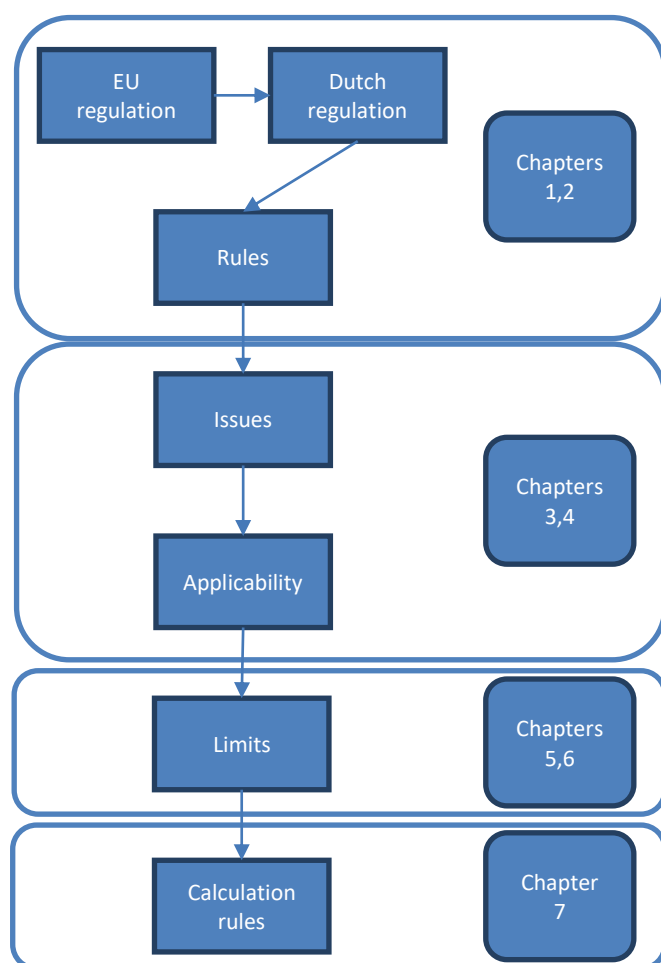


Figure 2. Thesis flowchart

3. OVERVIEW OF ISSUES

The procurement process can be used as a framework to place the Dutch law into. What follows is the categorisation of the Dutch general public procurement law.² Articles that have been skipped are either expired or not relevant.

3.1 General

Specification deals with estimating the value of the procurement, what procedure is viable to use for the procurement and the specifics of the procurement.

- Art 1.2 - 1.6: Principles of procurement
- Art 1.7 - 1.10b: Principles of EU-procurement
- Art 1.11 - 1.13: Principles of National procurement
- Art 1.14 - 1.16: Principles of “meervoudig onderhands” procurement
- Art 2.52ab: Ways of communicating
- Art 2.53 - 2.57a: Information exchange between parties

3.2 Choice of procedures

- Art 2.1 - 2.7: Applicability of regulation
- Art 2.8 - 2.11: Subsidies, joint procurement and central purchasing bodies
- Art 2.12: Mixed procurement
- Art 2.14 - 2.22: Calculating the estimated value of procurement
- Art 2.23 - 2.24: Exclusions to general law
- Art 2.26: Open procedure
- Art 2.27: Restricted procedure
- Art 2.28 - 2.29: Competitive dialogue
- Art 2.30 - 2.31: Competitive procedure with negotiation
- Art 2.31 AB: Innovation partnership
- Art 2.32 - 2.37: Use of the negotiated procedure without prior publication
- Art 2.38 - 2.39: Social and other specific services
- Art 2.42 - 2.43: Electronic auctions
- Art 2.44 - 2.47: Framework agreements
- Art 2.48 - 2.50: Dynamic purchasing systems

3.3 Specification

- Art 2.75 - 2.78b: Technical specifications
- Art 2.79: Subcontracting
- Art 2.80 - 2.81a: Special performance factors
- Art 2.82: Reserved tenders
- Art 2.83: Variants

3.4 Selection

- Art 2.51 - 2.52: Suitable candidates for tendering
- Art 2.58 - 2.61: Prior information notices
- Art 2.62 - 2.67: Contract notices
- Art 2.70 - 2.74b: Term of submission of tender
- Art 2.84 - 2.85: Self-declaration of candidates
- Art 2.86 - 2.89: Exclusion grounds
- Art 2.90 - 2.98: Qualification criteria
- Art 2.99 - 2.100: Reduction of candidates
- Art 2.101 - 2.102: Verification of candidates
- Art 2.103 - 2.104: Communication of exclusion, rejection

² Aanbestedingswet 2012

3.5 Contracting

Articles dealing with the rewarding of a contract

- Art 2.105 - 2.106: Invitation to tender
- Art 2.107 - 2.109a: Application for tender
- Art 2.109b - 2.109: Tender via electronic catalogue
- Art 2.110 - 2.112: Use of competitive dialogue
- Art 2.113 - 2.115a: Award criteria
- Art 2.116: Abnormally low tenders
- Art 2.117 - 2.125: Use of Electronic auction and dynamic purchasing systems
- Art 2.126 - 2.126a: Use of Competitive procedure with negotiation
- Art 2.126 - 2.126d: Use of innovation partnership
- Art 2.127 - 2.131: Award notices
- Art 2.132 - 2.138: Reporting on awarding
- Art 2.138a: Retention of contracts
- Art 2.139 - 2.143: Use of framework contracts
- Art 2.144 - 2.149: Use of dynamic purchasing system
- Art 2.157 - 2.163: Use of electronic auctions
- Art 2.163a - 2.163: Modification of contracts

3.6 Ordering, monitoring and after-care

These stages, also known as the operational function of procurement, deal with the general day-to-day purchasing. It executes the contracts made. The Dutch law does not regulate this stage of procurement. Contracting authorities do have regulation in place in the form of internal policy. Legitimacy issues occur here when personnel do not adhere to internal regulation. This is called maverick buying and consist of actions like for example buying items outside of existing contracts and not correctly filling in paperwork.

4. APPLICABILITY

4.1 General

Procurement law is based on certain principles that influence all subsequent regulation. These principles are derived from the negotiations that have formed the EU directives. Equal and non-discrimination in procurement and transparency in procuring are the leading principles. Out of these principles more specific regulation is derived.

Examples of this are the objective criteria that are required of the contracting authority in the choice for procedures and the selection of candidates.

The procurement contract size itself is subject to principles that influence its scope. Purchases required will be done in as many different independent contracts as possible and these will be further split into lots. This is the starting situation and can be negated from if properly motivated.

Because public procurement deals with tax money, procurement should add as much social value as possible. Think of efficiency and value for money in purchasing and reducing administrative burdens for candidates.

Transparency influences the way candidates and contracting authorities communicate. The use of electronic systems for tendering and communicating message about the tender is required in information exchange.

These general rules deal with the underlying motivation that validate the existence of more specific regulation. They are therefore difficult to check in a spend analysis, contract register or TED.

4.2 Choice of procedure

The procedures are the process that a procurement will follow to make a contract. The types of procedures are the following:

- Simple private / “Enkelvoudig onderhands”
- Multiple private / “Meervoudig onderhands”

Any procurement that constitutes a “small order” (with a value lower than 40-50.000 euros³) can be awarded on a one-on-one basis. This means that a first offer can be accepted without further negotiation. This is procurement in its simplest form and differs little from the purchases private organisations can make. Higher valuations require the application of stricter legislation. In cases of procurement of upwards of 50.000 Euros the use of more rigid legislation laid down in the “gids proportionaliteit” is required. This states, for example, the requirement for gathering a minimum of three and a maximum of five tender offers.

- European tender

European tenders apply one of the procedures outlined by the EU. These offer a step by step regulation in the application of the process. Because the content of the regulation for procedures deal with the process of the procurement, it will not be applicable in the calculation. The difference between the various procedures cannot be seen from a spend analyses, only if a EU procedure has been, or should have been used.

The choice for using a private- or EU procedure is made by assessing the total value of the purchase. When exceeding a value, the use of a different procedure is required. If the value of a procurement crosses 209.000 euros, the EU procedural regulations will apply. The following thresholds are generally used in the public procurement:

Amounts for supplies and services⁴:

Contract in Euros	What type of procedure to apply.
<50k	“Enkelvoudig onderhands”
50k – 209k	“Meervoudig onderhands”
209k >	European procurement procedure

Amounts for works:

Contract in Euros	What type of procedure to apply.
< 150k	“Enkelvoudig onderhands”
150k - 1.500k	“Meervoudig onderhands”
> 1.500k – 5.186k	National tender
5.186k >	European procurement procedure

The valuation is not as simple as just adding together the number of items you want ordered. It takes into account the total procurement of the contracting authority.

Valuation of procurement is further influenced by regulation that says that:

- Value for similar procurement is aggregated
- Procurement will not be split into independent purchases to evade EU regulation⁵

What the exact limits are for when a procedure is used in an illegitimate way will be discussed in chapter 5. This thesis will not focus on works contracts in favour of the valuation of supplies and services.

³ Gids Proportionaliteit paragraph 3.4.2

⁴ Circulaire “Grensbedragen voor procedures aanbestedingswet 2012 onder de drempelwaarde”

⁵ Art. 2.14, 2.15 – 2.21 Aanbestedingswet 2012.

4.3 Specification

Specifications define the characteristics which a supply or service must meet in order to be acceptable. They define minimum acceptable standards for quality, safety or environmental protection. Examples of this are the minimum amount of burning hours of a lightbulb, the level of safety protection which is required of a car or the recyclability of a product.

These standards may also define technical characteristics of products with the object of ensuring that products in the market are compatible. This is done with the use of references, labels, test reports and means of proof. Standards may be voluntary - that is, manufacturers may adopt them if they wish but are not compelled to do so - or mandatory in the sense that any product made or sold in a particular state or area must by law conform to the standard.

The consequences of not drafting specifications in accordance with applicable legal requirements will result in the specifications restricting the access of candidates that should lawfully be admitted to tender.

Failure to comply with rules and regulations on specifications can have significant practical consequences and delay the procurement. The issue may arise in practice in different ways:

- It may be raised by a tenderer that challenges the specification as being unlawful, requiring a modification or start of a new procedure.
- The issue of unlawful specifications may arise because a tenderer submits a tender that does not actually comply with the specification, but would comply if the specification had been lawfully drafted.

These issues, as well as the contents of the specifications cannot be found in a spend analysis, contract register or TED. The check for illegitimacy cannot use these rules and regulations.

4.4 Selection

Selection deals with the phase before the actual procurement process takes place. This makes the procurement public in the form of a tender which is published in an EU wide advertisement. The obligation to publish these notices is designed to ensure that all interested EU firms can find out about contracts in other EU Member States.

In any public procurement, contracting authorities will generally exclude candidates who are not considered capable of performing the contract reliably or who do not meet other relevant conditions. This process of excluding suppliers who do not meet the required conditions for participation are based on a reference to the qualification criteria of the tender document.

The suitable candidates are those firms that meet the minimum standards set by the contracting authority to make them qualified to participate in a contract. This leads to the reduction of candidates for the eventual procurement procedure process. There exist time limits that give candidates suitable opportunity to respond to the notices, submissions and possible exclusions.

In deciding the qualification and suitability of candidates the authorities provide fair opportunities for participation and procedures for assessing qualification are not unduly burdensome nor provide opportunities for authorities to discriminate against candidates.

These steps cannot be seen from a spend analysis, contract register or TED. The articles concerning the selection are not applicable to this form of estimating illegitimacy.⁶

4.5 Contracting

The contracting phase consists of articles which regulates the contracting authority into deciding which of the qualified tenderers has submitted the best tender. The award may sometimes be based on simply the lowest price or may also involve consideration of other factors such as quality. This does not apply under the EU rules. Here the combination of price and quality is the leading for the award of the tender. Under the EU regulation the same rules on the awarding of a contract apply to all procedures. The main purpose of the rules on award criteria is to secure transparency in the application of the criteria so that, for example, discriminatory decisions cannot be concealed. Even so the rule requiring award criteria to be linked to the subject matter of the contract could be seen as ensuring wide access to contracts. Even while applying the award criteria the tender might be awarded to a wrong tenderer. This is the case where abnormally low tenders have been submitted. Where because of its very low price or other terms may raise suspicions that the supplier will not be able to perform the contract in accordance with the terms offered. The contracting process differs slightly depending on the procurement process used. Because of this most procedures have their own articles detailing the exact process required, including time limits and steps to be taken.

Legitimacy is safeguarded in the contracting phase when the tenders confirm the following points:

Prevent abuse of discretion in the process. This prevents the abuse of power for possible corrupt dealings by contracting authorities. Together with ensuring that applicable rules can be monitored and possibly be enforced by candidates. Safeguard against poor judgement by the contracting authority that could negatively affect the value for money. Ensure that the candidates can submit the best possible tenders to meet the need and priorities. This requires the award criteria to be known to the candidates so they may take them into consideration.

Matching these points to data in the spend analysis is not possible. These require checking the steps in the process. This data is not available to us. A more thorough step by step analyses of the regulation can be found in the appendix.

4.6 Ordering

The main points to come back in the ordering phase are issues concerning maverick buying and buying out of contract. Maverick buying deals with employees not following company guidelines when purchasing. Purchases that have been made outside of closed contracts. Goods are purchased without authorisation from the purchasing department. This can be because the contracting authority does not have a choice but to buy from a different supplier. Employees purchasing without the knowledge of the purchasing department, be it from a contracted supplier or not.

Issues with legitimacy can arise when contracts are not adhered to, when purchases are made that cannot be matched to a contract. Or when purchases are matched to a contract that has expired and should have been tendered.

⁶ A more thorough step by step analyses of the regulation can be found in the appendix.

5. BOUNDARIES FOR CHOICE OF PROCEDURE

A contracting authority must add together the value of similar purchases so that it becomes a larger tender. This is known as the "aggregation rule" (Arrowsmith et al; 2011). To ensure this rule is followed regulation prohibits that contracts are split or separate contracts made with the intention of not applying EU regulation. It is important to remark that the value should be net of value added tax (VAT).⁷ This choice was made because of the difference in VAT in European countries. In the Netherlands the amount paid in VAT over services and products is 21%, this is where in the UK it is 20%.

What should or should not be aggregated does not become clear from Dutch law. Neither the EU directive or the consideration of the directive offer insight on this issue. The directive uses the word "type" in various cases to describe cases where aggregation is needed.

5.1 Type of the contract

The meaning of "type" is not clear, but there are various ways of looking at the subject. An example would be the use of:

- CPV (common procurement vocabulary) codes.

This is an EU wide classification system which deals with the types of procurement that a contracting authority could face. It can act as an advisory tool for contracting authorities and suppliers to streamline cooperation on the choice of a "type". CPV codes are mentioned in the directive as being the sole source for nomenclature about procurement.⁸

Contracting authorities should try to find the code that suits their envisaged purchase as accurately as possible. Although in some occasions contracting authorities may find themselves having to select several codes, it is important that they select a single code for the title of the contract notice. Should the level of accuracy of the CPV be insufficient, then contracting authorities should refer to the division, group, class or category that better describes their intended purchase, a more general code.⁹ Services will generally need to be aggregated only at much lower levels than the "categories" of services listed as the main categories of CPV codes, which typically cover a very wide range of services which would not typically be provided by a single firm.

The PIANOo centre for procurement has issued a document which groups purchases according to certain CPV codes in an effort to make practical suggestions for aggregation. Based on the criteria mentioned above, this list offers contracting authorities a starting point to base the "type" required for tendering on.¹⁰ This list gains validity because it is used to determine the "type" in adherences report issued by the department of Economics affairs and carried out by consultancy firm Significant.¹¹

- They are typically available from the same firm.

This reflects the objective of the rules as being to require aggregation when it is commercially reasonable for requirements to be packaged in a single contract. The test for this would seem to be whether the same firms would be likely to be interested in the contracts. For example, in some industries the same firms will be involved in selling and in

hiring out certain products, whilst in other this may be done by different firms (Arrowsmith et al; 2010). Also some firms are so large that they offer a multitude of various products and services, sometimes not even being in the same industry.

Aggregation will be based on commodity/cost category. It can be the case that such clear distinctions do not exist. In that case the contracting authority can use suppliers for aggregation as this covers goods and services from the same firm. This negatively influence the effect of larger suppliers on aggregation as they offer various different goods and services. The contracting authority should try and make the spend analysis suitable for the types required for aggregation. If this is not possible, the most conservative option is to aggregate based on supplier. Ultimately the internal policy of the contracting authority should provide a common code for the "types" of procurement to ensure continuity and transparency in calculation illegitimacy.

5.2 Type over time

If the "type" of procurement is known the next step is to know over what timeframe the purchases on this "type" must be calculated.

- Aggregated values are summed up over time.

The issue is that values cannot be taken as is, but the aggregated value of the procurement must be calculated over a certain time. The spend analysis for a single year cannot portray the total value of the contract. The runtime of the contract is what the value of a contract is normally based on. Some contracts do not offer a total value, in these cases the value of the contract will have to be calculated differently. It differs if the contract is made for supplies, services.

- For services contract the monthly value is multiplied by 48 months. Or in the case of a yearly spend analysis multiplied by four.
- For supplies the aggregation of the value of the same "type" over the last 12 months. So the spend analysis over the year can be used.

5.3 Exclusions

Exclusions are cases where the general procedure does not apply. There are a number of instances where it is not required of the contracting authority to procure with the use of EU procedures even when the value is above the threshold. Contracts based on different directives where the general EU procedures will not be used like. Also defence and security purposes where the contracts classified as secret or the performance of which must be accompanied by special security measures will be subject on different directives.¹² Public contracts for social and other specific services dealing with social, health and educational services which are influenced by cultural traditions of the country will observe to a higher threshold of €750,000. The services which fall under the exception are specified in the directive.¹³

Like the exclusion the distinction can be made between these services and other services based on the cost/commodity category. It can be seen from the commodity category or cost category what the type of product is. From this it can be determined if any of the exclusions apply. A distinction between normal procurement and the exclusions can be made because of this. If an item in the spend analysis is part of the exclusion, it should be seen as lawful because the directive does not apply.

⁷ 2014/24/EU art 5.1

⁸ 2014/24/EU art 23

⁹ Link in reference list

¹⁰ Link in reference list

¹¹ Link in reference list

¹² EU Directive 2009/81/EC

¹³ 2014/24/EU Annex XIV

5.4 Conclusion

To know what procedure had to be applied the “type” and value over time must be calculated.

Procurements that are below 50k are assumed to be legitimate because they can only be judged on process steps. Procurements between 50k and 209k are difficult to decide on. The difference between “enkelvoudig onderhands” and “meervoudig onderhands” is not made clear by the contract database. As the difference is in the number of suppliers required which the database does not show. The invitation of suppliers is however a simple procedural step and could be presumed to be done correctly.

As neither the spend analysis or the contract database give a distinction of the nature of the contract and the rate of renewal the most conservative option is to value each purchase over a course of 48 months. Also the use of framework contracts in EU procurement is often used and valuation over 48 months is in that case the most conservative option.¹⁴ If in 48 months the value of the contract crosses the threshold, an EU procedure is required to be lawful.

6. BOUNDARIES FOR ORDERING

Legislation dealing with the ordering, monitoring and after-care of procurement is not done through the “Aanbestedingswet 2012”. These processes deal with management issues and is regulated through internal policy. General points of illegitimacy can occur regardless of internal policy.

Procurement is made without the application of an existing contracts. Also known as maverick buying. A contract is made for a certain type of product to be procured through any of the procurement processes. Any purchase made in that commodity type without the application of that contract will therefore not be in accordance with legislation.

Procurement while using a contract that is no longer valid. When a contract finishes the term set out in the specifications or the maximum time limit of four years is reached a new procurement procedure is required. If purchases are made applying that contract these are not in accordance with legislation.

7. CONCLUSION, CALCULATION RULES

Legislation offers a multitude of issues for possible illegitimate procurement. Only a few issues are useable in estimating it using a spend analysis, contract register and TED. A true calculation of illegitimacy would not be doable using a spend analysis. The subjective nature of the regulations makes it difficult for the application of calculating rules to be used. What should be used are the objective parts of regulation that were analysed. These were the;

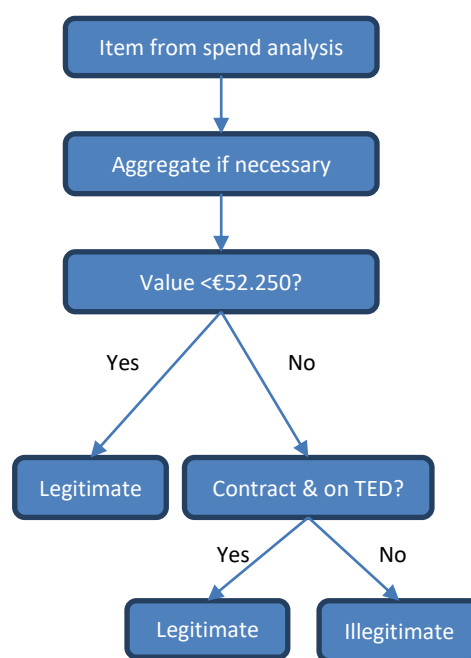
- Use of proper procedure
 - The aggregation of commodity types and the valuation thresholds.
- Validity of contracts
 - The use of the contract register and the TED/Tendered database.

The calculation rules can be made with applying these points. Alone these don’t offer much guidance, but act as a starting point.

Building upon the previous two points a contracting authority should be aware of the following:

- The types of procurement should be known and should fit the contracting authority.
- Any possible exclusions to the general rule must be kept to the correct standards.
- The distinction between works, services or supply contract must be made. This to ensure the proper aggregation rule.
- Aggregate the items according to the types set before.
- Determine if the aggregated value is above the EU threshold.
- If the aggregated value is above the threshold check the TED and contract database for matching contracts made according to an EU procedure.

In its simplest form a check for illegitimacy of procurement for services will yield the following result:



¹⁴ 2014/24/EU point 60

¹⁵ €209.000/48 months = €52.250

8. LIMITATIONS

The calculation uses the spend analysis and if possible the contract database and TED for estimating illegitimacy of an EU procurement. A more accurate estimate can be made when procedural steps are also checked. As shown procedural steps take up most of the possible ways that illegitimacy can occur within procurement.

This limitation makes it impossible to check for the difference in “enkelvoudig” or “meervoudig- onderhandse” procedures. Nor the difference in the various EU procedures.

The calculation check outlined can be seen as a preliminary step that provides contracting authorities with a basic estimation model. Improving the accuracy of the estimation can be achieved by adding modules of known data as they become available. This could be done through the development of the contract database or a management information system that supplements the data from a spend analysis. The viability of this development of course differs from organisation to organisation because of influences from available IT systems, managerial interest and professionalization of the purchasing staff.

The rules for estimating do prove for a good starting point in which gradual improvement could be added. A more thorough check will increase the accuracy of the illegitimacy measurement and can be a goal for further development. To steer this development, the illegitimacy issues can be divided between issues concerning:

- Purchasing

This can be seen as the issues concerning the improper specification, selection and contracting.

- Management

This can be seen as that which occurs after a contract is finalized. The improper use of the contract through maverick buying.

As public procurement in the Netherlands edges more towards joint purchasing of contracting authorities, the procurement above the EU threshold is becoming the de facto norm for all purchases because of the aggregation rules. For example, the purchase of something as simple as flowers will quickly reach above the threshold if purchased by a large organisation or a number of smaller ones working together. A focus was therefore put on EU procurement over smaller value ones.

Further uncertainty exists for contracting authorities because even if a procuring organisation complies with the detailed and specific rules of the directives or Dutch law it cannot be sure that it has acted legally. The potential for applying these principles to require particular conduct that the CJEU considers is part of a fair and transparent competition is almost totally open ended. The existence of the principles can be seen to create opportunities to argue for the illegality of any conduct that might possibly be considered as unfair in some way – even where different procuring entities take different views on whether conduct is unfair or not, and whether it is justified (for example, by considerations of efficient procurement), it is quite possible that the CJEU might decide against a particular approach and conclude that it violates one of the general principles. (Arrowsmith et al; 2010).

It can be concluded that public procurement is not a simple task and requires constant monitoring and attention in order to perform it correctly.

9. APPENDIX

Appendix for Selection

The selection phase is a huge part of the procurement process and makes up the bulk of the legislation. This phase is however not an ideal source of information for this thesis's purpose. The legislation is focussed on the procedural steps and content of the tender and unsuitable for an analysis by spend. The legislation will be examined on possible problems and illegitimacy.

Procurement procedures

The following procedures are used in procurement above the EU threshold. The first two procedures are facultative and can be used for all public contracts. The latter four procedures are only available when certain criteria are met.

- Article 27: Open procedure
- Article 28: Restricted procedure
- Article 29: Competitive procedure with negotiation
- Article 30: Competitive dialogue
- Article 31: Innovation Partnership
- Negotiated procedure without prior publication

Use of techniques and tools in combination with procedures

- Article 33: Framework agreements
- Article 34: Dynamic purchasing systems
- Article 35: Electronic auctions
- Article 36: Electronic catalogues
- Article 37: Centralised purchasing activities/bodies

Selection of candidates

Suitable candidates

Where a candidate or tenderer has advised the contracting authority or has been involved in the preparation of the procurement procedure then the contracting authority must take appropriate measures to ensure that competition is not distorted by the participation of that candidate. It can mean that the candidate must prove that advising has not given it unfair advantages.¹⁶ Measures to take away unfair advantage can be communication of relevant information that is only available to one supplier to all candidates.¹⁷ **Using unsuitable candidates in a tender breaches the principle of non-discrimination and equality. As such any contract made using these**

Information exchange and ways of communicating

The contracting authority can fail to inform the candidates about events surrounding the tender. This can mean questions about the tender documents or inquiries about the progress of the tender among others. **Not informing candidates correctly can impede the process of the procurement. It can lead to discrimination among candidates.**

Prior information and contract notices

Contracting authorities make their intentions of planned procurements known through the publication of a prior information notice or a contract notice. Not sending this to the electronic marketplace in a timely manner allows fewer response time by candidates. The prior information and contract award notices not made in the standard forms will be not useable by the electronic systems and thus put a strain on the efficiency and ability to trace procurement.¹⁸ **Very low level way of incurring illegitimacy. It diminishes the value for money of procurement by reducing efficiency.**

Term of submission of tender

Per procedure used and urgency of the tender, the time limits for the submission of tenders differ. Tenders received outside of the time limits will be disregarded in competing. A contracting authority should be lenient with this, for example in cases where extra time for gathering all necessary information is needed. **Disregarding tenders when they should be allowed to enter does not conform to the principles of non-discrimination and equality of the candidates to entry.**

Technical specifications

The technical specifications lay down the characteristics required of a works, service or supply. In the case of public works contracts the technical specifications are the laid down in the procurement documents. It defines the characteristics required of a service, product or supply. Contents which are further regulated are;

- Referring

European or national standards must be used as reference in the specifications. Technical specifications shall not refer to a specific way of executing the contract. Specifications must always have an option to supply an equivalent to the service or product required in the contract.¹⁹

- Labels

Where there is an intention to purchase works, supplies or services with specific environmental, social or other characteristics, they can require conformation to a label. These labels must only concern criteria which are linked to the subject-matter of the contract and are appropriate to define the characteristics. You cannot require a specific label and not accept labels that meet equivalent label requirements. A supplier cannot be excluded if a supplier had good reasons for not obtaining the specific label or an equivalent label within the time limits.

- Test reports, certifications or means of proof

Test reports, certifications or means of proof can be asked from suppliers to let third parties test the conformity of the product to specifications. These are performed by EU certified assessment bodies. A supplier cannot be excluded for handing over other appropriate means of proof when there are good reasons for this.

Technical specifications must afford equal access of suppliers to the procurement procedure and shall not have the effect of creating unjustified obstacles to competition. They are based on objectively verifiable and non-discriminatory criteria and accessible to all parties

Subcontracting

A supplier can subcontract when it is clear from the tender that it has intentions to do this. The supplier must always keep the contracting authority up to date about the subcontractors used. **Illegitimate when subcontractors are excluded from participation in public procurement.**

Specific performance factors

A tender which has economic, environmental, innovative or social labour factors can be subject to require special performance from the supplier. The tender documents lay down the way to comply with these requirements. These requirements are outside of the scope of public procurement.

Failure from the contracting authority to make known the performance requirements can lead to direct violation of

¹⁶ HvJ EU C-21/03

¹⁷ ECLI:NL:GHSGR:2007:BC0036

¹⁸ 2014/24/EU Annex V

¹⁹ Court of justice of the EU, C-359/93

legislation. This can lead to illegal actions by suppliers in the performance of the contract

Reserved tenders

Contracting authorities can restrict entry for specific contracts by allowing only specific candidates to enter. Candidates are allowed that do not meet the criteria for the reserved tender. The contracting authority has reserved the tender for subject matter that is not allowed to be reserved.²⁰

Equality is not guaranteed by entry of incorrect candidates. The contract is based on the application of incorrect legislation if the wrong subject matter is used.

Variants

Variants can be request candidates to enter variants to that laid down in the procurement documents. The contracting authority cannot accept variants unless it was specifically requested. Variants will be judged in the same regard as normal tenders. **If tendering variants gives unfair advantage in any way to the candidate it will disturb competition.**

Self-declaration candidate

A candidate must present a declaration that there is no reason to excluded it from the tender, that it qualifies for the tender, that it qualifies to the technical demands and on what grounds it qualifies to the selection criteria. **A candidate cannot continue in the tender without this declaration. Any contract signed without the self-declaration will be illegitimate.**

Exclusion criteria

The candidate or tenderer concerned must only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment. Prior to any such exclusion, candidates or tenderers must be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition. Contracting authorities must exclude an economic operator from participation in a procurement procedure where they have established, that that economic operator has been the subject of a conviction by final judgment for criminal activities. There is also grounds for exclusion when a supplier is linked with criminal activities, child labour, failure to pay taxes or social obligations, failure to act in the interest of the public or it can be shown that awarding the contract would not be in the best interest of tax payers money because of violations of the essence of the directive. Transparency, fair competition and value for tax payers' money. **Excluding candidates severely hinders competition in tenders. Contracting authorities should therefore be cautious in applying it.**

Selection criteria

To allow for a transparent selection, criteria must be picked on which suppliers can be selected. This selection must be based on the suitability of the supplier to handle the contract, the economic and financial standing of the supplier and the technical and professional ability of the supplier.

- The candidate can be asked to show financial statements to inform the contracting authority on possible risks in the execution of the contract.
- The candidate can be required to show technical and professional competence.

- The candidate must be able to provide the contracting authority with a proof of competence. That it is registered as a company with the proper authorities, and has the licenses required to execute the contract.

Selection criteria must be obtainable by all candidates to not take different types of proof of competence into consideration can be illegitimate. Basing selection on other than the three mentioned criteria is illegitimate.

Reduction of candidates

It is possible to limit the number of suppliers per tender. The minimum differs per procedure between three and five. Reduction cannot be done without having an objective and non-discriminatory reason. **Reduction of candidates without adhering to criteria set out in the procurement documents causes issues with transparency.**

Verification of candidates

Proofs with regards to the exclusion criteria can be requested at any time by the contracting authority if it is deemed necessary for the progress of the tender. **Continuing with a tender without the proper verification distorts competition.**

Communication of exclusion and rejection

The supplier will be informed as soon as possible about the exclusion or rejection. The reasons must be communicated within a reasonable time limit. Communication made cannot contain information that could distort competition. **Failure to communicate on these reasons could lead to transparency issues with the tender.**

Appendix for Contracting

The contracting process applies legislation about who to award the contract to and in what way. It provides the step by step progress for most of the procedures associated with public procurement.

Legislation

Invitation to tender

The invitation must be a transparent process, candidates are invited simultaneously and via a directly available internet address. **Invitations must be available to all candidates in a non-discriminatory way.**

Application for tender

Applications will be delivered through electronic means. The contracting authority cannot take notice of the tenders before the term for application has ended. **The application will be subject to open and fair competition. Applications must be unnecessarily declined.**

Use of tender via electronic catalogue

Outline of the procedural steps of tendering through an electronic catalogue.

Use of the competitive dialogue

Outline of the procedural steps of tendering through the use of the competitive dialogue

Award criteria

The contract can be awarded based on one of three ways;

- The economically most advantageous offer made.

This is a way a looking at the cost or price using a cost-effectiveness approach. It differs from choosing the lowest price through the use of criteria like quality, qualification and expertise of staff, maintenance or assistance, delivery times etc. These criteria shall be linked to the subject matter and given a

²⁰ Art. 77 2014/24/EU

relative weighing in importance for the awarding of the contract.

- Lowest cost based on cost effectiveness

Extra attention will be given to costs of the tender throughout the entire lifecycle. This means costs carried by external users or through environmental burdens.

- Lowest cost

Awarding criteria are only to be made using one of the three ways of awarding. Criteria cannot be used that have not been mentioned in the contracting documents. These criteria must be made in an objective way so as to ensure open and fair competition.

Award notice

Contracting authorities will document the awarding process and will contain a minimum of information, what exactly is laid down in legislation. There is a maximum of 30 days after concluding a procurement after which the award notice must be made. **In order for transparency in the market for public procurement it is necessary to publish notification for contracts before starting the procedures and after finishing them.**

Abnormally low tenders

If a tender seems abnormally low the contracting authority can investigate by requesting further clarification. This clarification can be used as a basis to reject the tender if has not sufficiently explained the low tender. **Abnormally low tenders can influence the openness and fair competition of the tender.**

Use of the Electronic auction and dynamic purchasing systems

Outline of the procedural steps of tendering through the use of the competitive dialogue

Use of the Competitive procedure with negotiation

Outline of the procedural steps of tendering through the use of the competitive dialogue

Use of the innovation partnership

Outline of the procedural steps of tendering through the use of the competitive dialogue

Retention of contracts

Copies of procurement contracts must be kept when the value is above one million euros for supplies and services or ten million euros for works. This must be kept for at least the duration of the contract. **Transparency issues can occur when there is trouble accessing finished contracts.**

Use of framework contracts

Outline of the procedural steps of tendering through the use of the competitive dialogue

Use of dynamic purchasing system

Outline of the procedural steps of tendering through the use of the competitive dialogue

Use of electronic auctions

Outline of the procedural steps of tendering through the use of the competitive dialogue

Modification of contract during term

Contracts can be modified without the need for going through an entire procedure again. Any increase in price is not higher than 50 % of the value of the original contract. Contracts may equally be modified without a new procurement procedure in . When the contract has been subject to a substantial modification, which would have required a new procurement

procedure the contract should be terminated. As is the case where it should have been excluded as a supplier or the supplier is in infringes in the obligations of the directive.

Any modification can only be done in the cases described in legislation. Modification done for other reason does not comply with open and fair competition.

Conditions on the performance

The contracting authority may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

Exclusions

Exclusions are cases where the general procedure does not apply. There are a number of instances where it is not required of the contracting authority to procure with the use of EU procedures even when the value is above the threshold. This is the case with certain services like financial services, sale, purchase or transfer of securities or other financial instruments. Civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations. This also applies on contracts where there is no competition available like, public passenger transport services by rail or metro, public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy, contracts in the water, energy, transport and postal services sectors. Acquisition or rental of an existing buildings or other immovable property. Loans, sale, purchase or transfer of securities or other financial instruments and employment contracts. Contracts based on different directives where the general EU procedures will not be used like. Also defence and security purposes where the contracts classified as secret or the performance of which must be accompanied by special security measures will be subject on different directives.²¹ The full list can be found in articles 7 to 12 of the directive.

²¹ EU Directive 2009/81/EC

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