

Administration in International Organizations
LAW OF PUBLIC CONTRACTS
25th Feb 2015

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Part I: Introduction to Public Procurement Regulation

Public procurement =
government's activity of
purchasing the goods and services
which it needs to carry out its
functions

Public procurement process:

1. Procurement planning
2. **Placing a contract**
3. Administering and executing
the contract

Three categories of procurement:

1. Goods (supplies/products)
2. Works (construction)
3. Services

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Objectives of public procurement systems

1. Value for money (efficiency) in the acquisition of required goods, works or services
2. Integrity - avoiding corruption and conflicts of interest
3. Accountability
4. Equal opportunities and equal treatment for providers
5. Fair treatment of providers
6. Efficient implementation of industrial, social and environmental objectives (“horizontal policies”) in procurement
7. Opening up public markets to international trade
8. Efficiency in the procurement process

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Objective 1: Value for money (efficiency) in the acquisition of required goods, works or services

Three aspects:

1. Ensuring the goods, works or services acquired are suitable (they meet the requirements for the task; they are not over-specified „gold-plated”);
2. Securing what is needed on the best possible terms;
3. Ensuring the contracting partner is able to provide the goods, works or services on the agreed terms.

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Objective 1: Value for money (efficiency) in the acquisition of required goods, works or services

- Often considered to be the primary goal of most public procurement systems
- Value for money in private and public sector:
 - Greater tendency towards inefficiency, corruption and national preference in the public sector;
 - Private sector does not rely to such an extent as public sector on formal competitive bidding
- Relationship with other goals:
 - Late tender may present greater value for money, but should be rejected in view of equal treatment principle;
 - Rules designed to curtail authorities' discretion may prevent corruption but may also disallow to pick offer that presents greater value for money;
 - Equal treatment in the long term may enhance value for money

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Objective 2: Integrity - avoiding corruption and conflicts of interest

Preventing practices which involve various forms of collusion between government and bidders:

- Awarding contracts on the basis of bribes;
- Awarding contracts to firms in which one has a personal interest;
- Awarding contracts to firms in which one's friends, family or business acquaintances have an interest;

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Objective 2: Integrity - avoiding corruption and conflicts of interest

- Close relationship with value for money
 - contracts will not be awarded to the best firms;
 - corruption will deter firms from bidding for future contracts
- Integrity as an independent objective (government as an example of following the highest standards)
- Corrupt practices prevent equal participation
- May conflict with value for money (discretion may enhance better choices in terms of value for money, but may also provide opportunities for corruption)

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Objective 3: accountability

Ensuring that the objectives and rules of the procurement system can be monitored and enforced (by means of transparent procedures, system of remedies)

Relationship with other objectives:

- Publishing information may increase costs and reduce efficiency
- Rigid rules may improve accountability but reduce value for money

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Objective 4: equal opportunities and equal treatment for providers

- No distinction should be made between firms except where this is justified based on relevant considerations
- The CJEU's definition of equal treatment:
“...the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified”
- Certain matters clearly violate the principle (awarding a contract because of a bribe) but often more complex policy decision will have to be taken

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Objective 4: equal opportunities and equal treatment for providers

- may improve as well as reduce value for money/integrity;
- may reduce efficiency in the procurement process

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Objective 5: Fair treatment of suppliers

Involves:

- Procedural fairness (due process) - suppliers have a right to have their case heard before a decision is made that affects them adversely; and/or a right to know the reasons for such decisions

Relationship with other objectives:

- Allowing appeals of decisions may avoid excluding suppliers who provide best value for money;
- Allowing appeals of decisions may improve monitoring of the procurement process and enhance integrity;
- May reduce efficiency in the procurement process

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Objective 6: efficient implementation of industrial, social and environmental policies in procurement

Implementing secondary/horizontal policies such as industrial, social, environmental, or employment policy.

Relationship with other objectives:

- Providing training on public procurement for SMEs may improve value for money;
- Allowing procuring entities to take into consideration horizontal policies requires more discretion which, in turn, may be used for illegal practices and make the procurement process more complex

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Objective 7: opening up public markets to international trade

Providing for foreign suppliers, products and services to have access to the public procurement markets of other states. Based on rationale that opening up markets to foreign competition improves economic prosperity.

- UNCITRAL Model Law on Procurement of Goods, Construction and Services;
- the Government Procurement Agreement in the WTO;
- The EU regime on public procurement

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Objective 7: opening up public markets to international trade

Means employed to achieve the objective:

1. Prohibiting discrimination against the suppliers, goods and services of other countries.
2. Requiring the adoption of transparent procedures for awarding procurement contracts.
3. Standardisation (harmonisation) of procedures for awarding public procurement contracts.
4. Addressing corruption.

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Objective 7: opening up public markets to international trade

Relationship with other objectives:

- Opening up markets may improve value for money (both from foreign firms and domestic ones);
- Improved transparency reduces corruption;
- Too much transparency curtails discretion needed sometimes to obtain value for money;
- May reduce procedural efficiency;
- Curtailing the abilities to promote horizontal policies

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Objective 8: Efficiency in the procurement process

Requires that the process is carried out without unnecessary or disproportionate delay or waste of resources for the procuring entity, and also without unreasonable costs for suppliers.

Relationship with other goals:

- Better suppliers usually prefer to participate in effective procurement processes (improves value for money);
- Open tendering procedures comply with equal treatment but generally increase costs

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Key principles for implementing procurement objectives

1. Transparency;
2. Competition;
3. Equal treatment (objective or key principle)

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Transparency

Four aspects:

1. Publicity for contract opportunities (requirements for a public advertisement of contract opportunities);
2. Publicity for the rules governing each procedure (publicity for the general rules; disclosure of the specific rules for a particular procurement);
3. A principle of rule-based decision-making that limits the discretion of procuring entities or officers (safeguards against poor decision-making and abuse)
4. The possibility for verification of the fact that the rules have been followed and for enforcement where they have not

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Competition

- Procurement systems award contract through competition between suppliers to choose the one which is the best of them
- the pressure of competition from other firms induces each bidder to put forward the best offer that it can;
- competition between suppliers for procurement is also an approach that can inject a significant degree of transparency;

Part II: Introduction to EU Public Procurement Policy

The main aim of the current EU policy on public procurement is to remove the barriers to the internal market that arise from governments' practices in procurement.

Procurement practices may operate as barriers to trade:

- Discrimination in favour of national industries;
- Used as a tool to promote horizontal policies;
- National security concerns;

Part II: Introduction to EU Public Procurement Policy

Sources of EU Public Procurement Law

Treaty provisions:

- Article 34 TFEU (ex Article 28 TEC) on free movement of goods (formerly Article 30);
- Article 56 TFEU (ex Article 49 TEC) on freedom to provide services;
- Article 49 TFEU (ex Article 43 TEC) on freedom of establishment (formerly Article 52);
- of significance are also EU competition law provisions, Arts. 101-109 TFEU

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Sources of EU Public Procurement Law:

The coordination directives that are currently required to be implemented in MS are:

1. **DIRECTIVE 2004/18/EC** OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the Public Sector Directive/Classical Directive)
2. **DIRECTIVE 2004/17/EC** OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (the Utilities Directive)
3. **DIRECTIVE 2009/81/EC** OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

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Sources of EU Public Procurement Law:

New directives:

- 1. DIRECTIVE 2014/23/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the award of concession contracts**
- 2. DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC**
- 3. DIRECTIVE 2014/25/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC**

Part II: Introduction to EU Public Procurement Policy

The EU regime seeks to develop the internal market through at least three means:

1. Prohibiting discrimination in public procurement;
2. Requiring Member States to award contracts through procedures that are transparent, to prevent them from concealing discriminatory behaviour behind a cloak of subjective decision-making;
3. Removing certain restrictions on access to the market.

List of authorities

Sue Arrowsmith (ed.), *Public Procurement Regulation: An Introduction*

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