

THE DEVELOPMENT OF PUBLIC PROCUREMENT AT LOCAL LEVEL IN THE NETHERLANDS: A LONGITUDINAL STUDY

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The Netherlands has a long tradition in using the traditional Design – Bid – Built, lowest price selection procurement. This traditional procurement is often connected to the discourse on poor innovation performance innovation within the construction industry. For over a decade the use of integrated contracts, like “design & construct (&maintain)” or “public private partnerships”, is promoted as an important requirement for stimulating innovation. Since The Netherlands Department of Economic Affairs in mid 1990’s stimulates innovation, the use of integrated contracts i.e. the move to innovative procurement (IP) and quality/price selection at national level is widespread adopted, together with a change from invited to more public tendering. Due to this change of policy an organization change was conducted. However, more than 80 % of the total budget of public works is spent by provincial authorities, local municipalities and services boards. They are slower in adopting IP and changing their procurement strategy. In the mid 1990’s the authors developed a survey focused on procurement and client-contractor cooperation at local level. The questionnaire for this research was reused in 2001, 2005 and 2010 to collect data for longitudinal trends. Due to a short time span the 2010 results could not be integrated in this paper. Parallel of this longitudinal study several ‘State of the Art’ studies were executed to document the development of (innovative) public procurement in general on local level. Also a number of master theses were written on studies related to IP by local authorities. On local level a change of the procurement policy as seen at national level is missing. The use of integrated contracts is incidental, lowest price tendering is still by far favorite and due to that an organization change, more managing and less control, is hardly implemented. Only the amount of public tendering is growing.

Keywords: contracts, local authorities, outsourcing, policy, procurement

INTRODUCTION AND LITERATURE REVIEW

The European and national procurement policy of public client should be legitimate, effective, and efficient. Legality refers to the tendering procedures which should be transparent, objective, non-discriminatory, and equal. Effective and efficient in the way competition, due to the internal organisation and market circumstances, is organized. Clients can use different contract forms, i.e. the traditional *Design-Bid-Build*, *Design & Construct* (DC) or *Engineering & Construct* (EC), to outsource activities and select a partner based on lowest price or the Economically Most Advantageous Tender (*EmaT*). *EmaT* is looking for best quality/price ratio by outsourcing design, together with the way of execution, to contract partners. The lowest price is especially used in traditional *Design-Bid-Build* contracts with design

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responsibility for the client whether EmaT is used for 'non traditional' contract forms to develop new product/creative solutions in combination with process efficiency (Drechsler, 2009).

At local level and from a transaction cost perspective, Dorée (1996) studied the way competition is organized by municipalities. In the early 90s, the use of integrated contract forms by municipalities in the Netherlands was negligible and invited tendering was preferred (Dorée, 1996). Continuity of relations and cooperation for a longer time was the (procurement) policy to shrink opportunistic behaviour by contractors, in line with the third safeguard of Williamson (1975, 1985).

About the same time, the Ministry of Economic Affairs introduced the Innovative Procurement Program (IPP). The new, innovative forms of procurement were to stimulate a different competition between the contractors: more on product and smart solutions in combination with price, instead of price competition only. The closer coordination of design and construction would contribute to substantial savings in terms of time as well as costs, the development of better innovative capabilities of contractors, and long-term improvement of efficiency and effectiveness in the construction industry (Latham, 1994; MEZ, 1997; Dorée, 2001; RegieRaad, 2005; Seaden *et al.* 2001; Sijpersma & Buur, 2005). The Dutch construction industry also gladly accepted the IP program. They saw it as an opportunity to show and develop their capabilities.

After the 2003 parliamentary inquiry into collusion, distrust rose (Dorée, 2004). National organizations like PSiBouw¹ and RegieRaad Bouw² were formed to institutionalize and support the change of procurement policy and overall reform in the construction industry. These organizations were also used as platforms for repairing the relationship between client and contractor. Collusion influenced the procurement policy and cooperation between parties for a long time.

To support the reform initiatives in the Dutch construction industry, important national public clients for civil works—Rijkswaterstaat and ProRail—changed their procurement policy towards a more market driven competition. Instead of the traditional Design-Bid-Build (contract)form, selection based on lowest price and a favour for invited tendering the starting point became public tendering (unless,...), *Design-Build* (a form of integrated contract which we continually refer to in this study) and quality/price ratio selection. Parallel to this policy change, Rijkswaterstaat and Prorail transformed their organisations to more managing and less 'controlling' the process. Since local authorities are funding more than 85% of the civil works undertaken in the country, a reform of the construction industry heavily depends of a policy change on local level.

This paper will discuss the development of the procurement policy in different stages from the mid 90s until today and the developments and consequences regarding the transaction cost theory of Williamson mentioned earlier.

RESEARCH OBJECTIVES

This paper describes the work in progress of a research project investigating the status of procurement policy developments from the mid 90s until today and the use of innovative contract forms in the Netherlands. The results are mainly from research conducted for the regional RegieRaad Bouw Noord (2006), RegieRaad Bouw Zuid (2008), RegieRaad Bouw Limburg (2008), and Bouwend Nederland (2009). The results are drawn from the research reports, the individual MSc theses supervised by

the authors, and various other reports. The paper, firstly, provides insight into the extent of the current situation and its developments over time. Secondly, it highlights problems encountered with the procurement policy. Lastly, it provides direction for further development of the procurement policy.

RESEARCH METHOD

Dorée (1996) studied the organizational forms using a series of detailed questionnaires that included open and closed questions with clarifying statements. These questionnaires were reused in later research efforts to investigate trends, specific topics related to developments, or organization forms and problems. The results of Dorée and Hermes (2005) surveys are used as baseline data for this paper.

The research for RegieRaad Noord, the first of the research for the regional RegieRaden, consisted of four phases. Firstly, an extensive literature review was conducted, and this resulted in the design of an initial set of survey questions. Secondly, structured interviews were held with a mixed grouping of officials from the municipalities with the intention of refining the final questionnaire to be used as the survey instrument. Thirdly, the resultant web-based questionnaire was sent to targeted organizations. Lastly, following an extensive data analysis exercise using the SPSS and Excel software packages, a series of further meetings were held with a sounding board group in order to discuss the initial findings and prepare the final report.

The web-based questionnaire contained 29 closed questions, 3 open-ended questions, and 58 statements. The closed questions related mainly to the implementation of procurement policy. The open-ended questions related to assessing the most important themes necessary for implementation of the procurement policy and themes for the dialogue between officials and managers. The themes for a dialogue are only used in this research. The 58 statements mainly measured the policy's suitability for the organization's circumstances and were rated using a Likert-type response scale from 0 (*completely disagree*) to 10 (*fully agree*).

The questionnaire was sent to all the 52 municipalities in Noord. One municipal official (the main political appointee) and one municipal manager (responsible for undertaking the work) were targeted in each of the organizations in Noord. In the other research projects, a total number of 132 municipalities, only the manager was canvassed. Approximately 30% of the 52 municipal officials in Noord responded and 45% of the 184 managers (RegieRaad Bouw Noord *et al.*, RegieRaad Bouw Zuid, RegieRaad Bouw Limburg and Bouwend Nederland) responded overall.

RESULTS

The results of the different research projects have been summarized into four categories as discussed in the introduction & literature review chapter: tendering framework, contract forms, selection, and organization. The categories discuss the current situation and developments from the mid 90s.

Tendering Framework

This theme focuses on the issues of importance due to tendering framework and regulation, the manner in which they are dealt with, and the responsibility of municipal managers. A manager is defined as someone who is responsible for the execution of the works. The main issues are those taken from the research projects in RegieRaad Bouw Noord *et al.*, RegieRaad Bouw Zuid, RegieRaad Bouw Limburg,

and Bouwend Nederland. Today almost all canvassed organizations use funding threshold mechanisms in the selected, the invited, and the public tender forms.

Tender form	1991-1993		2009
	Amount [%]	Turn over [%]	Amount [%]
Invited	67	45	10
Selected	26	36	60
Public	7	19	30

Table 1: Shift in tender forms between 1993 and 2009

Between 1991 and 1993, the invited tender was by far favourite (Dorée, 1996). About 67% (45% according to the total invested money) of the municipalities used this form, followed by selected tender with 26% (36%), and public tender with 7% (19%). From that time, there was a shift from invited tender towards selected and (European) public tender, especially by larger municipalities. Nowadays, the selected form in terms of sheer numbers ranks highest (60%), followed by European public tender (30%), and invited tender (10%) (Bouwend Nederland, 2009). In 2003, 15% of the tender was public tender and was responsible for 47% of the total amount (Economisch Instituut voor de Bouwnijverheid, 2003).

The larger municipalities reported an increase in legal costs since applying a system of public tender. This led to an increase in opportunistic behaviour. The increase in opportunistic behaviour and legal conflicts was more than expected (Hermes, 2006). Smaller municipalities, using mainly invited and selected tender procedures, did not share the same experiences. However, they did feel pressured into using public tender procedures more often. The negotiated tender procedure—one of the remaining invitation-to-tender forms—is only applied incidentally. Managers report over-estimation of contract price occurs generally. The over-estimations for traditional contracts are done to prevent possible requests for additional credit. It seems to be logical with regard to the increase of legal costs as discussed previously.

Contract Forms

In the early 1990s, municipalities hardly used integrated contract forms (Doree, 1996). The IPP launched by the Ministry of Economic Affairs changed the policy at a national level: from “Design – Bid – Build, to “Integrated, unless.” The policy at the local level is still “Design- Bid-Build”, although a majority of the organizations has experiences with integrated contract forms. In the eastern part of Holland, approximately 60% of the municipalities used an integrated contract form at least once. In comparison with traditional Design-Bid-Build, the use of the integrated contract form is still in the minority (Bouwend Nederland, 2009).

A mix of functional and detailed requirements is possible and often used. It is sometimes confusing due to the different roles. In practice, it often relapses to a traditional role interpretation and ways of controlling the process (RegieRaad Bouw Noord *et al.*, 2006; RegieRaad Bouw Zuid, 2008; Bouwend Nederland, 2009).

It is better to use less detailed requirements as necessary. Next to the relapse, the longer the duration of the execution time, in general, the more changes of detailed requirements in the contract occur. A functional description of requirements gives more flexibility to look for solutions, and to cope with changes, within the contract and to do so without additional costs. A deviation in practice will result in detailed discussions and lead to additional costs (Congres Bouwend Nederland, 2008).

Knowledge transfer between municipalities can help, but the level of knowledge transfer remains restricted to incidental initiatives which results in missed

opportunities for further development (RegieRaad Bouw, 2006; Bouwend Nederland, 2009). The growth of juridical conflicts hampers the use of new contract forms (Bouwend Nederland, 2009). A more constructive way of cooperation, necessary when uncertainty rises, is necessary to eliminate the concern of the client (Veldink, 2007). A mediated coalition or alliance seems a more common form to use and is also preferred, in general, by contractors (Bouwend Nederland, 2009). However, in practice, this form is hardly used due to the focus on (price) competition and uncertainty about (design) responsibilities.

Therefore, most organizations continue to show a preference for traditional contract forms (based on specifications and drawings). The preparatory activities are either carried out internally or outsourced to consulting engineering firms. More than half of the managers use framework agreements for contracting consultant engineering firms and use performance specifications for maintenance contracts. Integrated contract forms are applied experimentally (RegieRaad Bouw Noord *et al.*, 2006; Bouwend Nederland, 2009).

Selection

In European Union (EU) and national procurement regulation, the (lowest) price is the main criteria for selecting a contract partner. The introduction of integrated contract forms, in combination with more attention to innovation, sustainability, and restriction of social inconveniences, was accompanied by the use of EmaT for selecting the preferred contractor. In EmaT, the quality/price ratio varies, in general, between 10/90 and 40/60 but can go up to 100% quality if the price is fixed (RegieRaad Bouw Zuid, 2008; Bouwend Nederland, 2009). Competition in the latest form is entirely focused at product and process criteria. The use of process criteria is more common than product criteria. Also process criteria have a higher weight than product criteria if used in combination. Next to the execution plan, criteria with regard to minimizing social inconveniences, accessibility, and communication with stakeholders are frequently used (Regieraad Bouw Noord *et al.*, 2006; RegieRaad Bouw Zuid, 2008; Van Zeeburg, 2007). In 50% of the EmaT tendering product elements and/or criteria like design, aesthetics, lifespan of the product and/or sustainability, are applied. Tendering for quality/price provides a rather interesting outcome: the bidder with the highest score for quality also offers in many cases the lowest price (Bouwend Nederland, 2009; Lentjes, 2009). The cost of EmaT tendering for bidders is highly contentious. Public clients are slightly positive that compensation for design competition is appropriate. Bidders, however, disagree (Bouwend Nederland, 2009). In practice, an offer is often more detailed than required by the client. It is a traditional way of reducing risk and a less entrepreneurial way of risk handling in line with the essence of integrated contracting (Bouwend Nederland, 2009; Lentjes, 2008; Rakers, 2007). It is interesting to see that a bidder who invests more in the tender phase to look for product and process efficiency, has a greater chance to win the tender than one who wants to reduce the cost of a bid, using earlier solutions and much of the information of earlier tenders, as the basis for a solution and price (Rakers, 2007).

Traditionally, price has been the most important factor in appointing contractors. The emphasis on “price only” is in tension with social topics such as innovation, sustainability, accessibility, environment, security, and nuisance. However, the trend has changed in the past few years with an increase in the use of other “non-price” factors for appointing contractors. Public clients would prefer using “non-price” factors more often but are hampered by the operationalization of rather subjective

(quality) criteria (RegieRaad Bouw Noord *et al.*, 2006; Bouwend Nederland, 2009; Van Zeeburg, 2007). A detailed study of the criterion to be used when “non-price” factors are applied has not been conducted, but experience shows that price continues to be the most important criteria.

Organization

In the past decade, the outsourcing of activities by municipalities has increased. Main reasons for outsourcing in the mid 90s were for more savings, budget flexibility, and space for new policy by reducing labor costs (Dorée, 1996). In 2006, the motives for outsourcing are more widespread; the use of market dynamics, concentrating on key role, financial loss, more flexibility or more belief in the market are the main reasons (RegieRaad Bouw Noord *et al.*, 2006). It is interesting to note that none of the organizations in the 90s and 2006 appear to attach strategic importance to outsourcing relative to their core business. This is in contrast to private companies that attach significant importance to outsourcing.

In the traditional situation, outsourcing to consultant engineers requires labor-intensive control mechanisms. According to managers, this is a result of a lack of attention to detail in the preparation or a consequence of too high a workload at the consultant engineers firms. In general, officials and managers find they have to take responsibility for quality. The feeling is the consultant engineers firms and contractors take significantly less responsibility for quality. So, the costs involved with accompanying and checking the work of the consultant engineers firms undermines the benefits for outsourcing. Contractors are able to depend on the support of public clients for the execution of work. However, although the contractor is responsible for the quality of a product, the experiences in practice differ strongly. As a result, the separation of responsibilities becomes unclear.

In order to act as professional clients in the future, according to managers, key disciplines would include “calculation and market prices,” “project management,” and “technical and structural” skills and knowledge. Figure 3 below shows the ranking of disciplines by importance.

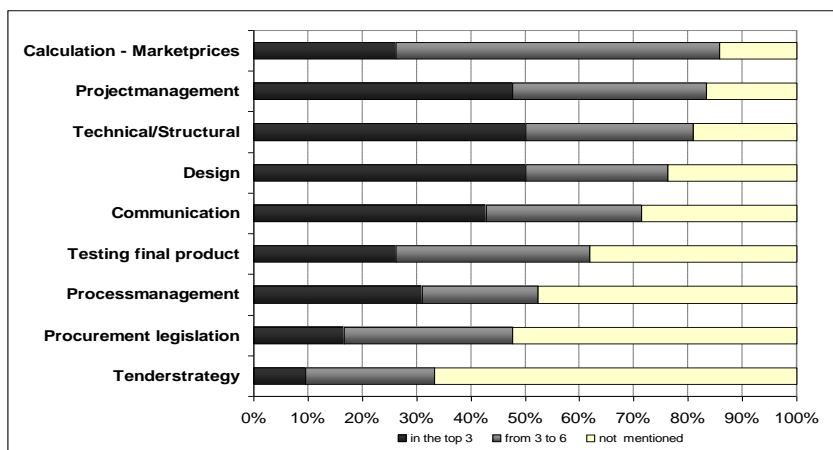


Figure 1: Disciplines ranked by importance (Stadswerk, 2006)

In response as to whether organizations perceived tendering to be a specific competency or whether they found it to be part of central purchasing duties, the majority of managers (approximately 75%) see tendering as a separate discipline which asks for specific skills and competencies.

It is not clear if organizations have sufficient and current knowledge of competition and procurement. Although policy developments occur frequently, they appear to be implemented slowly at the local level. The tension between developments in legislation and the implementation of procurement policy remains a concern.

DISCUSSION

The results of the longitudinal study provide insight into developments within the last 15 years, the current situation at local municipal level, and the way in which local authorities are coping with new developments.

New EU legislation and a subsequent reinforcement of directives favour a more market-based policy and an emphasis on reinforcing competition at the rural level to stimulate competition. This has implications for current Dutch policy, which favours procurement procedures based on funding thresholds. More importantly, the consequences are significant for smaller municipalities in the Netherlands, with their preference for invited and selected tender mechanisms. There may, therefore, be an urgent need for a review of policy.

There are valuable lessons and comparisons to be drawn from the UK, USA, Canada, and Australia. It appears that these countries favoured a more market-driven approach that focused on the construction industry. This is in stark contrast to the Netherlands, where the focus has been on the government-led policy initiatives which have led to incidental use of innovative contract forms and slow changes in procurement policy at the local level.

Egan's (1998) report provides indicators for the way forward. It suggests five driving forces needed to spearhead moves towards improvement in construction. Issues of leadership, a focus on the customer, integrated process and teams, a quality driven agenda, and commitment to the people are at the heart of any reform initiatives. Significant lessons for both public clients and the construction industry in the Netherlands are

- The current (unilateral) competition strategy pays less attention to cooperation. The lack of cooperation causes higher transaction cost to control the contractor and counteract opportunistic behaviour. With a more balanced cooperative and competitive strategy the total cost and the quality might be positive compared with a strict price competitive strategy.
- Municipalities should be more open to implement integrated contract forms to address problems currently encountered in traditional Design-Bid-Build contract forms.
- The mediated coalition or alliance should be considered more often in order to stimulate cooperation. It can also bridge the gap between traditional contract form and integrated contract forms if municipalities have a problem with the "loss of control."
- There is an urgent need for leadership at the local level to address important issues of outsourcing strategy, the division of responsibilities, and cooperation between organizations to push positive change in procurement strategies.
- This should result in an increased willingness to use integrated and mediated contract forms, a greater division of responsibilities, less labour-intensive control mechanisms, and more flexible approaches to procurement.

CONCLUSION

Municipalities still prefer invited or selected tenders, but the total amount of public tenders has grown strongly during the last 15 years. This trend is expected to continue. Together with the increase of public tenders, an increase of opportunistic behaviour and legal conflicts between client and contractor is apparent. The relationship between client and contractor has become more formalized since 1996.

It is obvious that public clients are still “traditional” thinkers and less flexible with regard to the use of new contract forms. Traditional skills are still qualified high to the developments. Public clients should in the future act more proactively towards new developments and changes to regulations. This, in turn, requires the development of additional skills and competencies needed to successfully handle new contract forms.

The use of integrated contracts is most certainly not standard practice. For a successful implementation of integrated contracts, functional requirements in combination with a 'non traditional' way of role execution seems to be the main factors. However, the adoption of new procurement forms as a standard form in the “toolbox” of municipalities seems to be far away.

Despite the growing interest for product and process quality and the positive experiences and still growing attention for innovation and sustainability, a shift in price competition in favour of a quality/price competition is not in line with the expectations. Juridical complications due to the use of subjective criteria and preference for the traditional way of preparation make the developments more incidental than structural.

So, there is no structural change of the procurement policy on local level and therefore widespread reform of the construction industry.

ACKNOWLEDGMENTS

The support of Stadswerk, Bouwend Nederland [Construction in the Netherlands], the regional RegieRaden Bouw Noord [Building Council region North], Zuid [Building Council region South], Limburg [Building Council region Limburg] and individual organizations is gratefully appreciated. The work of the following MSc students is acknowledged: Anne Altena, Alexander Beukers, Jasper Hermes, Daan Rakers, David Rensen, Jan Karel Veldink, and Tijs van Zeeburg.

1. PSiBouw – national organization made up of clients, the construction industry, advisors, and researchers to share knowledge and experience surrounding innovation.
2. RegieRaad Bouw – national organization appointed to stimulate change in the construction industry. There are five regional Regieraden; Noord, Zuid, Limburg, Oost en West.

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