

PUBLIC PROCUREMENT

THEORY, PRACTICES
AND TOOLS



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EDITED BY JOLIEN GRANDIA
AND LEENTJE VOLKER



Public Procurement

Jolien Grandia • Leentje Volker
Editors

Public Procurement

Theory, Practices and Tools

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Praise for *Public Procurement*

“There is no doubt that public procurement is an important field of research and practice; its economic significance impacts well beyond the value of contracts placed by governments through formal, regulated public procurement processes with their immediate suppliers. The supply chains and networks that are activated to supply goods and services to the public sector represent substantial percentages of GDP in economies globally. But economic activation is not the only impact – societies can benefit, and broader government policies can be implemented through public procurement. I welcome the broad perspective taken of public procurement in this text, how governments might influence it and how its governance has changed over time.

By bringing together multiple perspectives of public procurement (legal, economic, political, value-based views) and addressing multiple levels (policy, strategy, management and operations) this text will help readers improve their understanding of the complexity of public procurement. It is a multi-level, complex system, often dealing with conflicting policy objectives nationally and internationally. But also, good practice of the operational process of public procurement is described in a clear, concise way.

Over and above the topics covered in the text, there is a passion within the writing for public procurement researchers and practitioners to, not only embrace, but also participate actively in the dynamically changing space of public procurement. I do not hesitate to recommend “Public procurement – theories, practices and tools” for practitioners, researchers and students.”

—Christine Harland, *Full Professor, Politecnico di Milano*

“At last! Thanks to six Dutch scholars, educators and trainers in the field of strategic public procurement now have an excellent core textbook to recommend to their students. Over 8 chapters, each with clear learning objectives, the authors cover all ‘the basics’ of public procurement, explaining processes, models and strategies. The real added-value of this book lies however in its coverage of the policy and strategic opportunities and priorities for procurement in the public domain. The two chapters on public values and procurement law set out the wider context and drivers of public procurement. Drawing on their extensive experience in practice, the authors provide rich insights into coping with conflicting values and competing priorities, and sensemaking as

part of decision making (for example) – making this an ideal book for advanced procurement studies both in universities and professional development settings. There are plenty of figures and examples to illustrate the issues addressed, and references to guide further reading. The closing chapter looks to the future, highlighting key transitions within our field and calling on readers to become agents of change, leveraging the many opportunities for strategic and policy impact that can be realised through effective procurement.”

—Louise Knight, *Full Professor, University of Twente*

“Those of us who concentrate on public management and organizational analysis need to be well-informed about public procurement, a crucially important topic in contemporary government. Jolien Grandia’s and Leentje Volker’s and their colleagues’ *Public Procurement – Theories, Practices and Tools* provides a valuable resource for those of us who want to enhance our understanding of the topic. It can serve as an effective supplemental reading in courses on public management and many related topics. The authors provide multidisciplinary expertise, including specific practical guidance along with concepts and frameworks that support broader systematic and strategic thinking about procurement.”

—Hal G. Rainey, *Alumni Foundation Distinguished Professor Emeritus,
The University of Georgia*

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Introducing Public Procurement

1

Jolien Grandia, Lizet Kuitert, Fredo Schotanus,
and Leentje Volker

Abstract

This chapter introduces the concept of public procurement and explains what it is and is not and how it is distinct from private purchasing. To do so it describes the public-private continuum and explains what publicness is. Subsequently, the public procurement process is described using the circular 3P (Prepare, Purchase, and Perform) model. This is followed by a discussion of the seven developmental stages of public procurement. It explains how public procurement has developed over time from an executive management function aimed at fulfilling an internal demand to a policy instrument that can collaboratively create public value. The chapter ends with an explanation of the multifaceted nature of public procurement and why understanding and applying multiple perspectives (e.g., economic, legal, societal, and political) is necessary to bring public procurement into a new era and fully understand and utilize the impact of public procurement.

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Keywords

Public procurement · Public-private continuum · Private purchasing · Procurement process · 3P-model · Public procurement development · Multifaceted public procurement

Learning Objectives

After studying this chapter, the reader will be able to:

- Define public procurement.
- Describe the public-private continuum.
- Explain differences between public procurement and private purchasing.
- Describe the public procurement process using the 3P-model.
- Understand why the public procurement process is circular and continuous.
- Describe the seven developmental stages of public procurement.
- Explain why the development of public procurement is crucial for achieving public value.
- Understand that multiple perspectives on public procurement are necessary to fully understand and utilize the impact of public procurement.

1.1 Introduction

In the European Union (EU) over 250,000 public organizations spend around 2 trillion € annually, which is about 14% of GDP, procuring works, supplies, and services. Also, in countries outside the EU, around 12% of the GDP is spent by public organizations. This can add up to values between 5000 and 8000 € per citizen per year. Despite the considerable impact that public procurement has on the market, economy, public organizations, citizens, and businesses, it has not (yet) matured into a broad academic field. This book therefore seeks to shed light on public procurement by discussing what it is, how you can procure in the public sector, and ways to bring public procurement into the modern era, an era where public procurement is more than a management function and actively contributes to societal goals such as the reduction of greenhouse gas emissions or creation of job opportunities for long-term unemployed citizens and the overall creation of public value. By reading this book the reader will not only learn what public procurement entails, but also learn how they can become an agent of change via public procurement and actively contribute to the achievement of societal goals and creation of public value.

This book addresses the influence of the economic, legal, societal, organizational, and political context of public procurement. This first chapter lays the foundation of the book, explaining its necessity and the relevance of presenting an

integrated and multidisciplinary view on procurement practices and tools to prepare for a new era of public procurement.

Section 1.2 addresses what is public and what is private. In Section 1.3, this chapter introduces and defines the concept of public procurement. Section 1.4 explains the main differences between public procurement and private purchasing. In Section 1.5, the procurement process is introduced as a process of prepare, purchase, and perform. Section 1.6 introduces the seven development stages of public procurement. Section 1.7 addresses how the economic, legal, societal, political, and organizational perspectives intertwine in public procurement. Section 1.8 provides a reading guide for the rest of the book.

1.2 The Public-Private Continuum

To determine what public procurement is and how it is different from its private counterpart, it is important to first define what ‘public’ means and what public organizations are. The degree to which the organization is public determines, among other things, to what extent public procurement rules apply. In general, a distinction can be made between organizations that are purely public (e.g., municipalities or ministries) and who are usually required to abide by public procurement law (e.g., public transport or semi-public health care organizations) and purely private (e.g., furniture companies or supermarkets) that fall outside the scope of EU public procurement law. However, in today’s society, the lines between public and private are blurring, due to developments such as externalization, outsourcing, and public-private partnerships. The ‘publicness’ of organizations is now no longer a dichotomy but a continuum. Organizations can embody the characteristics of the public and private domain and therefore create and safeguard both public and private values. The position on the public-private continuum is partly determined by the extent to which organizations are constrained by political control, how they are funded and financed, and the extent to which they perform public and private tasks. This means that if an organization is considered public or private can vary per country, dependent on whether institutions that provide public services such as health care, transport, and education are privately or publicly owned. This is further addressed in Chapter 2.

On opposite ends of the continuum are organizations that are purely public and are thus required to abide by EU public procurement law, and private organizations that fall outside the continuum. The semi-public organizations that are positioned in the middle of the public-private continuum are usually internally hybrid, meaning that they often have characteristics of both the public and private domain, such as combining a public task and/or mandate (such as housing or care) with more private organizational values (making profits or satisfying shareholders). Some examples of such semi-public organizations are private hospitals, housing corporations, health insurance companies, and foundations or joint ventures. If the relevant legal criteria are met, these entities can also fall under the scope of EU public procurement law. Accordingly, the position of an organization on the public-private continuum

determines whether an organization is considered to be a public ‘contracting authority’ and therefore whether they need to comply with the rules of public procurement law when purchasing works, supplies, or services on the market. This can also differ per country. More information about public procurement law can be found in Chapter 3.

1.3 What Is Public Procurement?

Public organizations continuously try to guide society by certain ways of governance. Their governance is aimed at ensuring the security, safety, and well-being of citizens, but can also stimulate or obstruct specific societal developments in fields such as education, immigration, animal welfare, and climate change. The resolutions, choices, and actions of public organizations regarding these specific societal developments are implemented through public policies which illustrate how public organizations try to drive or hinder developments that they deem (un)desirable. For the execution of these policies, as well as their own operations, public organizations worldwide need works, supplies, and services.

- *Works* encompasses public works that are built and maintained for the internal functioning and operation of public organizations or primary process of public organizations, such as offices of public organizations or public buildings such as town halls and schools. Public organizations also procure the construction and maintenance of public roads and water works, such as tunnels, highway maintenance, coastal protection activities, bike paths, and sidewalks.
- *Supplies* (also referred to as *Goods*) encompasses products or other commodities that are necessary for the internal operation and functioning of the public organization, such as office supplies, coffee machines, furniture, ICT, energy, or transportation. Public organizations also procure supplies that are necessary for the execution of their policies and primary tasks, such as uniforms for police officers, fighter planes for the air force, fire engines for the fire department, hospital beds for public hospitals, or passports for citizens.
- *Services* encompasses services that are necessary for the internal functioning of the public organization, such as cleaning, security, or catering services, as well as consultancy work, translation services, or workshops for civil servants. It also encompasses services that are necessary to execute the policies and primary process of the public organizations, such as dyslexia training, mental health care services, unemployment training programs, or cleaning services for the elderly.

If a public organization requires a work, supply, or service, they have the option of producing these works, supplies, or services themselves or to buy (procure) them from private or non-public parties. This decision is called the make-or-buy decision. When public organizations decide to procure it rather than make it themselves, this is called public procurement.

In this book, we define public procurement as the acquisition of works, supplies, or services by government or public organizations from the market or another outside body, while simultaneously creating and safeguarding public value from the perspective of their own organization.

The words ‘*acquisition*’ and ‘*from the market*’ are important here because it highlights that public procurement does not encompass all expenditures of public organizations. It, for example, does not include money spent on benefits or salaries of people that are employed by public organizations via a labor contract. Simply put, it only includes acquisitions from private or non-public parties that a public organization receives an invoice for (Telgen, 1994).

The addition ‘*while simultaneously creating and safeguarding public value*’ is also important because it highlights that public procurement is more than fulfilling a demand of the internal organization for a work, supply, or service. It plays a role in creating and safeguarding public value as well. A common misconception regarding public procurement is that it is restricted to the purchase and signing of a contract with a supplier, while in fact it also includes the initialization, preparation, and performance management of contracts with multiple and diverse suppliers. In this process, public value is created and safeguarded. Please note here that the legal EU framework only regulates the ‘*acquisition*’ part of public procurement, whereas national law can include rules from private or administrative law, as further discussed in Chapter 3.

1.4 Public Procurement Versus Private Purchasing

The terms procurement and purchasing are often used interchangeably. However, purchasing often signifies the process of acquisition in manufacturing and other markets, while procurement is used mainly to describe acquisition in the public sector. The procurement volume and value of public organizations is similar or even substantial than many of their private counterparts. In the Netherlands, for example, the central and decentralized governments procure yearly around 84 billion Euros on works, supplies, or services for their 17 million citizens. In this book, we focus on the process of acquisition in the public sector and therefore use the term procurement rather than purchasing if we refer to the whole acquisition process.

Public procurement is expected to meet high standards of transparency, integrity, accountability, and exemplary behavior. These values and often conflicting goals need to be managed according to the governance mechanisms that are in place. These mechanisms, in combination with political goals and the political responsibility of politicians, place demands on public procurement that are not found in private purchasing. Furthermore, unlike private organizations, public procurement faces a plethora of stakeholders, such as citizens, fellow politicians, line management, civil servants, labor unions, and taxpayers, all with differing and even conflicting objectives that need to be considered. Chapter 4 describes the organizational deliberations of public procurement processes.

However, and perhaps more importantly, public procurement is constrained by legal rules that do not apply to private purchasing. These are established in various national and international regulatory frameworks, such as the pluri-lateral Agreement on Government Procurement (GPA) of the World Trade Organization, or primary and secondary legislation of the European Union, such as the Directives on public procurement (2014/24/EU, 2014/22/EU, and 2014/23/EU). These legal rules enforce the demands regarding, for example, equality, transparency, and integrity.

Moreover, public procurement is also frequently used as a policy instrument for reaching desired goals in society and creating public value, such as creating possibilities for small- and medium-sized enterprises (SMEs), driving the market for sustainable supplies or reducing the distance to the labor market for long-term unemployed citizens. Strategic public procurement choices are addressed in Chapter 5.

Therefore, the main differences between public and private purchasing are the compliance with legal rules, the expected standards with regard to values such as transparency and integrity, and the variety of societal goals and public values that need to be addressed. These differences are discussed and related to procurement activities in Chapter 2 on public values.

1.5 Procurement Process in Three Ps

The general procurement process has been portrayed quite differently between various scholars and practitioners. Some authors provide detailed models, with some models being linear and others circular. Despite these differences, there are no clear contradictions between the different models. The main differences are found when the models are applied to individual tenders and contracts. For instance, for simple tenders and contracts, standardized templates can be used and purchasing steps can be taken quickly. For more complex and unique tenders and contracts, a customized and detailed approach is more appropriate.

In this book, a circular process model is used to illustrate the procurement process, called the 3P-model (Schotanus, 2022), see also Figure 1.1. The 3P refers to the three phases in the model: Preparation, Purchase, and Perform. The 3P-model is developed specifically for the public sector, and it uses a continuous approach, like models developed for private purchasing such as the purchasing wheel (Van Weele & Rozemeijer, 2022). The procurement process is visualized as a circular and thus continuous process. The circularity of the process affects what and how purchasing activities are used to make purchasing-related decisions—such as buying less, using products longer, (re)using products instead of using disposables—part of the purchasing process. Despite the differences between public procurement and private purchasing, the phases of acquiring and using supplies and services are similar. Yet, this 3P-model adds concepts such as policy goals, procurement procedure, social contract, and circular procurement elements that fit the specifics of public procurement.

Below the seven steps that fall within the three phases of prepare, purchase, and perform of the 3P-model are shortly introduced.

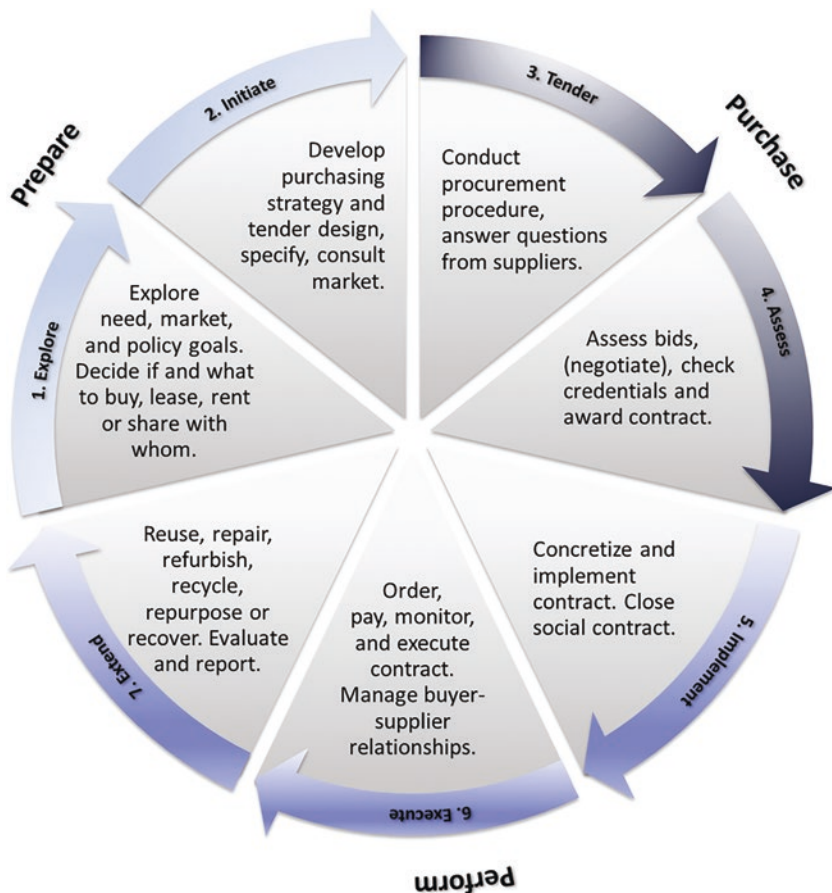


Figure 1.1 The 3P-model of public procurement

Preparation Phase

The preparation phase consists of two steps: explore and initiate. The aim of the preparation phase is to explore the procurement requirements and initiate the actual purchasing processes.

Step 1: Explore

The first step in the procurement process is exploring the need and to what extent it is necessary to use the efforts of suppliers to fulfill this need or if the organization can make the supply or provide the service themselves. This is called the make-or-buy decision. The need for works, supplies, or services is based on a predictive analysis by the buyer of what is required, previous spend, and what supply possibilities are available. Sustainable procurement and policy-related elements are also considered: is it possible to share instead of buy? Is it possible to buy less or

postpone the purchase and use the current product longer? Will products be bought new, second-hand, or can a service contract be used? Is there an alternative for disposables? Is it possible to fulfill certain policy goals with the purchase? This exploration can be considered the first step of procurement. Chapters 2, 4, 5, and 7 discuss these underlying concepts and organizational structures.

Step 2: Initiate

After the initial step in which it is decided to buy a work, supply, or service, a purchasing project is started, and a team is formed. The team develops a purchasing strategy and sets specific goals for the purchase related to costs, quality, and public value. As part of the strategy, decisions are made regarding the tender procedure, for example, a competitive dialogue or a restricted tender and contract length. Also, any specific societal and political sensitivities need to be identified, as well as relevant procurement policies that need to be translated into the procurement strategy. This is addressed in Chapters 5 and 7.

For specific aspects of the procurement strategy, specifications, supplier selection model, and/or contractual clauses, potential suppliers may be consulted. Based on the strategy, descriptive documents are drafted in which it is explained how the supplier(s) will be selected and what is required from the suppliers to be allowed to submit a bid. Requirements and criteria can all be used to create public value via the tender. More information about the legal aspects of procurement can be found in Chapter 3. The development of a supplier selection model is described in Chapter 6.

Additionally, a program of requirements or specification document and in some cases an ambition statement and a draft contract (especially for larger purchases) are written. Specifications can be functional, technical, or a combination of both. A draft contract lists several items such as the price arrangement, terms of payment, penalty clauses, warranty conditions, safety regulations, or delivery terms (Van Weele & Rozemeijer, 2022). Finally, before the tender is started, a decision must be made regarding who must be involved and who will make which decisions in which phase of the process. More details on these decisions can be found in Chapters 6 and 7.

Purchasing Phase

The purchasing phase consists of two steps: tender and assess. If there is a pre-qualification phase, then Steps 3 and 4 are conducted twice: once for the pre-qualification phase and once for the tender phase of the tender.

Step 3: Tender

At the start of the tender phase, the tender is announced publicly or, in case of a very small tender, specific suppliers are invited to submit a bid. During this step suppliers can usually ask questions about the tender at a specific moment and answers are usually shared with all potential bidders. This way demand is connected to supply. Then the suppliers can submit their requests for participation or their bids to be assessed by the buyer. Chapter 6 discusses the details of the tender process.

Step 4: Assess

In the assessment phase, the requests for participation (for pre-qualification) and the bids (for awarding the contract) are assessed. In negotiated procedures, there is also the option for buyer and supplier to negotiate about the bids. In the assessment phase, the credentials of the suppliers are checked as well. Additionally, it is allowed to ask verification questions or more credentials in case there are ambiguous elements in a bid. The assessment step can be a formal process in case a buyer awards a contract based on lowest price only. In case the buyer uses qualitative award criteria as well, an evaluation committee is appointed. The assessment can then consist of several rounds of individual and joint decision-making. Based on the outcomes of the assessments, the bidders receive written and often oral feedback about their bids. The winning bidder is awarded the contract. Chapter 6 describes the details of these decision processes. Once the tender and the assessment is finished, the last step in the process is evaluating the process up to Step 4 and seeing what can be learned for new tenders.

Performing Phase

The performing phase consists of three final steps: implement, execute, and evaluate and learn. These final steps link the purchase to the performance (or delivery) of supplies, services, or works that have been procured.

Step 5: Implement

In the implementation phase, the contract can be finalized and signed, and the winning bid can be concretized and implemented by the supplier, often in collaboration with the buyer. For small or simple purchases, it is not required to concretize, but in many cases, buyers and suppliers need to coordinate activities and implement a contract before it can be used.

Besides the legal contract, a relationship and social ‘contract’ can be established with the supplier. A social contract typically refers to unwritten rules or codes about behavioral expectations for day-to-day human interaction. Note that in some cases, parts of the social contract are already established during the purchasing process, especially when there is a considerable amount of human interaction during the process. More about the contract implementation can be found in Chapter 7.

Step 6: Execute

After the contract is implemented, the execution of the contract starts. This has different meanings for different types of contracts and projects. It can mean that a supplier starts with designing or constructing a new building, that there is a new operator for public transport, a new provider for social support services for citizens, or that internal users can now order specific supplies such as pens or paper or services such as temporary labor, cleaning, and engineering services. Sometimes there is a strict distinction between ordering (Step 6) and executing (Step 7) (e.g., first placing an order for office supplies and next receiving the supplies). In other cases,

Steps 6 and 7 are more intertwined. For instance, when there are several go/no-go moments in a project after which invoices are paid. This is further discussed in Chapter 7. During the performing phase, the relationship with the contracted supplier needs to be managed as well. The quality of the work, supply, or service needs to be monitored, complaints of internal users or citizens need to be addressed, and it is important to verify whether promises made during the supplier selection process are kept. If certain promises cannot be met, an alternative must be found or more formal steps need to be taken to assure that the initial goals of the purchasing project will still be met. When managing a contract, it can be especially challenging to ensure that sustainable and social promises made in bids are realized.

Step 7: Extend

The final step is trying to extend the use period of a product or work as long as possible. Circular terms such as reuse, repair, refurbish, recycle, remanufacture, repurpose, and recover apply to this step. Once the work, supply, or service is delivered or when the contract is going to expire, the last step in the process is evaluating and reporting about the contract and seeing what can be learned and start preparations for a new contract (when relevant). In addition, it is important to monitor what happens to public works or supplies after they have been used. This can be challenging for public organizations as their focus may have already shifted to preparing for a new contract. Chapter 7 discusses this in detail.

1.6 Seven Development Stages of Public Procurement

Over the years public procurement has developed from an executive management function aimed at fulfilling internal demands for works, supplies, or services to a policy instrument that can create societal value. Knowing and understanding the different stages that public procurement is progressing through is crucial for understanding how public procurement can contribute to achieving societal value, such as creating employment opportunities for people excluded from the labor market, improving labor conditions abroad, or diminishing the negative results of production and consumption. As explained in the previous section, each procurement process goes through the three phases of prepare, purchase, and perform. However, the considerations that play a role during each of these procurement phases have changed over time. This has changed because public procurement (as a management function) and the role it plays, inside and outside of public organizations, has also changed over time. In many European countries, public procurement has developed from an executive management function (fulfilling a need of the organization) to a highly tactical and strategic management function (using procurement to reach policy goals) (Tassabehii & Moorhouse, 2008). It is however important to note that not all public procurers, even those in Europe, have such a tactical role. How much public procurement as a management function has developed varies per country and organization and continues to develop.

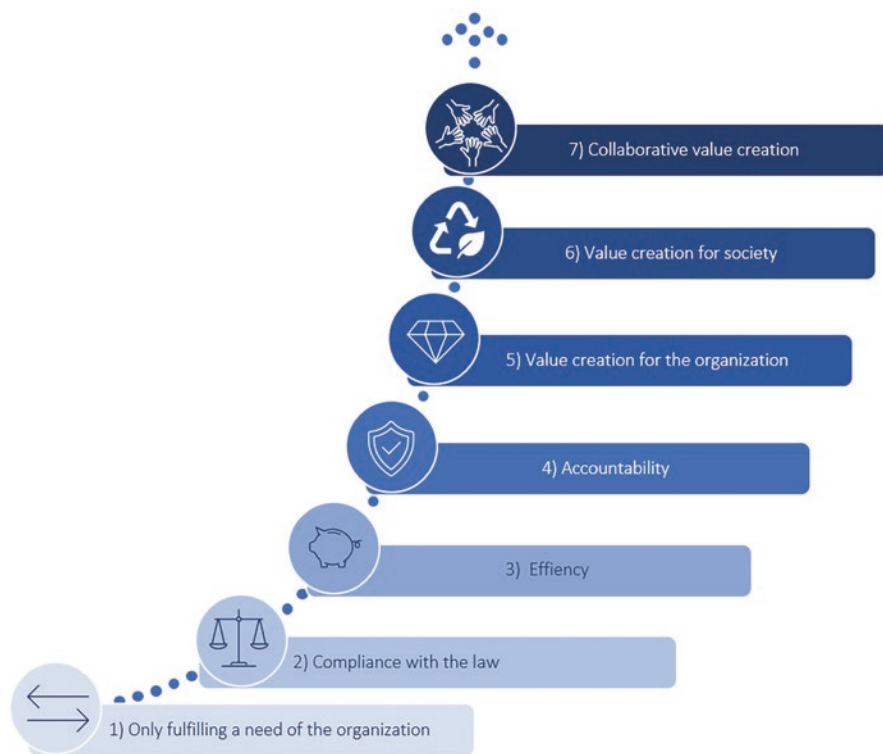


Figure 1.2 Seven stages of public procurement development (based on Telgen et al., 2007)

Currently, the following seven developmental stages that public procurement can progress through are recognized: (1) fulfillment of needs, (2) compliance, (3) efficiency, (4) accountability, (5) optimizing internal value for money, and (6) achieving external value and (7) collaborative value creation. However, as public procurement continues to develop, new stages might be added. The seven developmental stages of public procurement (based on Telgen et al., 2007) are illustrated in Figure 1.2 and discussed below.

Stage 1: Fulfilling the Need of an Organization

In the first developmental stage of public procurement the main issue is the fulfillment of needs. Procurement aims to fulfill what users demand, in the right quantity, at the right time, and in the right place. Availability of whatever is needed is the only objective. Thus, the duty of procurers is only operational and executive. They purchase what the organization needs and only pay attention to fulfilling that specific need.

Stage 2: Compliance with the Law

In the second developmental stage of public procurement, compliance with the law comes into the picture, thereby changing the duty of procurers. Procurement is no longer only about fulfilling a need, now it is also important that this need is fulfilled without any fraud or corruption. Even though, in the last two decades, Member States of the EU have introduced a wide range of anti-corruption measures, studies show that corruption still prevails in the central eastern EU countries. There are also indications that Directive 2004/18 did not address many well-known corruption risks, such as outside suppliers that are formally or informally involved in drawing up specifications. Thus, fraud and corruption pose a major risk to public procurement and undermines efficient procurement.

Stage 3: Efficiency

In the third stage of public procurement, the focus is on efficient procurement. In this stage, the focus shifts to getting the most for a fixed amount of money while, of course, still fulfilling the need and preventing fraud and corruption. The attitude of public organizations toward public procurement becomes more commercial at this stage, and procurers start to look at how they can ensure that their organization gets ‘the most bang for their buck’ and to try to make their procurement as efficient as possible.

Stage 4: Accountability

In the fourth developmental stage of public procurement, accountability becomes an issue for the procuring organizations. Apart from preventing fraud and corruption and ensuring an efficient procurement process, from this stage onward public organizations also must explain and convince the public why they are doing this and that they are doing it well. Public organizations are held accountable for their procurement and procurement decisions and are thus required to have a transparent and well-designed procurement process, such as the EU directives that require European Member States to publish tenders above a threshold in the Tenders Electronic Daily (TED).

Stage 5: Value Creation for the Organization

In the fifth developmental stage, the scope of public procurement starts to broaden outside the direct scope of the procurement process. It is not only cost or efficiency that is important, but also the value that such items and services themselves bring to

the organization. This means that, for the first time, the attitude of public procurement starts to change from reactive (you ask, we buy) to proactive (we suggest, you ask, we buy). From this stage onward, public procurers must start looking for ways to add value to the organization through the procurement of works, supplies, or services. If the organization has a need for new computers, the procurer could, for example, suggest contracting *Devices as a Service* (DaaS) including laptops, desktops, and so on depending on the user need instead of just buying desktop computers. This not only fulfills the need for new computers and could result in cost savings, but also makes work more convenient and flexible for the employees when they choose a laptop instead of a desktop, as it better enables them to work from home. The additional value that is created by procuring works, supplies, or services is in this stage still internal. Although DaaS also creates incentives for circularity, as the supplier remains the owner of the laptops, the value in Stage 5 is typically created for the public organization, its employees, citizens, but not for society.

Stage 6: Value Creation for Society

In the sixth developmental stage, value creation for society becomes part of public procurement. At this stage, public procurement's scope expands outwards and starts to look at how procurement can add value to its environment as well. For example, governments increasingly use their authority as a large buyer in the market to compel private organizations to contribute to the achievement of their public objectives, such as preventing climate change or unfair working conditions down the supply chain, creating employment opportunities for long-term unemployed citizens, or creating opportunities for small- and medium-sized local businesses. For the DaaS example described in Stage 5, this means, for instance, that the procurer also has requirements for the supplier such as how to recycle or upgrade the devices. In this stage, public procurement is no longer just a management function, but also a policy tool that can be used to achieve outcomes in society. To further stimulate this development, the European Commission has reformed its procurement Directives to give EU Member States more freedom to use their procurement as a policy tool as of 2016. Although this is already the sixth developmental stage, it is by no means a recent development. The first major move away from using procurement merely to fulfill internal needs already happened soon after World War I, when the British Government introduced a program that employed disabled ex-servicemen via public procurement. After World War II, this approach spread beyond ex-servicemen in Britain, to giving preference in government purchasing to products produced by sheltered workshops for disabled workers, for example (McCrudden, 2004). Nowadays, governments in the EU use their public procurement for a multitude of societal goals. Although the use of public procurement to achieve social outcomes is widespread in Europe, detailed information about how it operates is often unreliable and difficult to find.

Stage 7: Collaborative Value Creation

In this seventh developmental stage of public procurement, public organizations do not attempt to use their procurement for the creation of external value alone, but rather do this in collaboration with other (public or private) organizations and/or citizens. Through co-production or co-creation, value is created that is considered necessary and useful by not only the public organization itself, but also by others. For example, a municipality in need for a new playground can opt to procure a sustainable play equipment made from recycled and natural materials. However, by collaborating with local citizens (and their children) they could create a playground that is both sustainable and creates more value for the local children that will use the playground.

The development of public procurement as a management function is crucial for achieving public value. In the early stages, the creation of value, or even the recognition that public procurement could achieve societal outcomes, was absent. Fortunately, this has changed over the years in many organizations. To be able to utilize public procurement for the creation of public value, public procurement as a management function must develop to at least Stage 6. This has proven to be a challenge and is one of the main reasons for this book.

1.7 The Multifaceted Character of Public Procurement

The mixture of governance models and multiplicity of domains from which the works, supplies, or services are procured requires a multifaceted view on public procurement. With around 14% of the GDP spend on public procurement in Europe and around 12% worldwide, *the economic perspective* is an obvious one. Spending money at the levels of public procurement will certainly impact the economic market. For example, austerity policies can result in public spending cutbacks, which can have implications for both the economy at large and markets for specific supplies and services. The economic perspective can be a dominant perspective in decision-making surrounding public procurement, both in general and for specific projects, and often overshadows other perspectives. The economic perspective is, for example, visible in the discussion of the three governance models and the reducing complexity approach in Chapter 2, the emergence of joint procurement structures in Chapter 4, the discussion of risks and routine strategies in Chapter 5, the choice between lowest price and Most-Economically-Advantageous-Tender approach in Chapter 6, or the discussion on how the type of remuneration selected affects the supplier's behavior and efforts in Chapter 7.

The *legal perspective* is, together with the economic perspective, often the prominent or even dominant perspective in public procurement. This can manifest itself through risk-averse behavior to avoid legal issues. The legal perspective can,

however, also be used to open the door for other perspectives, for example, awarding contracts based on sustainability and social requirements instead of lowest price is becoming more common. In this book, the legal perspective is used to explain and highlight how the legal framework impacts the procurement process and how it can drive or hinder the other perspectives. While the legal perspective is of course central in Chapter 3, where relevant legal aspects are discussed in light of achieving social and sustainable objectives, the legal perspective can be identified in most other chapters as well. For example, in the description of the 3P-model as well as the developmental stages of public procurement in Section 1.5, the discussion of dilemmas and value conflicts in Chapter 2, the question whether a public procurement policy is allowed in Chapter 5, as an underlying logic in the sensemaking that a tender is, as is explained in Chapter 6, or in the discussion of disputes and enforceability of contracts in Chapter 7.

The societal perspective has more recently been growing in importance, with the continued development of the procurement function in public organizations. Applying a societal perspective can for example stimulate the market to deliver more sustainable works, supplies, and services and provide employment opportunities for people currently excluded from the labor market, helping to end child labor and ensure fair working conditions for all. One must realize that much of the service that is delivered by public organizations to citizens uses supplies, services, and works that are procured to fulfill these primary responsibilities. Think, for example, of public transport, infrastructure works, or health care services that have a significant impact on quality of life. The societal perspective is therefore also applied throughout the book, although it is most prominent in Section 1.6, Chapters 2, 5, and 8 where it is used to explain how public procurement has developed and can contribute to the achievement of societal goals and public value.

Finally, public procurement should also be viewed from an *organizational perspective* and a *political perspective*. Topics such as political corruption or political competition shape make-or-buy decisions, procurement strategies, or tender procedures. In this book, we use the political perspective to highlight aspects or complexities that are related to the politics in which public procurement takes place, such as the impact of elections, coalition agreements, or promises made to voters. This is not particularly dominant in one specific chapter but can be found throughout the book and specific examples that are used to explain the complexity of public procurement. The organizational perspective is particularly visible in the discussion of the creation of public value in Chapter 2, the organizational aspects of procurement in Chapter 4, and considering public procurement policy and strategy discussed in Chapter 5. Chapter 6 describes the organization of a tender process in relation to aligning demand and supply.

These multifaceted characteristics can reinforce or counteract each other and play a large role in understanding why achieving public value in public procurement is not easy. Each of these implications can be seen as a different perspective on public

procurement, and the interactions between them are the basis on which this book is written. These perspectives are not only relevant for understanding and analyzing public procurement, but also for optimizing public procurement. Only focusing on one perspective in the procurement process can result in sub-optimal procurement. For example, focusing on the economic perspective and achieving the lowest price might be cost-effective but goes against the European legal framework, whereas a too strong of a focus on preventing legal issues might result in the procurement of a safe option which is not the optimal choice for society. Understanding and applying multiple perspectives is therefore also necessary to further public procurement and become the change agent that the field of public procurement needs. Chapter 8 describes the developments in public procurement in this era of change and the implications of these developments for public organizations.

1.8 Reading Guide

This book consists of eight chapters. Each chapter starts with an overview of the learning objects and a short summary of how the chapter is structured. It introduces the topic and then describes the most relevant concepts, models, and other information that we think belong to the field of public procurement. Each chapter includes several examples of the concepts that are introduced to show their relevance. We aim to make each chapter individually accessible for different audiences, which enables the use of the chapters for a variety of educational purposes. The complete book provides an integrated multidisciplinary and contemporary view on the field of public procurement.

The first four chapters provide the basis for this book. The definitions and basic concepts of public procurement as used in this book are introduced in this first introductory chapter. Chapter 2 focuses on the aim of public procurement from a public administration view with regard to creating public value. Chapter 3 provides the legal context of public procurement law and regulations. Chapter 4 introduces how the procurement function is organized in public organizations.

Then the three Ps of the public procurement process are discussed building on insights from a combination of disciplines, such as public management, purchasing and supply chain management, and organization science. Chapter 5 explains how to develop procurement policy and translate this into a purchasing strategy in the preparation phase. Chapter 6 indicates how to organize a tender and select a supplier in the purchase phase. Chapter 7 discusses the design and evaluation of public contracts in the perform phase of public procurement.

The final Chapter 8 summarizes the trends and developments in public procurement and explains why we believe it is so important to become a change agent in the essential and intriguing field of public procurement and bring it into a new era.

1.9 Summary

In this chapter public procurement is defined as the acquisition of works, supplies, or services by government or public organizations from the market or another outside body, while simultaneously creating and safeguarding public value from the perspective of their own organization. It is also explained in this chapter that due to developments such as externalization and public-private partnerships, the ‘publicness’ of organizations is not a dichotomy but a continuum. The main differences between public and private purchasing are the compliance with public sector-specific legal rules, the expected standards with regard to values such as transparency and integrity, and the variety of societal goals and public values that need to be addressed. The public procurement process is subsequently described using the 3P-model, specifically developed for public procurement, referring to the three phases in the model: Preparation, Purchase, and Perform. Although these phases are also found in private purchasing, the model adds concepts such as policy goals, procurement procedure, and social contract that fit the specifics of public procurement. This is followed by a discussion of the seven developmental stages of public procurement. It explains how public procurement has developed over time from an executive management function aimed at fulfilling an internal demand to a policy instrument that can collaboratively create public value. The chapter concludes with an explanation of the multifaceted nature of public procurement and why understanding and applying multiple perspectives (e.g., economic, legal, societal, and political) is necessary to bring public procurement into a new era and fully understand and utilize the impact of public procurement. A reading guide of the book finalizes the chapter.

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Public Values in Procurement

2

Lizet Kuitert

Abstract

This chapter outlines the importance of considering procurement strategies from the perspective of public values. It explains that public values are dynamic and have different interpretations depending on the situation, the context, and the stakeholders that perceive these values. As the governance models that are in place in an organization can influence the public procurement function and which values need to be ensured and safeguarded by procurement professionals, the three basic governance models which are relevant to public procurement (Traditional Public Management, New Public Management, and New Public Governance) are described. This is followed by a discussion of what value tensions, dilemmas, and conflicts are and how they add to the complexity of public procurement and can make safeguarding public values a balancing act. This chapter ends with a description of different coping patterns that help deal with value conflicts by either reducing or engaging in the complexity that is caused by the value patterns in a public procurement organization and the procurement process.

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Keywords

Public values · Public service delivery · Complexity · Value conflict · Value pluralism · Safeguarding public values · Coping patterns

Learning Objectives

After studying this chapter, the reader will be able to:

- Understand the concept of public values, various types, and their pluralistic character.
- Describe the three main governance models that are relevant to public procurement and safeguarding public value.
- Understand public value decision-making in the three phases of the public procurement process.
- Recognize that complexity in public procurement has increased over time.
- Understand the difference between a value tension or dilemma and a value conflict.

2.1 Introduction

Public values reflect what society believes are important values. A public organization can therefore strongly benefit from considering procurement strategies from the perspective of public values. In this book, the term public value is used to refer to a multitude of conceptualizations of procuring works, supplies, or services in which societal expectations are met. The concept of public value is sometimes also referred to as social value or societal value. Public value is associated with public interest, normative public values, managerial public values, economic value, market failure, publicness, integrative publicness, and public supplies. If a private value reflects an individual interest, it can only be deemed of public value if there is a collective benefit.

In this chapter, the definitions and interpretations of the term public value are discussed in Section 2.2. Section 2.3 shows that public values are dynamic and open to interpretation depending on the context in which they are identified, such as a country, industry, or period of time. Section 2.4 describes the three main governance models from the field of public administration. Section 2.5 explains how today's societal challenges affect the relationship between the public buyer and other stakeholders. Section 2.6 addresses that value tensions are inevitable in public service delivery and discuss value dilemmas in the different phases of the procurement process. Finally, it is explained how one can cope with these conflicting values in Section 2.7.

2.2 The Concept of Public Values

Public organizations have a specific responsibility toward public value, which by their nature they are accountable for. Contemporary public management conceptualizes public value as that which is created or added through the activities of public organizations and their managers. As explained in Chapter 1, public organizations try continuously to govern developments in society. The resolutions, choices, and actions of public organizations regarding the governance of these specific societal developments are laid down in public policies. To execute these public policies as well as their own operations, public organizations procure works, supplies, or services.

Another aspect of public value is the difference in the scope of ‘customers’ to which public values need to be delivered as opposed to private values. Public organizations deliver value based on what citizens and their representatives have mandated them to achieve (Moore, 2000). The ‘public’ in public value refers to one or more ‘publics’ who are the locus of any potential impact and whose interests are the foundation of the value proposition (Cresswell et al., 2006). This means that public organizations are accountable to many different stakeholders in society, from public to private, societal and market parties. These stakeholders all bring different value interests which adds to the complexity of public procurement. Conversely, a for-profit organization takes their lead from their customers and a non-profit organization focuses on the needs of their donors.

However, in practice what is considered a public value or private value is still difficult. A value is not solely public or private, and private organizations may also strive for public value (Van der Wal, 2008). There are some values that are more common for public organizations such as efficiency and reliability, and corporate social responsibility or financial return for private organizations. There are also some shared values, such as accountability, honesty, and experience; however, the interpretation of these values by public or private organizations may be different. For example, the distinction between ‘process accountability’ for the public sector (accountability is equated with transparency) and ‘output accountability’ for the private sector (delivering certain standards or quality levels).

Differences in interpretation also occur within the public procurement agencies between different professions. For example, a technical management department will look at sustainability from the point of view of water drainage and danger of flooding, an urban planning department from the point of view of greening and space for electric charging stations, and a social welfare department from the point of view of participation and social cohesion. The difference in interpretation adds to the complexity of public procurement and therefore the dynamic context in which governmental decision-making occurs. The demarcation between public and private values also differs from country to country, which further adds to the intricacy of interpretation (De Graaf & Paanakker, 2014).

Finally, the concept of value pluralism refers to the fact that not all values can be achieved at the same time (De Graaf & Paanakker, 2014). Public values can be incompatible. The pursuit of certain values must inevitably comprise or limit the

ability to pursue certain other values. For example, innovation often takes more time in the preparation phase and is considered less efficient. Public values can also be incommensurable. There is no single currency or scale with which to measure conflicting values. For example, time efficiency is measured in labor hours and quality in load bearing capacity. The ‘measurability’ can take different timeframes, for example, sustainability is about the life cycle of products and usability is a current issue. Furthermore, it is important to note that public values are subjective. Values may also have different interpretations; beauty is, for example, often considered to be ‘in the eye of the beholder’. And therefore, if a conflict occurs regarding the beauty of a particular building design, no rational assessment can be made. Consequently, it is up to the policymakers and public managers of public procurement agencies to balance different or contradictory public values during the different phases of public procurement.

Hence, public values reflect what society believes are important values. One could also define public values as a consensus on the principles on which government activity should be based. For example, that governments should act transparent. This means that public values can be considered as standard guidelines for the rights, benefits, and prerogatives to which citizens should (and should not) be entitled, the obligations of citizens to society, the state, and one another, and the principles on which governments and policies should be based (Benington, 2011). This means that public values are not only about the output itself but also about the process of the delivery and responsibilities of the actors involved.

Distinctions are made between three types of public values: procedural values, performance values, and product values (De Bruijn & Dicke, 2006; De Graaf & Paanakker, 2014):

- *Procedural values* relate to the way the public sector should act and which standards of government action should be met. Procedural values relate to the quality of the process, such as integrity, transparency, and equality, and are also referred to as the ‘rules of the game’. Procedural values can often be recognized in codes of conducts of various international public organizations.
- *Performance values* are generally associated with effectiveness and efficiency, for example, in time and money, while procedural values relate to the quality of the process, such as integrity, transparency, and equality.
- *Product values* consider both the concrete (tangible) outputs, by directly offering works or supplies or indirectly by providing services such as the provision of reliable infrastructure, as well as the outcome related to the broader impact on society such as reliable health services. It is important to include both the *output* and the *outcome* because there is a growing demand for long-term thinking about how we can secure needs both for now and for later generations and the impact on society.

2.3 Complexity of Operating in the Public Domain

The exact set of public values and the interpretation of these values changes as a response to manifold societal transitions, including globalization and urbanization, population aging, climate change, and digitalization. For example, sustainability targets could lead to a growing focus on circularity, while international threats could lead to a higher need for cybersecurity. In some countries people are increasingly moving out of the city, which leads to an increasing need for flexibility in building policies to respond to these changes. Another example is a growing demand for long-term perspectives on housing and food for later generations through sustainable and circular solutions.

These developments affect the tasks of public organizations in the public value process (Bryson et al., 2014) and with this the focus on and direction of values. Due to fiscal pressures, socio-economic demands, and changing political priorities, the process of public service delivery is changing. In a public management context, politics always determine the core values that are being pursued. Public organizations translate these values into policy platforms, policy initiatives, and public programs. To execute these policies and programs, public organizations deliver public works, supplies, or services.

Professionals in public domains are crucial for rendering effective public services, but in current neoliberal times, their acts are contested, and their autonomy is weakened (De Graaf et al., 2014). Trends like globalization, privatization, and ser-vitization have changed the relationship of public authorities with society and market entities. Liberalization and privatization have created a network of more interdependent actors. To deliver and secure the new set of public values, public organizations increasingly need the knowledge and skills of bot specialized market players and social partners. Therefore, public organizations often search for a partner to collaborate with. The different private and societal values that these collaborating parties bring make public procurement more complex. Public organizations are particularly influenced by these movements since they can be seen as the executive party of leading politics (Entwistle & Martin, 2005).

There is an ongoing debate about the appropriate role of government in the field of public management and whether public values are safe in private hands. The results of these debates often emerge as public procurement policy. One of the most important results was a reaction to public sector downsizing and privatization a few decades ago. Many services were contracted out and major public-private partnerships were formed. For example, in construction, the fully integrated Design, Build, Finance, and Maintain (DBFM) contracts in which a private consortium of suppliers, engineering firms, and facility management companies were asked to build, maintain, and operate school buildings, roads, and other social and economic infrastructure which used to be managed by public authorities. Although certain operational responsibilities are outsourced or shared, it is important to remember that the public buyer always remains social-politically responsible for the public good. This must be translated into the public value proposition. To act socially responsible one must, for example, think about the life cycle costs of specific works, supplies, or

services and realize that the design of a technology determines to an important extent how it will be produced and be used, what maintenance will be required, and how the product is to be demolished.

Alongside the increased involvement of private parties, citizens and other stakeholders are becoming more actively involved in the co-creation of public values and bring in their own interpretation of values. If you participate more closely with users, you may also encounter intrinsic motivations or pragmatic interests, such as where to place the trash cans and lamp posts. As a result, it is no longer sufficient to only pursue the traditional procedural public values such as legitimacy and transparency and performance values such as efficiency and effectiveness. Product values such as sustainability, circularity, and 'smart' must now also be pursued. Additionally, the ongoing definition of value has resulted in a broader societal reconceptualization of prosperity. This, in turn, formulates public values, that is, what society believes to be integral to the process of delivering certain products or services whose provision is considered the responsibility of the government.

2.4 Three Basic Public Governance Models

The governance models that are in place in an organization can influence the public procurement function. Governance can be understood as the use of institutions, structures of authority, and collaboration to allocate resources and coordinate or control activity in society or the economy (Klakegg, 2009). This influences which values need to be ensured and safeguarded by procurement professionals and how these organizations can accomplish this. From the field of public administration, three basic governance models can be identified which are also relevant to public procurement: (1) Traditional Public Management, (2) New Public Management, and (3) New Public Governance. Safeguarding public values in the context of procurement can be considered a matter of balancing these three basic governance models to create an optimal mix of administrative justice, effective social security, efficient use of public means, and collaboration with private and societal partners.

These different governance models may be deployed at different organizational levels, departments, or domains, as the specific objectives at each unit may be distinct, however they are always interrelated. For example, a higher-level governance plan, such as the ambition to reduce CO₂-emissions by 30%, can impose constraints on a lower organizational level, for example, by only purchasing electric company cars. Hence, governance frameworks provide the boundaries and rules in which the procurement professional can freely act to produce value for the various actors. In the next section, the values, rules, and norms of each governance model are discussed.

Traditional Public Management

The Traditional Public Management (TPM) governance model emerged as a response to the challenges of industrialization, urbanization, the rise of the modern corporation, faith in science, belief in progress, and concern over major market

failures. TPM emphasized policy, legal rules, and has an administrative management focus based on centralized and legitimate authority, rules, procedures, and legislation. TPM values hierarchy and is dominated by values that ensure the quality of the process, indicating that values such as loyalty, equality, and lawfulness should be pursued.

TPM governance models assume a situation where there is a hierarchical relationship between the government and the supplier and where the government is potentially able to enforce the safeguarding of public values. An example of this would be if the government determines the level of performances, for example, 90% of all trains should arrive on time, and fines the service provider if this is not the case (De Bruijn & Dicke, 2006). This creates a common frame of reference as to what public values are, demonstrating that they are important. One solution dominates: a strong government translates the values into clearly delineated standards and formulates clear rules for protection of these standards. Practice has shown, however, that these frames are sometimes ambiguous and there is limited room for adapting to changing needs. It can also lead to sub-optimal solutions. For instance, the service provider could realize 90% only by running less trains.

New Public Management

New Public Management (NPM) emerged with the policy shift from Keynesian economics to neoclassical economics. This caused a transfer of assets and activities to the private sector through mechanisms such as public sector downsizing, privatization, contracting out, public-private partnerships, and concerns with government failures. This centered around a belief in the effectiveness and efficiency of markets, a belief in economic rationality, a push away from large, centralized government agencies toward devolution and privatization, and an emphasis on public value.

NPM prioritizes market values and has a formal contractual focus based on legal contractual arrangements, arms-length transactions, and bargaining. NPM demands that public organizations change their attitude toward the market and society at large, in that they must move away from their former role as service providers and instead see themselves as service brokers (Boivard, 2007). The market approach is dominated by business-oriented values of effectiveness and efficiency. The basis for strategy is profit maximization. Market mechanisms include the provision of public services through splitting the buyers of services from the suppliers and introducing elements of competition through contracting out services to a mix of private companies, voluntary organizations, and quasi-autonomous national government organizations (Cornforth, 2003).

Governments use market forces to protect public values rather than opposing and trying to mitigate such forces. Incentive structures are used to achieve policy objectives especially using markets. One example of this mechanism is that of energy producers who can differentiate themselves from their rivals by offering 'sustainable' energy. Privatization, then, tends to be accompanied by increased visibility for the companies involved and an increase in the overall transparency of the sector. By laying down special conditions in the tender, governments can then safeguard the values that they pursue.

New Public Governance

A more interactive, inter-organizational and indirect form of governance, commonly referred to as New Public Governance (NPG), has been unfolding over the last decade. This new emphasis on public value emerged as a response to the fragmentation, structural devolution, single-purpose organizations, and performance management caused by the NPM governance model. NPG focuses more on building a strong and unified sense of values, trust, value-based management, and collaboration. Team building, involving participating organizations and improving the training and self-development of public servants, has an important place in these reforms.

While NPG has by no means replaced TPA and NPM, it has introduced a whole new set of principles and mechanisms of network-oriented governance that supplement those previously in place. With NPG, the mechanism for achieving policy objectives can be different for each situation. This approach can be understood as selecting from a menu of alternative delivery mechanisms based on the perceived value for money. This often means helping to build cross-sector collaborations and engaging with citizens to find unanimous objectives. The government may facilitate the creation of an institutional structure for these negotiations—for example, by promoting efforts to encourage consumers to organize themselves into representative bodies. From an instrumental perspective, the government might design procedures or rules for these negotiations. For instance, who is to take part in the negotiations, when the negotiations are to take place, and how the agenda will be drawn up. A government can carry out the design of these processes themselves, have them designed externally, or invite the negotiating parties to make a proposal for their design. What is of the essence here is that all parties agree about the rules, thus creating a ‘negotiated environment’. The flexibility in this approach allows for a tailored procurement arrangement.

2.5 Public Value Tensions in Public Service Delivery

The blurring of traditional boundaries between public and private provokes questions regarding democracy, legitimacy, and accountability, or in other words *public responsibility*. The increased collaborative nature of public service delivery—through contracts or by co-creation—changes relationships, tasks, responsibility division, and the nature of public service delivery. One of the most persistent and widely shared critiques of the popular public-private partnerships concerns the lack of accountability. Public value management has a distinctive understanding of the challenges of efficiency, accountability, and equity. TPM and NPM have clear answers to safeguard these values. In both TPM and NPM, a greater emphasis is placed on the procedural notions of the democratic process, rooted in formally elected officials, shifting the focus of administrators’ actions to the creation of that value. TPM has an administrative management focus based on centralized and legitimate authority, rules, regulations, procedures, and legislation, while NPM has a formal contractual focus based on legal contractual arrangements, transactions, and bargaining.

The increase in network governance models that originate from the NPG perspective is driven by the continuing criticism of traditional forms of governance, such as hierarchies and markets, which are, respectively, too rigid and too reactive. However, networks—like public-private partnerships and co-creation—often lack the accountability mechanisms available to the state, are difficult to steer or control, and are difficult to get agreements on what outcomes and actions should be taken. One of the reasons for this is that it can be difficult to understand and determine who is ‘in charge’, relying instead on autonomous units operating in a setting of demand uncertainty with high interdependence in complex tasks. A network governance model tries to overcome these problems by using social mechanisms rather than authority, bureaucratic rules, standardization, or legal recourse. Because in networks the emphasis is on a horizontal rather than a vertical organizing principle, one organization does not have a superior-subordinate relationship with the other. New Public Governance therefore focuses on building relationships based on interpersonal trust, mutuality, and reciprocity rather than building formalized structures that ensure public values.

2.6 Value Dilemmas in Procurement Processes

It is expected that different value dilemmas will arise during different phases of public service delivery, and trade-offs between procedural values, performance values, and product values will need to be made. Managers will be called to account for process as well as outcome, as well as for individual incidents and aggregate patterns observed at each stage of public value creation in the procurement phases. Hence, it is important to apply public value thinking in the different phases in the process of procurement.

In practice, it is often assumed that once the buyers’ subjective values are expressed in, for example, the weighting of selection or award criteria, then the rest of the process can be regarded as a rather value-free and rational administrative exercise. However, this is often far from the case and tensions invariably arise between the simple embedding and the original idea behind often applied multi-criteria decision-making models: to learn more about one’s values during the process. In the following sections a few value dilemmas will be explained based on three procurement situations: (1) the make-or-buy decision, (2) purchasing strategy as part of the prepare phase, and (3) contract and relation management as part of the perform phase of procurement.

Make-or-Buy Decision Values

When preparing a tender, an important step in the procurement process is determining the need and to what extent it is necessary to use suppliers to fulfill this need or if the organization can make the works, supplies, or provide the services themselves. This is called the make-or-buy decision. This step revolves around whether conditions are suitable for contracting and whether public values are safe in private hands.

The general dilemma between dependence and responsibility fuels the debate on public values in various sectors, such as health care or infrastructure: are public values safe in the hands of private suppliers that operate under regular market conditions? If new values, such as circularity, innovation, and sustainability are to be adopted, a different way of thinking about tendering is needed at the front end. Who—public or private—can best identify which values are appropriate? Legal exigencies can lower market competitiveness, thereby diluting the advantages of contracting relative to in-house service delivery. Regarding circularity, policy-related elements should be considered: is it possible to share instead of buy? Is it possible to extend or postpone the purchase? Is it possible to fulfill certain policy goals with the purchase (e.g., stimulating job creation, innovation)?

If procurement goals are innovation and efficiency, then contracting with a private supplier may be more desirable, because private employees operate with higher-powered, compensation-based, and profit-oriented incentives than civil servants. If the goal is more government control over service provision, then internal production may be preferred, because civil servants' motivations are typically better aligned with the government's mission. Another issue is determining whether service and market conditions favor certain opportunistic behavior. In some situations, private parties cannot fully predict all possible future scenarios and contracts are typically underspecified or incomplete, allowing opportunistic suppliers to exploit contracts to their own advantage at the expense of the contracting authority's goals. To minimize such opportunism, the public organization must incur transaction costs by clearly specifying the values sought in performance measures, writing more detailed contracts, monitoring suppliers' performance, and enforcing sanctions when necessary.

Public and semi-public organizations enter into public-private partnerships for reasons of long-term benefits such as improved value for money and to create added value. Proponents of public-private partnerships emphasize the ability of private market parties to deliver services more efficiently. In the short term, this leads to benefits such as time and cost savings, higher quality of service, lower administration costs, and risk transfer. They emphasize that the heterogeneous nature of these networks, alliances, or partnerships is inherently flexible as these networks are shaped by different dimensions of hierarchy, formality (e.g., regulation), and cooperation. Opponents complain about the reduction of the ability of governments to adapt to changing needs of buyers and users as a result of long-term contracts.

Make-or-buy considerations in outsourcing need to be based on the degree of private involvement which then influence the choice of contract. For integrated contract forms in public-private collaborations, part of the contract is sub-contracted to a private market party. Internal aspects (organizational structure, finances, policies, knowledge, experience, and capacity), external factors (political, societal, and market environment), and project factors (money, time, quality, influence, complexity, and risks) influence these considerations (Kuitert, 2021). Stakeholder preferences and democratic processes, for example, establish the values to be optimized in service delivery. Public law sets the boundaries within which public managers must operate, thereby permitting, authorizing, or requiring a range of actions.

Organizational arrangements (also) define the capacity, resources, and transaction costs for managing service delivery contracts. The characteristics of service markets influence which contracting tools and suppliers are best suited to achieve stakeholder values. It is this complex interplay that makes public procurement a challenging task, see also Example 2.1.

Example 2.1: A Make-or-Buy Decision Dilemma

An important dilemma in relation to the make-or-buy decision concerns the legitimization of public procurement versus trust-based collaboration. This dilemma is a result of the need for more frequent collaboration to execute today's complex public services to the level of legal standards that public organizations should adhere to. Supplier collaboration takes time because relationships need to be built. However, one cannot build on earlier collaborations because of the law prescribing new procurements to meet equity and non-discrimination. Furthermore, it is not allowed to just extend a successful buyer-supplier collaboration. To collaborate, values such as trust, collegiality, honesty, transparency, and understanding each other's interests are essential. Hence, the contractual relationship between buyer and supplier is still more common than other more relational connections. The legalization of procurement therefore competes with the desire to collaborate based on trust.

Supplier Selection Values

Public service delivery processes can be filled with tensions between operational, strategic or policy requirements since different stakeholders might hold different opinions on what type of performance is more important (cost performance vs. value performance) and what should be done to improve performance. For example, when procuring coffee machines, the budget holder might think the price of the delivered product is most important, while the users find taste of the coffee most important, or sustainability officers could argue that sustainability and social aspects are more important. Therefore, the procurement process is not straightforward or easy. In fact, including values such as sustainability and social criteria add complexity to an already complex situation.

The purpose for entering a partnership with a supplier (either public or private) influences the way it is approached. While setting up this process, a buyer needs to make many decisions that are loaded with value dilemmas, including specifying suppliers' obligations and tasks, defining the contract's renewal provisions, and specifying its incentive and performance-measurement systems. These strategic purchase decisions include an explicit choice on elements such as the degree of private involvement in the supply chain, the tender approach, and the risk allocation (Brown et al., 2006). These decisions influence the level of flexibility during the delivery of the public value: fragmentation of the supply chain increases the buyer's ability to steer, while integration increases the supplier's ability to steer.

There are different forms of risk (e.g., financial risk, demand risk) that must be parsed and addressed. The goal of risk identification, allocation, and negotiation is ‘assigning risk to the organization that best understands and can manage and control the risk and maximizes public benefit’ (Clifton & Duffield, 2006). One of the main reasons for creating public-private partnerships in the past decennia has been the shifting of risk (and therefore cost) from public organizations to the private sector. This led to new insights into which risks would be safe in private hands, such as ‘just in time delivery’ of certain materials, while others, like permits or stakeholder communication, appeared to be more difficult to manage by private actors. Practice has shown that as public procurement becomes more focused on value rather than price, supplier selection becomes increasingly complex. This complexity can be addressed by finding the appropriate balance of risk allocation, as this ensures a greater accountability for the services delivered and their conformance to public expectations. Example 2.2 shows how purchasing decisions can lead to specific value dilemmas.

Example 2.2: Purchasing Strategy Dilemmas

The following examples show how specific purchasing strategy decisions can impact different value dilemmas (Brown et al., 2006; Clifton & Duffield, 2006; Naoum & Egbu, 2016):

Asset specificity: For public organizations, asset-specific services can privilege suppliers that win the first contracts, thus constraining future competition.

Ease of measurement: Refers to how easily and successfully public managers can assess the quantity or quality of services. As with asset-specific services, difficult-to-measure services make governments vulnerable to unscrupulous suppliers. In these circumstances, managers could even be wise to avoid the market altogether through internal service delivery.

Risk allocation: When outsourcing responsibility, the role of the buyer changes and therefore their role in ensuring and safeguarding public values. More specifically, in public-private collaborations, the performance-based integrated contract forms are partially the responsibility of a private market party through a sub-contract. The different types of responsibility, for example, contractual responsibility and organizational responsibility, need to be managed in a more explicit way than in traditional models since different types of logic and values need to be integrated.

Integration of the value chain: Opportunities for enhanced value and improved long-term service outcomes may be achieved by the introduction of alliancing concepts into public-private partnerships. Proposed governance structures provide greater project flexibility and offer the potential to improve societal interests and to avoid some of the weaknesses inherent in the supply chain. However, this also opens possible dilemmas between restricting and flexibility.

Contract and Relation Management Values

In monitoring and guiding the execution of the contract, public organizations focus on managing the contract in which a balance between procedural values, performance values, and product values is sought. Here, quality assurance can be used to check whether the public procedural, performance, and product values agreed upon in the needs definition and contract negotiation are being met. Sometimes this involves concrete key performance indicators (KPIs), sometimes it involves more subjective discussions about methods of action and other informal ways of safeguarding values.

When tasks are transferred to market parties through procurement, safeguarding public values becomes extra complex. This is because the public organization limits its direct influence on results and process. A contractual relationship is never equal: there is always a buyer who ‘controls’ and a supplier who ‘delivers’. Public parties are limited to establishing a set of functional requirements, leaving solutions to the private party. This is a strict division of roles and responsibilities, compared to partnering which is precisely about encouraging parties to bridge the conflicting interests that are central to their exchange relationship. Hence, due to false equality, a contractual relationship can make a truly equal collaboration more difficult. Therefore, public actors are increasingly looking for a more appropriate role in the implementation phase.

2.7 Coping with Conflicting Values

For public organizations, adhering to the collective of public values is key. Growing value pluralism, however, makes addressing public value while also managing values of external partners ever more challenging. Value conflicts can easily arise, as public values are not interchangeable, comparable, or even necessarily compatible with each other. Multiplicity in value systems could result in conflicts both within the public organization and between public, market, and societal stakeholders in the supply chain. The ‘public value balancing act’ is thus both relevant within the public buyer organization and in collaboration with other actors in the supply chain (Kuitert, 2021). Tensions between values can have positive and negative effects. There can be not only functional conflicts but also dysfunctional conflicts or constructive conflicts. Therefore, tensions are not necessarily a problem, except when they are mismanaged. True conflict only arises when a situation in which contradictory values converge is not properly managed.

The purpose of and necessity for balancing the different value systems in the internal and external supply chain is the creation and maintenance of sustainable value for the organization and its stakeholders, or in other words safeguarding public values (Kuitert et al., 2019; Too & Weaver, 2014). This section describes several ways of coping with these potential value conflicts by either reducing or engaging in the complexity that is caused by the value patterns in a public procurement organization and the procurement process.

Reducing or Engaging Complexity

How value pluralism is approached determines to a large extent how value conflicts are dealt with in terms of safeguarding public values. There are two main perspectives on value pluralism: (1) the more defensive reduction of complexity in values through rational-technical either/or trade-offs and (2) the more proactive approach to complexity with a both/and view (Kuitert, 2021; Schillemans & Twist, 2016; Thacher & Rein, 2004). This distinction relates to how decision-makers view the commensurability of values as depicted in Table 2.1.

The reducing complexity approach is based on the classical economic view and includes supporting a process whereby a single value system becomes dominant in an ‘either/or’ perspective. This is only possible when one believes that values can be commensurable. To justify their trade-offs in decision making, actors first identify the relative importance of each value, for example, social welfare, and then make a decision that maximizes the ‘master’ value, for example, by using cost-benefit and multi-criteria approaches (see also Chapter 6). This perspective is considered to be based on a very rational-technical and defensive attitude.

From an engaging with complexity view—originating from a social value view—public actors may consider trade-offs to be inevitable and impossible at the same time. This means that actors should embrace the conflicting nature of value, adopt a paradoxical view, and aim to optimize the balance between conflicting values. To adopt the incommensurable perspective on value pluralism, actors need to actively embrace conflict, accepting the co-existence of competing extremes by means of confrontation and transcendence. This means actively adopting a ‘both/and’ decision-making approach rather than an ‘either/or’ rational-technical decision approach.

Table 2.1 Overview of different approaches to the complexity of public procurement (Kuitert., 2021)

	Reducing complexity	Engaging with complexity
<i>View on value pluralism</i>		
Value chain perspective	Classical economic view	Social value view
View on value considerations	Commensurable	Incommensurable
Decision-making approach	Trade-off (either/or)	Paradoxical (both/and)
Attitude	Defensive	Active
<i>Dealing with value conflicts</i>		
Response strategies	Separation	Synthesis
Techniques	Decoupling and compromising	Encouraging and balancing
Coping strategies	Firewall (structural separation), Bias (favor through dominant discourse), Casuistry (taking a case-based approach), Cycling (sequential separation), Anchoring (resort to procedural means)	Hybridization (the result of the ability to actively—and even creatively—manage the complexity of the various logics)

From a reducing complexity perspective, public actors, when faced with value conflicts, are likely to either opt for decoupling or compromise when responding to value conflicts. Decoupling is the separation of conflicting elements, either in time—by first addressing one and then the other—or in space—by placing elements in different compartments. A public organization active in the construction industry can, for example, place procurement tasks in the spatial domain in two compartments: the development of new buildings or infrastructure assets into one compartment oriented at the engineering and larger construction market, and the maintenance and renovation into a more service management and facilities management compartment. Compromises in these activities can be made by setting minimum standards—think of CO₂-emission standards—adopting new behavior or by negotiating existing behavior. From a ‘both/and’ perspective which engages complexity, public actors can combine value systems by addressing conflicts and transcending them through synthesis. Actors are encouraged to weigh up for themselves how a new balance, not a compromise, can be found between the conflicting demands.

Timing and Level of Coping with Conflicting Values

Coping strategies are key organizational responses to value conflicts. The perspectives of reducing and engaging with complexity are not mutually exclusive and can be combined, but several questions emerge: Where in the organization and when do you deploy your actions? How can you make use of values that are around you when dealing with the relevant value conflicts? Considering both the procurement situation and the actors involved creates more flexibility in coping. By ‘changing’ the actors involved and/or the situation, the value dynamics also change, and other response strategies can be applied. For a more flexible approach when dealing with value conflicts important in complex dynamic environments, it is therefore important to look at ‘when’ or ‘by whom’ the coping should be deployed relative to when or where the conflict arose. Reacting directly to who is experiencing the conflict is not always the most effective way to deal with a value conflict as the conflict that occurs is dependent of the situation and the actors involved. For example, when applying for approval from a specific (internal) committee, one can approach this committee earlier in the process to make them aware of the initiative you are taking. One could also involve somebody in the project that is very experienced when it comes to the decision process of these kind of committees to be better prepared.

Different actors have different places in the network and are involved in different phases of delivering public service contracts. For example, administrators are more involved during the preparation phase, while project managers usually operate in the execution phase. These actors bring their own value palette, and the confluence of value palettes influences how a value trade-off or attempt at balancing occurs. For example, if there is a conflict between the value of sustainability and efficiency, efficiency will probably take precedence due to the strong influence of budgets. However, as coping is relative to where the conflict occurs in time, it is possible that at a later stage an actor becomes involved who places a higher value on sustainability or another value that supports sustainability, such as innovation. The balance

between values changes and therefore other considerations are made. This is called a coping pattern, such as ‘deferral,’ visualized in Figure 2.1.

Value dynamics change as the situation and the involved stakeholders change, and so does the way a value conflict is handled. A new coping pattern appears when one considers coping as relative to the conflict. In the context of construction procurement (Kuitert, 2021), four coping patterns have been identified on the temporal axis: Deferral, Prolongation, Anticipation, and Coincidence (see Table 2.2). Public buyers can leverage the time axis by bringing considerations forward (earlier, bringing forward) or pushing them back (later, push back). Deferral, a kind of postponement, is an example of a movement on the time axis that pushes back the action relative to the moment of potential conflict. Time may then solve the conflict due to external or internal factors, like the example in Figure 2.1 on sustainability, efficiency, and innovation. Prolongation refers to prolonging the involvement of certain actors in multiple phases of a procurement process. Intermediaries who perform boundary spanning activities is an example, while anticipation brings actions forward. This means that you could, for example, involve certain actors earlier in the process when there is still a lot of solution space to integrate their needs, so they won’t be resisting later in the process. An example is the involvement of an assessment body such as a tender board: although it holds a dominant position in the tender phase, in the preparatory phase where they are not formally responsible, they could be more inclined to think creatively, such as what values to include in the contract.

This same study (Kuitert, 2021) revealed four coping patterns at the spatial axis: Prevalence, Relegation, Aggravation, and Coincidence. The spatial axis can be exploited by escalating (top-down) or degrading (bottom-up). Prevalence uses hierarchy to cope top-down with conflicts that occur at lower hierarchical levels of the network or partnership. This is often seen as something bad, a last resort, or a form of escalation, but an alderman with a strong intrinsic motivation for certain values

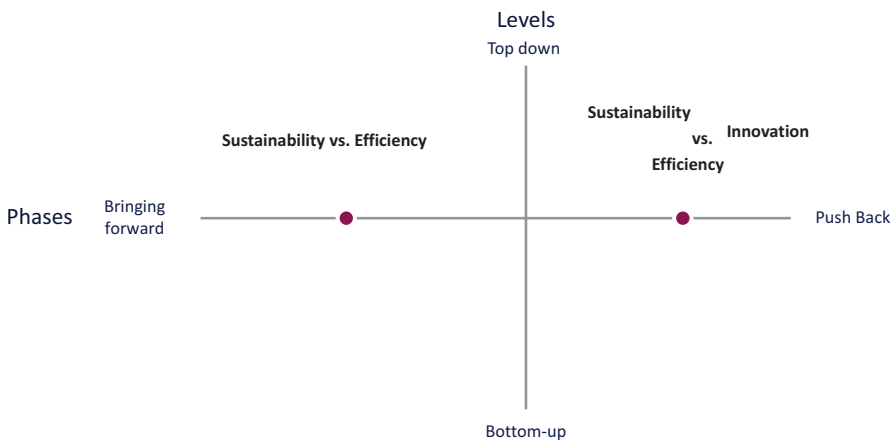


Figure 2.1 Values in relation to the Deferral coping pattern

Table 2.2 Coping patterns on the temporal and spatial axis

Coping pattern	Deferral	Prolongation	Anticipation	Prevalence	Relegation	Aggravation	Coincidence
Explanation of coping pattern	Deferral refers to situations where coping with conflicts is deferred and takes place at a later time and in another project phase than the one in which the conflict occurs.	Prolongation refers to situations where the coping takes place multiple times, spread over a longer period after the moment of the conflict, either within or across phases.	Anticipation refers to situations in which the coping takes place before the moment of conflict itself.	Prevalence refers to situations in which the coping takes place at a higher level than the one where the conflict has occurred.	Relegation refers to situations where the coping takes place at a lower level relative to where the conflict occurs	Aggravation refers to situations in which the coping occurs at the locus of the conflict while utilizing the value systems of higher network levels	Coincidence refers to the situation in which two groups of network actors work in parallel at the same network level to cope with value conflicts, regardless of where the conflict occurs
Direction	Push back 	Push back 	Bringing forward 	Top-down 	Bottom-up 	Bottom-up 	Parallel
Visualization of patterns X = conflict O = coping := phase transition							
Within/across	Across phases	Across and within phases	Across phases	Across network levels	Across network levels	Across network levels	Within phases and network levels
Response-strategy towards value pluralism	Postponement of trade-off	Engage	Engage	Reduce	Engage	Engage	Engage

could, for example, lead to a lot of institutional support for a project. With a bottom-up coping pattern, the coping is executed at a lower level than the conflict occurs. The use of pilots to step outside the system word and avoid bureaucratic conflicts in the case of relegation can be considered as such a bottom-up coping pattern. One can also cope with value conflicts at the same level at which the conflict occurs, for example, by using conditions and criteria for projects or subsidies for solar panels. This is called Aggravation, situations in which the coping occurs at the locus of the conflict while utilizing the value systems of higher network levels. Coincidence allows different actor groups to come together and run parallel trajectories. This makes uncommon collaborations possible and can both impact the temporal and the spatial axis.

Table 2.2 gives an overview of the different characteristics and a few examples per coping pattern.

Figure 2.2 shows how the different patterns are visible on the temporal and spatial axis of an organizational procurement situation. The ‘movements’ of the coping that these patterns represent, ‘when’ or ‘whom’ the coping (perspectives of reducing and engaging with complexity) should be deployed relative to when or where the conflict arose, provide public managers with flexibility in dealing with value conflicts. No size fits all, tailoring is needed. This tailoring can be done by changing the direction in time or space, moving across and/or within the phases or levels, and adopting different response strategies to value pluralism.

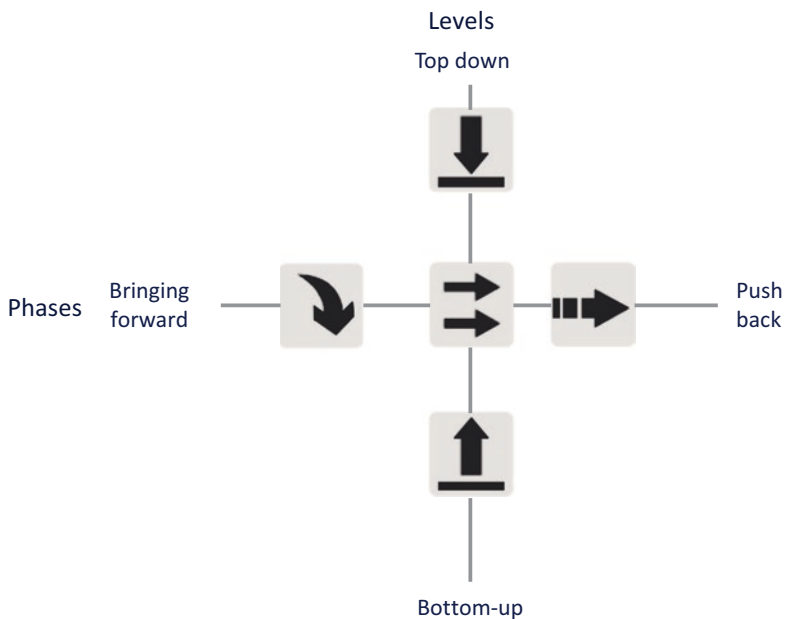


Figure 2.2 Coping patterns on the temporal and spatial axis

2.8 Summary

This chapter discussed the topic of public values in the context of public procurement. Public organizations increasingly operate in public-private partnerships and co-create value in networks. This makes public procurement a dynamic context in which public decision-making occurs even more complex. It is explained that values can be placed on a scale from public to private and that values are dynamic and have different interpretations depending on the situation, the context, and the actors that perceive them. Hence, public values are sector, culture, and time specific. The chapter explains that as society holds public organizations accountable for both the ‘means’ and the ‘ends’ in the process of delivering public values. They therefore need to account for the process, output, and outcome of procurement processes and consider procedural, performance, and product values when making decisions. This can cause value tensions, dilemmas, and conflicts. In the different phases of public procurement, value decisions are made that impact the way public buyers can steer or are dependent on private parties and other societal stakeholder to deliver public services. Safeguarding public values often becomes a balancing act because public organizations must act in an environment in which value pluralism causes conflict. Yet, this value pluralism is also part of the solution. Two different views on creating and capturing value represent different approaches toward complexity of value pluralism: (1) the more defensive reduction of complexity in values through rational-technical either/or trade-offs and (2) the more proactive approach to complexity by engaging with complexity based on a both/and view. This chapter concludes that depending on where a conflict arises in the phase of public service delivery or the level of the project or service that needs to be procured, different coping patterns can be formed.

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Public Procurement Law in the European Union

3

Willem A. Janssen

Abstract

This chapter discusses EU public procurement law. Public authorities in the European Union must comply with the rules of European public procurement law when purchasing works, supplies, or services on the market. Being able to maneuver swiftly within the legal scope of these rules is of utmost importance because it enables professionals in the public procurement context to make purchasing decisions in compliance with the law and its objectives. These rules often allow for, or even stimulate, efficient and effective procurement in line with a public organization's objectives and tasks. Particular attention is, therefore, paid in this chapter to how the law allows for sustainable and social public procurement. This type of legal knowledge is necessary for public procurement to be able to contribute to solving societal challenges, such as climate change and social injustice. Accordingly, the aim of this chapter is to provide an understanding of EU public procurement law by delving into its objective, sources of law and the legal principles. The scope of these rules is also discussed and some of the most prominent aspects of the procedural rules are highlighted considering sustainability and social objectives. Finally, this chapter describes the remedies for aggrieved bidders to gain legal protection.

Keywords

EU public procurement law · Principles · Sources of law · Equality · Transparency · Proportionality · Procedures · Legal protection

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Learning Objectives

After studying this chapter, the reader will be able to:

- Understand the roots, objective(s), and sources of EU public procurement law.
- Explain the importance and role of legal principles.
- Understand the law's scope and know when it applies.
- Explain the legal possibilities to purchase sustainable and social outcomes.
- Understand the remedies for aggrieved bidders to gain legal protection.

3.1 Introduction

Public authorities in the European Union ('EU') must comply with the rules of EU public procurement law when purchasing works, supplies, or services on the market. Being able to maneuver swiftly within the legal scope of these rules is of utmost importance because it enables professionals in the public procurement context to make purchasing decisions in compliance with the law and its objectives. These rules often allow for, or even stimulate, efficient and effective procurement in line with a public organization's objectives and tasks. Particular attention is, therefore, paid in this chapter to how the law allows for sustainable and social public procurement. This type of legal knowledge is necessary for public procurement to be able to contribute to solving societal challenges, such as climate change and social injustice.

Accordingly, the aim of this chapter is to provide an understanding of EU public procurement law by delving into its objective in Section 3.2, sources of law in Section 3.3, and the legal principles in Section 3.4. The scope of these rules is discussed in Section 3.5 and some of the most prominent aspects of the procedural rules are highlighted considering sustainability and social objectives in Section 3.6. Section 3.7 describes the remedies for aggrieved bidders to gain legal protection.

3.2 Public Procurement Rules: The Internal Market and Discrimination Law

EU public procurement law finds its roots in the EU's ambition to establish an internal market, which broadly stated is aimed at contributing to peace and prosperity in the EU. Since the 1970s, these rules aim to create an internal market for public procurement by breaking down barriers to trade between the Member States of the EU. The enactment of specific legislation on public procurement has, thus, focused on banning protectionist decisions of public authorities. These authorities could

prefer to award a contract to their own national, regional, or local bidders instead of their foreign counterparts (Arrowsmith, 2014). Furthermore, the objectives of national public procurement laws in the EU Member States are often more extensive and include the fight against corruption through procurement procedures by making public spending transparent and a focus on achieving best value for taxpayer's money through the competitive process. Given the fact that EU law always has supremacy over national law, however, these national objectives and rules cannot obstruct the application of EU law and, thus, the creation of the internal market. The same is true for the individual objectives that a public organization has identified for a specific public procurement procedure. Accordingly, stimulating the local economy by awarding a contract to a local market participant instead of allowing foreign bidders to participate in a procedure is generally not allowed.

3.3 The Sources of EU Public Procurement Law

To understand EU public procurement law means initially recognizing the layered nature of the law. It means that it is important to understand that international law including the Government Procurement Agreement ('GPA') that applies to situations in which market participants from outside of the EU wish to gain access to a European public procurement procedure, European law including primary, secondary, and tertiary law, and national procurement laws on the EU Member State level are of importance, see Figure 3.1. In this, the EU level of law is discussed. On this level of law, the hierarchy of legal sources is relevant to understand which level of law is more important when applying and interpreting legal questions. For instance, primary law precedes secondary law, and the former is, thus, of a higher hierarchy.



Figure 3.1 Applicability of EU public procurement law

Primary and Secondary Law: Treaties and Directives

Within the EU context, the European Treaties provide the primary law obligations for public procurement in the form of the free movement rules, which are included in articles 34 (supplies), 49 (establishment), and 56 (services) Treaty on the Functioning of the European Union (TFEU). Their objective is the establishment of an internal market in general. However, the most important set of public procurement rules is found in secondary law in the 2014 Public Procurement Directives on public procurement, including Directives on public contracts (2014/23/EU), on concession contracts (2014/25/EU), and on contracts awarded by entities operating in the water, energy, transport, and postal services sectors (2014/25/EU). These Directives can be seen as a further explication of the more general and before mentioned free movement rules. Accordingly, directives must be implemented into the national public procurement laws of the EU Member States. National legislatures are obligated to implement them in their civil or administrative procedural systems and also to add their own rules as long as this does not conflict with the EU law obligations.

The Directive on public contracts, which takes central stage in this chapter, contains a substantial set of procedural obligations for public authorities. The most recent reform of this Directive has showcased the strongest will of the EU legislature to also provide legal possibilities to include social and sustainable objectives in public procurement procedures. In the years prior to 2014, the legislature placed inclusive and sustainable growth at the forefront of the EU's Europe 2020 agenda and put public procurement and the law in the spotlight as one of its main drivers given its substantial economic impact on 14–19% of the EU GDP. This has resulted in many additional and clarified possibilities to include such objectives, such as the possibility to use labels (art. 43) and to award contracts based on the lowest life cycle costs (art. 68), discussed below. Though, in general the Directive does not regulate 'what' contracting authorities procure, but only 'how' they procure. In addition, the law does not contain an obligation to contract out or to liberalize sectors, meaning that contracting authorities can always (jointly) perform tasks with their own financial means and based on their own organizational structures (CJEU, C-26/03, *Stadt Halle*).

EU Thresholds and Cross-Border Interest

The Directive on public contracts, however, only applies if the relevant financial thresholds for either works, supplies, or services are met, which are published by the EU Commission every two years (art. 4 Directive on public contracts). Below these thresholds, national public procurement law or a public organization's own public procurement policy can still be applicable to a public procurement procedure. Noteworthy is the fact that the free movement rules can also apply to procurements below the thresholds if the relevant procurement has a 'cross-border interest', which existence is assessed based on the procurement's technical specifications, the

value of the contract, and the location of the performance of the contract (CJEU, C-147/06, *SECAP*). This means, for instance, that the principles of equality and transparency still apply, which are discussed in Section 3.4.

In addition to the financial thresholds, the Directive on public contracts only applies if it concerns ‘procurement’, which is defined as ‘*the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose*’ (art. 2 Directive on public contracts). Contrarily, if it concerns the sales of governmental buildings or the auctioning of shares in former state-owned entities, the Directive on public contracts does not apply, but the free movement rules can again still be applicable (CJEU, C-145/08, *Club Hotel Loutraki*). Figure 3.1 shows the different levels of applicability of law.

Tertiary Law

As a tertiary source of law, jurisprudence by the Court of Justice of the European Union (‘CJEU’, ‘Court’) and soft-law instruments by the European institutions must be mentioned. The CJEU has the final word on the interpretation of EU law (art. 267 TFEU), which means, for instance, that legal uncertainty caused by the wording of primary or secondary law can be resolved through its case-law. The Court often relies on a teleological (also referred to as ‘functional’) interpretation of EU law, which means that it uses the objective of EU public procurement law—the creation of an internal market for public procurement—to decide how a specific concept should be interpreted. It means that concepts that define the scope of public procurement law, such as contracting authority or public contract (see Section 3.5), must be interpreted broadly. Exemptions must, contrarily, be interpreted narrowly (CJEU, *Teckal*). Notably, a judgment of the Court applies in all of the EU Member States after publication, making it a rich source of public procurement law even though the legal questions are derived from the legal proceedings in one Member State. Finally, soft-law instruments, often published by the European Commission, are also seen as an authoritative source to interpret the law, but are not generally legally binding, even though debate exists if they are indeed not binding as well. Examples of soft-law in the public procurement context are the EU Commission’s Communication on using the public procurement framework in the emergency situations related to the COVID-19 crisis 2020 or the EU Commission’s Staff working paper on public-public cooperation 2011.

3.4 The Foundation of the Law: The Public Procurement Principles

The foundations of EU public procurement law are built on the principles of equality, non-discrimination, transparency, and proportionality. Codifying a long line of case-law stemming from the CJEU, article 18(1) Directive on public contracts

obliges contracting authorities to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. Furthermore, this provision clearly states that the design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. It has been debated in the literature if ‘competition’ as such is also a principle of EU public procurement law (Sanchez-Graells, 2015). The specific rules on public procurement, such as those related to announcements, award criteria, and exclusion grounds, can be derived from these principles. Understanding these principles, thus, provides a basis to better understand the more specific rules on public procurement, without having to discuss the entire body of rules in this chapter.

In the following sections, the scope and content of the principles of EU public procurement law are subsequently discussed, namely, equality and non-discrimination, transparency, and proportionality.

Equality and Non-discrimination

In the public procurement context, equality intends to prevent prejudice of (groups of) economic operators, distinctions made based on nationality or preferential treatment of (groups of) tenderers in general. It means that similar situations must not be treated differently without any objective justification. As a specification of equality, the principle of non-discrimination requires that discrimination based on nationality is forbidden. Prior to the introduction of this principle in the Directive on public contracts, the CJEU concluded in 1993: ‘On this issue, it need only be observed that, although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured’ (CJEU, C-243/89, *Commission/Denmark*, par. 33).

In its 2004 milestone case of *Succhi di Frutta*, a case that is nearly relevant for all public procurement issues, the CJEU even went further in its conclusions. The Court stated that ‘under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions’ (CJEU, C-496/99, *Succhi di Frutta*, par. 110). As such, the principle of equality means that contracting authorities in general must ensure a ‘fair’ public procurement process. It means that all interested economic operators are subjected to the same competitive conditions in a procedure, meaning that modifications of criteria or bids during a procedure must be met with hesitation (art. 72 Directive on public contracts).

Transparency

The principle of transparency must be read considering the principle of equality. Without transparency, equality is seemingly impossible to achieve. The CJEU concluded in 2003 by stating that ‘in that context the Court noted that, in accordance with established case-law, in light of the dual purpose of opening up competition and of transparency pursued by the Directive, that concept must be given an interpretation as functional as it is broad’ (CJEU, C-283/00, *Commission/Spain*, par. 48–52). Accordingly, transparency supports the creation of a system of openness, which will lead to increased accountability and prevention of discrimination based on nationality. It is also deemed necessary for the fight against corruption or to prevent any form of conflict of interest (CJEU, C-496/99, *Succhi di Frutta*). The principle of transparency in the public procurement context has been identified to uphold two purposes, which were identified by the Court in *Telaustria* (C-324/98) in 2002: ‘That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed’ (par. 62). The objective of this twofold purpose is to preclude any risk of favoritism or arbitrariness on the part of the contracting authority. Consequently, this principle requires that ‘all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents’. This must be done in such a way that ‘all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way’ and so that ‘the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract’ (CJEU, C-496/99, *Succhi di Frutta*, par. 111). This implies that all criteria and conditions of a public procurement procedure must be set in a clear, precise, and unambiguous way, but it also means that economic operators need to be reasonably informed. For instance, from the perspective of transparency, it means that contracting authorities are required to publicly announce a procedure and to include, among other things, the award criteria and the relative weighting given to each of those criteria.

Proportionality

Within EU law, the proportionality principle as a general principle of law means that, among other things, the actions of the EU shall not go beyond what is necessary to achieve the objectives of the Treaties (article 5 TFEU). More specifically, the principle of proportionality requires in the public procurement context that all conditions and criteria must be proportionate and reasonable in relation to this subject matter of a contract (the so-called link to the subject matter of the contract). Consequently, this principle is relevant in relation to the exclusion grounds, the award criteria, the selection criteria, and the number of criteria. It means that, for example, asking for a bank guarantee of one million euros for a public service

contract of 75,000 euros without any significant risks would seem disproportionate. It also means that criteria related to the general business operations of a bidder, including Corporate Social Responsibility policies, are not allowed. Similarly, it seems that a requirement to perform a contract for 100% by long-term unemployed persons would also be disproportionate (CJEU, C-31/87, *Beentjes*). Also, for instance, award criteria are perceived to be connected to the subject matter of the public contract where they concern the works, supplies, or services to be provided under that contract in any respect and at any stage of their life cycle.

3.5 The Scope of EU Public Procurement Law

In general, EU public procurement law applies if the public organization awarding the contract is a ‘contracting authority’, and if the contract qualifies as a ‘public contract’, unless an exemption is applicable.

Who Must Follow the Rules: Contracting Authorities

The concept of ‘contracting authority’ refers to the state, a regional or local authority, a body governed by public law, or an association formed by one or more such authorities or one or more such bodies governed by public law (art. 2(1) sub 1 Directive on public contracts). Depending on the national governmental organization, this means that municipalities, provinces, autonomous regions, directorates, and ministries are often undisputedly under a duty to tender. In the *Beentjes* case of 1988 (C-31/87), the CJEU decided that the State is a functional concept, meaning that the Court considers generally if the composition of an entity, assigned tasks, and dependency on other authorities to decide if an entity is a contracting authority. In this light, much more debate has taken place before the CJEU about the interpretation of the concept of a ‘body governed by public law’. The latter is defined as a body that (1) ‘[is] established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character’, (2) ‘[has] legal personality’, and (3a) ‘[is] financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; (3b) or are subject to management supervision by those authorities or bodies; or (3c) have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law’ (art. 2(1) sub 4 Directive on public contracts). The first two criteria are cumulative, whereas the third is alternative in which all three options aim to establish that a dependency relationship exists between the body governed by public law and the involved authorities.

An extensive line of case-law before the CJEU has provided insights into how the criteria of a body governed by public law must be interpreted. There is, for example, no definition of ‘needs in the general interest, not having an industrial or commercial character’, but the Court has provided insights into what is relevant

when considering this concept. It is irrelevant if an entity is set up as an entity under public or private law (CJEU, C-470/99, *Universale Bau*). Also, if market parties do not provide a need in the general interest on the market, this is an indication that it concerns a ‘needs in the general interest, not having an industrial or commercial character’ (CJEU, C-18/01, *Korhonen*). Contrarily, if there is strong competition on the market, the opposite conclusion can be drawn. As the Directive on public contracts summarizes: ‘A body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a “body governed by public law” since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character’ (Recital nr. 10 Directive on public contracts).

The provision of commercial activities on the market in addition to tasks in the general interest do not make it impossible for a contracting authority to exist (CJEU, C-411/04, *Mannesmann*). When it comes to the phrase ‘for the most part’, it refers to more than half (CJEU, 337/06, *Bayerische Rundfunk*). In addition, not all payments result in a dependency relationship and only include those that are granted without the need to fulfill a specific contractual requirement (CJEU, C-316/18, *Cambridge*). Finally, supervision means that the involved authorities can influence the decision-making of a body governed by public law but that supervision after such decision-making (ex post) is insufficient to speak of supervision (CJEU, C-373/00, *Truley*). Contrarily, incidental supervision as opposed to continuous supervision can still lead to sufficient supervision in the end (CJEU, C-237/99, *French Social Housing Corporations*).

What Objects Are Subjected to the Rules: Public Contracts

Contractual agreements that fulfill the requirements of a ‘public contract’ are under a duty to tender. A ‘public contract’ is a contract ‘for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services’ (art. 2(1) sub 5 Directive on public contracts). Public contracts can, thus, be subdivided into ‘public works contracts’, ‘public supply contracts’, and ‘public service contracts’. Accordingly, it means that a public contract when (1) it concerns a written agreement between one or more economic operators and one or more contracting authorities must be concluded, (2) a selection has been made by the contracting authority (CJEU, C-9/17, *Tirkkonen*), (3) it concerns a contract for pecuniary interest. The CJEU has clarified that a ‘contract for pecuniary interest’ means that the ‘contracting authority which has concluded a public works contract receives a service pursuant to that contract in return for consideration’ (CJEU, C-451/08, *Helmut Müller*, par. 48). In this light, ‘consideration’ is interpreted broadly and can also include tax benefits or accrued rights. In this light, it must also be noted that such a contract can come in the form of a framework agreement (art. 33 Directive on public procurement).

A public contract differs from a concession contract, which is regulated by the Directive on concession contracts. The latter concerns ‘a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment’ (art. 5(1) Directive on concession contracts). Accordingly, the award of a works or services concession covers the transfer of an operating risk in the exploitation of those works and services, enclosing demand, or supply risk or both (CJEU, C-206/08, *Eurawasser*). Finally, the concept of economic operator with which a contract is closed is interpreted broadly and includes ‘any natural or legal person or public entity’ (art. 2(1)(10) Directive on public contracts) (Manunza & Meershoek, 2020).

Exemptions from the Duty to Tender

Even though a public contract might be under a duty to tender by a contracting authority, the Directive on public contracts contains various exemptions, which mean that a direct award can take place. Noteworthy are, among others, the exemptions for public contracts awarded and design contests organized pursuant to international rules (art. 9 Directive on public contracts) and specific exclusions for service contracts (art. 10 Directive on public contracts). Of particular relevance are also the exemptions for contracts awarded between public authorities, which have been subjected to much debate (Janssen, 2018; Manunza & Meershoek, 2020). The exclusive right exemption allows for such cooperation without the need for a public procurement procedure. In this case, it concerns service contracts awarded to a contracting authority that has been granted an exclusive right and is therefore the only operator allowed to perform the contract (art. 11 Directive on public contracts, CJEU, C-220/06, *Correos*).

Gaining importance in practice is the exemption for public contracts awarded to a separate legal entity, which is controlled by the awarding contracting authority and can also be exempted. This separate legal entity then also needs to perform 80% of its turnover for the controlling contracting authority (art. 12 Directive on public contracts, CJEU, C-107/98, *Teckal*). Finally, contractual cooperation between contracting authorities—instead of with a separate legal entity—can also be exempted if it, among other criteria, ‘establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common’ (art. 12 Directive on public contracts). It is clear that a cooperation for waste collection would fall under this exemption (CJEU, C-480/06, *Commission/Germany*), whereas it is debated if back-office services such as IT and HR services would as well (CJEU, C-796/18, *Stadt Köln*).

3.6 Legal Possibilities to Enable Sustainable and Social Purchasing

If a public contract needs to be awarded in compliance with EU public procurement law, a contracting authority could award this contract with the objective of achieving a sustainable and social outcome (Sjåfjell & Wiesbrock, 2016). In the following sections, the more specific rules for public procurement procedures are discussed in this light. The leitmotiv of this discussion is found in the legal possibilities to include these sustainable objectives (Arrowsmith & Kunzlik, 2009) and social objectives (McCrudden, 2007) in such a procedure. Relevant in this non-exhaustive overview are at least market consultations, the procedures and reserved procedures, the technical specifications and labels, exclusion, award criteria, and contractual conditions.

Market Consultations

Market consultations can be useful to explore what is on offer on the market prior to the start of a public procurement procedure. This is particularly relevant for contracting authorities that are unaware of the market structure or for those authorities that are unsure what type of providers, such as social enterprises or SMEs to aim to provide sustainable or social outcomes, are active on the market. Article 40 Directive on public contracts explicitly provides for this possibility but leaves open how these consultations are organized. To organize these consultations, contracting authorities may seek advice from independent experts or market participants. This advice may be used in the planning and conduct of the procurement procedure. However, it may not have the effect of distorting competition and cannot result in a violation of the principles of non-discrimination and transparency by offering a competitive advantage to the involved parties.

Procedures and Reserved Procedures

The Directive on public contracts contain various types of procedures. Noteworthy are the competitive procedure with negotiation (art. 26(4) and 29 Directive on public contracts), the open procedure (art. 27 Directive on public contracts), the restricted procedure (art. 28 Directive on public contracts), the competitive dialogue (art. 30 Directive on public contracts), and the innovation partnership (art. 31 Directive on public contracts) or the negotiated procedure without prior publication (art. 31 Directive on public contracts).

Each procedure has its own procedural requirements, in which differences can at least be found in (1) the length of a procedure in terms of time limits, (2) the various selection and evaluation phases that are applied, and (3) the amount of negotiation that can take place with economic operators or involvement of the contracting authority. To exemplify the first and the second points, for instance, an open procedure is characterized by the possibility for interested economic operators to submit

a tender in response to a call for competition, and the minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent. Contrarily, a selection takes place prior to the evaluation in restricted procedures, meaning that ‘any economic operator may submit a request to participate in response to a call for competition containing the information’ and contracting entities may limit the number of suitable candidates to be invited to participate in the procedure. In relation to the second point, solutions that are not readily available ‘off the shelf’ can be procured via a competitive dialogue or an innovation partnership, given that these procedures allow for involvement of the contracting authority in the development phase of a product. Alternatively, if there can be no competition given that only one economic operator can provide a solution, then the negotiated procedure without prior publication can be used.

Should contracting authorities wish to award public contracts to sheltered workshops or to social enterprises, the so-called reserved procedures can be useful, because contracting authorities can reserve the right to participate in such a procedure. These procedures are only available if the national legislature has decided to implement them in national law (optional implementation). The first reserved procedure allows a contracting authority to organize a procedure for sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons (art. 20 Directive on public contracts). An important legal requirement is that at least 30% of the employees of those workshops, economic operators, or programs are disabled or disadvantaged workers, which categories can be further filled in by national law.

The second reserved procedure allows a contracting authority to limit participation to social enterprises in the field of health, social, and cultural services (art. 77 Directive on public contracts). These entities must, among other things, have their objective in the pursuit of a public service mission, reinvest their profits with a view to achieving the organization’s objective, and have its structures of management or ownership based on employee ownership or participatory principles, or require the active participation of employees, users, or stakeholders. The idea behind these procedures is that these market participants would otherwise struggle to compete in a ‘normal’ procedure and allows a contracting authority to specifically stimulate these entities on the market.

Technical Specifications and Labels

The technical specifications lay down the characteristics required of a work, supply, or service and/or thus allow a contracting authority to focus on sustainability aspects (art. 42 Directive on public contracts). Accordingly, these specifications must allow for access of economic operators to a procurement procedure and are not allowed, for instance, to ensure that only a single market participant can participate. To simplify this process, contracting authorities often refer to a label in a public

procurement procedure to stimulate social and sustainable purchasing. Examples of these labels are ISO certificates, such as ISO9001 and ISO14001, or sector-specific labels, such as FSC for sustainable wood and Cradle-to-Cradle certification for circular construction. From a legal perspective, it is important that the specific requirements of a label are linked to the subject matter of the contract, such as the description of the product and its presentation (art. 43 Directive on public contracts, also see Sect. 3.3 on proportionality). Furthermore, the requirements of the label must be drawn up based on objectively verifiable criteria, using a procedure in which stakeholders in a sector can participate. Accordingly, the label must be accessible and available to all interested parties. To ensure flexibility, however, contracting authorities should always allow for alternatives that fulfill the same requirements instead of the label itself (CJEU, C-368/10, *Max Havelaar*). Consequently, contracting authorities are not allowed to require economic operators to have adopted a certain corporate social or environmental responsibility policy, because this concerns the general functioning of a participant instead of their bid in a procedure.

Exclusion Grounds

There are obligatory exclusion grounds and facultative exclusion grounds (art. 57 Directive on public contracts). Obligatory grounds must always be applied a public procurement procedure. This exhaustive list includes among other things participation in a criminal organization and bribery. In terms of social public procurement, reference is also made to exclusion for the use of child labor and other forms of trafficking in human beings, and an economic operator must also be excluded if it fails to fulfill its obligations relating to the payment of taxes or social security contributions. These matters must be established by a judicial or administrative decision that is final and binding in accordance with the legal provisions of the country in which it is established or of the Member State of the contracting authority. The list of facultative grounds, which can be applied per specific public procurement procedure, is also found in article 57 Directive on public contracts. This exhaustive list includes conflicts of interest and grave professional misconduct (CJEU, C-465/11, *Forposta*). From a social and sustainable procurement perspective, an economic operator may be excluded if this entity has violated environmental, social, and/or labor laws enshrined in article 18(2) Directive on public contracts. When applying optional exclusion grounds, contracting authorities should pay particular attention to the principle of proportionality (CJEU, C-171/05, *Connexion*), meaning that automatic exclusions are not permitted (CJEU, C-395/18, *Tim*). Contracting authorities may refrain from compulsory exclusion where it is justified by overriding reasons relating to the public interest, such as public health or the protection of the environment (art. 57 Directive on public contracts). Bidders must also be able to 'self-clean' any offences falling under this category of exclusion grounds to gain a second chance to participate if justified (sub 6).

Award Criteria: Sustainability and Social Criteria and Life Cycle Costing

Award criteria are in a prominent position to include sustainability and social considerations. According to the law, the award of public contracts shall be based on the most economically advantageous tender (art. 67 Directive on public contracts). This is based on the price or cost by using a cost-effectiveness approach such as life cycle costing and may also comprise the best price-quality ratio that must be assessed based on criteria, including qualitative, environmental, and/or social considerations. These criteria may include, for example, quality, the organization, qualification, and experience of staff assigned to performing the contract, or after-sales service and technical assistance, delivery conditions such as delivery date, delivery process, and delivery period or period of completion. Recital nr. 92 Directive on public contracts clarifies that the list mentioned in article 67 is not exhaustive.

Most interestingly for sustainability and social purposes is the use of the lowest life cycle costs (Andhov et al., 2021). Article 68 states that these costs include two categories, namely, (a) costs such as acquisition costs, cost of use such as energy costs, maintenance costs, and end-of-life costs, and (b) costs linked to environmental externalities related to the work, supply, or services during its life cycle such as the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs. Calculation methods must, among other things, be based on verifiable and non-discriminatory criteria and be accessible to all interested parties. To stimulate the lack of life cycle costing, the EU Commission has introduced non-obligatory calculation methods for, for example, vending machines, computers, and indoor lighting.

Example 3.1. Contracting Authorities and Award Criteria

Contracting authorities are currently exploring the use of lowest life cycle costing in their award criteria. This is then preferred over awarding contracts based on lowest price or a best price-quality ratio, because these criteria do not consider environmental externalities. It means that when procuring clothing for the fire department also damage to the environment or mitigation costs thereof during the production phase can be included or that the use of power and the impact on the environment of ICT data centers are also part of the cost calculation and subsequent comparison.

Contractual Conditions

As a closing piece, contract conditions are also a suitable place to include sustainability and social considerations. Article 70 Directive 2014/24/EU states that contracting authorities may lay down these conditions relating to the performance of the contract. These conditions must be linked to the subject matter of the contract

Table 3.1 Overview of relevant legal articles for sustainable and social procurement

Phases of a public procurement procedure	Opportunity to include sustainable and social objectives	Relevant articles in Directive on public contracts
Market consultations	Search for market participants offering sustainable and social solutions or test the suitability of a procedure	Art. 40
Division into lots	Provide opportunities for SMEs offering sustainable and social solutions	Art. 46
Procedures	Choose a specific procedure that is suitable for the required outcome	Art. 26–31
Reserved procedures	Reserve the procedure to sheltered workshops or social enterprises	Art. 20 and 77
Exclusion grounds	Exclude market participants that have violated labor and environmental laws	Art. 57
Technical specifications and labels	Specify the required level of sustainability or social standard or use a label for this purpose	Art. 43 and 45
Selection criteria	Select market participants that fulfill the set requirements in the selection phase	Art. 58
Award criteria	Give sustainability or social considerations a (significant) place in the MEAT criteria and/or use life cycle costing	Art. 67
Contractual conditions	Include contractual conditions related to the sustainable and social performance of the contract	Art. 70

and included in the call for competition or in the procurement documents. This article even explicitly mentions that these criteria may include economic, innovation-related, environmental, social, or employment-related considerations. This is summarized in Table 3.1.

3.7 Remedies for Aggrieved Bidders

Aggrieved bidders that deem that a violation of EU public procurement law has taken place can attempt to act against the involved contracting authority in multiple ways. The remedies that are available depend on how legal protection for bidders is organized on the national level in their respective procedural laws, because EU law must respect the procedural autonomy of the Member States. In general, however, there are at least three options: to file proceeding at a national court, to ask preliminary questions by the national court to the CJEU, or to file a complaint at the EU Commission.

The Procedure at a National Court

On the national level, different legal traditions exist when it comes to public procurement law. Depending on the Member State, it can mean that either an administrative court, a civil court, or a specifically assigned tribunal or review board, or a selection of them, is competent to hear public procurement cases. Irrespective of this national forum choice, a claim must initially be filed before a district court in most instances, but national law may depict that a complaint must initially be made at the involved contracting authority. Depending on the system, a summary proceeding can be used in situations where urgency is required, whereas more in-depth legal issues might make a 'normal' proceeding necessary. Subsequent appeals can be made at the competent national court or supreme/high court, which in turn depends on how such appeals are structured on the national level.

Even though national procedural differences may exist, the Remedies Directive (89/665/EEC) provides the European rules for national proceedings in the public procurement context. For instance, this Directive requires a minimum ten-day standstill period after the award of the contract (art. 2a and 2b) and the completion of the public contract. Additionally, this Directive requires all participating economic operators to be informed about the outcome of the procedure. Moreover, this Directive contains provisions relating to interim measures, setting aside decisions that have been taken unlawfully, and the award of damages (art. 2). This Directive must be implemented into the national system of legal protection.

The Preliminary Procedure at the CJEU

If a question on the interpretation of EU law arises during a national proceeding, a national court can pose preliminary questions to the CJEU (art. 267 TFEU). In some instances, such as if this question arises at a court of last instance after which no appeal is possible, the court must pose these questions (CJEU, C-283/81, *CILFIT*). Following proceedings before the CJEU, the national court receives an answer to its question(s). Subsequently, the national court decides on the dispute at hand. Accordingly, it is not possible for aggrieved bidders to pose these questions themselves to the CJEU. Direct access to the CJEU is only possible in very limited number of situations, which do not appear likely in the traditional public procurement law context (art. 263 TFEU).

The Infringement Procedure at the EU Commission

Finally, aggrieved bidders can file a complaint at the EU Commission, claiming that EU law has been violated by a contracting authority. The Commission is not obliged to follow up all complaints and is allowed to set enforcement priorities. Should the Commission decide to initiate proceedings, it means that it can conclude that the involved Member State does not comply with EU public procurement law. If the

Member State does not change its standpoint after a formal notice, then the Commission can file an infringement procedure at the CJEU in which the Court has again the final say on the interpretation of EU public procurement law (art. 258 TFEU). In the unlikely event that a Member State refuses to comply with this judgment, the Commission can re-file proceedings and financial penalties can be imposed (art. 260 TFEU).

3.8 Summary

In this chapter, EU public procurement law has been introduced as a field of internal market law. Aiming to provide an understanding of this field of law, it is considered that, when a ‘contracting authority’ awards a ‘public contract’, and no exemption applies, these rules, vested in primary, secondary, and tertiary law, are applicable. It means that the principles of equality, non-discrimination, transparency, and proportionality and, most importantly, the Directive on public procurement provide the legal boundaries for a public procurement procedure. While discussing some of the more substantive rules of public procurement, it is argued that the procedural obligations allow for discretion of a contracting authority to procure works, supplies, and services in line with sustainable and social objectives on the market. Hence, the law contains a variety of legal possibilities to not only fulfill the initial need of a contracting authority, but also aid the fight against climate change and social injustice.

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Organizing Public Procurement

4

Fredo Schotanus

Abstract

This chapter introduces organizational structures for public procurement and explains that the procurement function of any organization is broad and involves more than the procurement department. It discusses several options that public organizations have for organizing their procurement function, depending on their maturity and organizational coherence. For example, coordinated purchasing is a common organizational form for small public organizations, whereas center-led purchasing might be more suited for larger public organizations. Both forms can facilitate the transition to sustainable and social public procurement, using among other things a central sustainable procurement policy and guidelines, offering resources, and sharing best practices. This chapter ends by zooming in on joint procurement as a specific organizational form for cooperating public organizations. It presents four types of joint procurement (Hitchhiking, Bus Ride, Carpooling, Convoy, and Formula 1 Team) and explains that simple forms of joint procurement can be used for commodities and simple or non-emotional tenders and more intensive forms of joint procurement are more suitable for complex tenders.

Keywords

Procurement organization structures · Procurement department · Coordinated purchasing · Center-led purchasing · Joint procurement structures · Economies of scale

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Learning Objectives

After studying this chapter, the reader will be able to:

- Understand what the difference is between the purchasing function and the procurement department of a public organization.
- Understand the link between (inter)organizational structures and economies of scale, process, and knowledge.
- Explain in which situations different organizational structures for procurement are most suitable for a public organization.
- Understand the advantages, disadvantages, and obstacles of joint procurement.

4.1 Introduction

Due to the large financial impact and potential value of public procurement, the procurement function is an important function for many public organizations. It is, however, also a complex function. On the one hand, there are procurement-specific issues that relate to public value, legal, economic, and accountability characteristics, or technical reasons that lead to this complexity. On the other hand, there are organizational issues, such as many public officers and external parties involved with public procurement in different roles (e.g., director, budget holder, user, advisor, sustainability officer, accountant, contract manager). Because of this, public organizations must develop formal and regulated purchasing and contract management processes and procedures to ensure basic procurement values such as equality, non-discrimination, transparency, proportionality, and value for money (Harland et al., 2019).

Many public organizations have a procurement department to support purchasing and contract management processes within their organization. How this department is organized can vary considerably. It can be positioned close to general management or 'deeper down' in the organization, as a staffed department or integrated in other departments (Telgen, 2003). A procurement department can be involved in the organization in different ways: strategically alongside management looking at how to improve the organizational processes, tactically by thinking about strategic tendering processes, and operationally in relation to the processing of orders.

The coming years, the usage of joint procurement is likely to increase since it can offer the required scale, capacity, and knowledge for purchasing sustainable innovations related to the societal challenges we currently face. In addition, the concept is useful in times of crisis to prevent unwanted competition between EU Member States and to coordinate supply. For large investments in defense and security, it can also help to facilitate research and development and synchronize military equipment throughout EU Member States and other countries to promote operational effectiveness.

This chapter focuses on organizational aspects that are specific for public procurement. General organizational management aspects are out of scope. In this chapter, it is first explained what organizational procurement structures are available for public organizations. Next, a specific form of organizing public procurement is introduced, namely, joint procurement. In this specific form, procurement is organized jointly between two or more independent public organizations. This chapter concludes with an explanation for which situations, and for what types of works, supplies, or services, different forms of joint procurement are most suitable.

4.2 Purchasing Organization Structures

Organizational structure is a way in which responsibility and power are allocated and work procedures and control are carried out in an organization (Tran & Tian, 2013). Organizational structures consist of several elements, including the level of centralization, formalization, specialization, departmentalization, and the number of hierarchal levels. Formalization refers to the extent to which written rules and regulations are used in an organization. Higher levels of formalization are common for public procurement-related processes. Specialization refers to the extent in which jobs are specialized. For instance, a procurement department can have several general procurement professionals or procurement professionals who specialize in different markets. The number of hierarchal levels refers to vertical differentiation of an organization. There can be a short or long chain of command. Departmentalization refers to the way departments are structured (e.g., functional, process, buyer focused, geographical, or combinations).

The most studied organizational structure element is the level of centralization (Zheng et al., 2010). A central position will make it easier to gather information, to define a joint approach, to use one infrastructure, to make everyone buy from the same supplier, and to keep control. A decentralized level will be appreciated by the different departments in the organization because there is more room for flexibility and tailoring, and decisions are made faster.

The level of centralization is also an important element in organizational structure models developed specifically for procurement. One of these purchasing models is developed by Rozemeijer (Rozemeijer, 2000). This model identifies five basic organizational models for purchasing organization structures that have different levels and forms of centralization. The forms are named decentralized informal and voluntary coordination, coordination, centralized purchasing, center-led, and the federal organization of purchasing. In Figure 4.1 (Rozemeijer et al., 2003), these forms are plotted against purchasing maturity and organizational coherence.

Purchasing maturity refers to the level of purchasing professionalization of a public organization. A public organization in the lower stages has a low purchasing maturity level and an organization in the higher stages has a high purchasing maturity level. *Purchasing coherence* refers to the ability of an organization to generate synergies (Bals et al., 2018), which can be subdivided in economies of scale, economies of knowledge, and economies of process. In the context of purchasing,

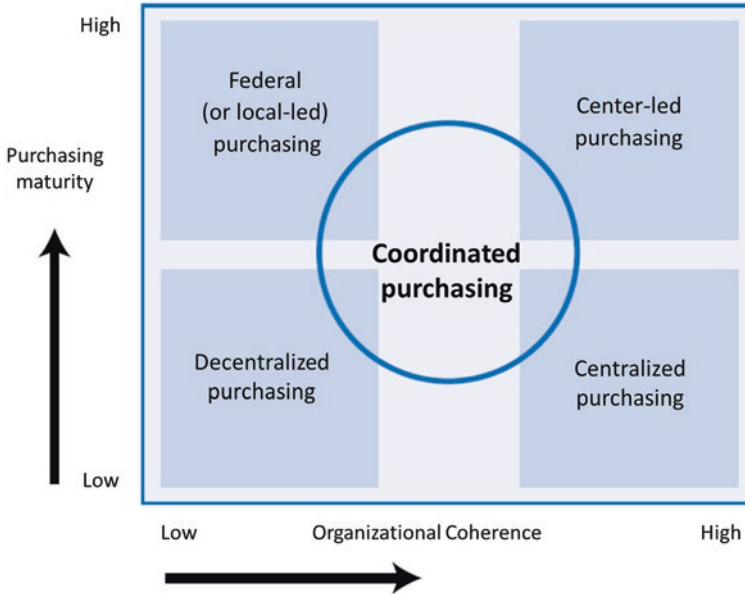


Figure 4.1 Organizational approaches for procurement

economies of scale generally mean that due to increased volume, certain fixed (transaction) costs decrease, leading to better price-quality-impact ratios. *Economies of knowledge or information* can be created by sharing knowledge and information or by better utilizing specific knowledge. For instance, the IT department of a public organization probably has more knowledge and experience about the IT market than the HR department. If this department is appointed as lead buyer for all IT-related purchases of an organization, this creates economies of knowledge. *Economies of process* refer to the concept of lower transaction cost and reduced workload. For example, assume there is an organization with several departments that have a similar demand. In this case, having one joint tender reduces duplications, as instead of many tenders only one tender is required. Similarly, if all departments use (almost) the same procurement documents, but tender by themselves, this also reduces transaction costs for both buyers and suppliers.

The Rozemeijer model indicates when different organizational structures for procurement can be applied. For instance, when both organizational coherence and purchasing maturity are moderate, a coordinated purchasing structure can be applied. In this case, this is likely to be more appropriate than decentralized purchasing. However, as is the same with many other matrix models, the model is not perfect. Other variables such as organizational size, environmental complexity and dynamics, extent of goal alignment, supplier management practices, and technology in use can also influence the choice for an optimal structure. For instance, large organizations tend to have a more complex purchasing structure than small organizations (Trent, 2004). This could mean that a small but coherent and mature

organization does not apply center-led purchasing, but a simpler structure, such as centralized purchasing. Also note that day-to-day practice always asks for adjustments because no two organizations are the same. Models are always starting points to design the purchasing function that best suits a specific organization and may not be up and running from the start but will evolve with time. Below, the properties and specifics of the decentralized, coordinated, centralized, center-led, and federal purchasing structures are described in more detail.

Decentralized Purchasing

In a decentralized purchasing structure, each department of a public organization is responsible for organizing its own tenders. Coordination or collaboration with other departments is voluntary, ad hoc, and informal (Rozemeijer, 2000). There is no centralized coordination other than through the general procurement policy. Decentralized purchasing structures place all responsibility for purchasing activities with the departments. In practice, the model is more often found in small- or medium-sized organizations with low purchasing maturity levels.

Advantages of this model are high levels of flexibility and low levels of management overhead (Rozemeijer, 2000). In practice, this can result in construction departments specializing in tenders for works, facility departments specializing in tenders for facilities, and so on. A disadvantage of this model is that there are less economies of scale, economies of process, and economies of knowledge. It can also be more challenging to drive sustainable public procurement to higher levels, as each department could reinvent the wheel. Concepts that require coordination, such as joint procurement, also become more difficult to organize. Finally, it can also occur that departments try to avoid EU public procurement law or are not aware of specific applicable rules. Especially when several departments have a similar demand with a contract value that exceeds EU tender thresholds, conflicts with EU procurement law may arise when departments tender individually.

Coordinated Purchasing

Coordinated purchasing consists of departments that are usually advised by a procurement department for specific tenders (Rozemeijer, 2000). Tenders for generic demand, such as office supplies or energy, are conducted by the procurement department. The procurement department oversees procurement issues of concern for the entire organization, and it seeks opportunities for the organization as a whole, where individual departments may not have an organization-wide overview. This model is often used by small- or medium-sized public organizations.

An advantage of this model is that some levels of economies of scale, economies of process, and economies of knowledge can be achieved due to the coordination function of the procurement department. This model can also help to realize policy objectives related to sustainability and social aspects to a larger extent than in a

decentralized model. Nevertheless, as the procurement department only has a consulting role, it can be challenging to realize policy objectives when they are not in the direct interest of departments.

The role of the procurement department is often ‘just’ an advisory one. The department needs to ‘sell’ its advice. This is especially challenging when an organization moves from a decentralized model to a coordinated model, as the other departments had previously only tendered by themselves. In a coordinated purchasing role, it is therefore especially important for the procurement department to have a close relationship with the other departments, more so than having a close relationship to the board (Rietveld, 2009). When the procurement department loses touch with other departments, it might not be involved in all tenders conducted by the other departments. This could lead to lower contract compliance for central contracts.

Centralized Purchasing

With a centralized purchasing approach, a central procurement department tenders on behalf of all departments. The other departments are consulted but are not responsible for their own tendering (Rozemeijer, 2000). An advantage of this model is that it can potentially achieve the highest levels of economies of scale, economies of process, and economies of knowledge. However, there is little user control and lower responsiveness to specific needs of departments. However, it is easier to realize policy objectives with this approach, as the central procurement department can oversee the benefits of the whole and impose such objectives. Nevertheless, central purchasing models are only rarely found in public procurement practice.

Center-Led Purchasing and Federal Purchasing

Center-led purchasing and federal purchasing (see the next subsection) are ways of organizing the purchasing function that avoid the rigidity of centralized structures and the fragmentation of decentralized structures (Rozemeijer, 2000). The main difference between the two is that in center-led purchasing ‘the center makes it happen’ and in federal (local-led) purchasing the ‘center supports and facilitates’. Both concepts typically fit best with large public organizations with multiple procurement departments or groups of public organizations that are closely related to each other, such as a group of ministries. Especially when policy objectives need to be realized by all procurement departments (and when required preconditions are fulfilled), a center-led model is preferred.

A center-led structure consists of mature decentral procurement departments and a central procurement office. The departments conduct the actual tenders, and the central office is responsible for setting policies, sharing knowledge, and control. The office also coordinates the types of tenders conducted by the departments. This prevents duplications and allows each department to become lead buyers and

specialize in different types of tenders. An advantage of this model is that economies of scale, knowledge, and process are utilized, while the disadvantages of a central model are reduced. The departments have more control, and there is a higher responsiveness to specific needs of departments.

Federal purchasing consists of a small central core organizational unit, hierarchically flat in structure, supporting the organization with knowledge, and coordinating several autonomous procurement departments (Rozemeijer, 2000). The departments are interrelated with a shared service center. The departments have a reporting line to their own board, not to the central core.

In the local-led purchasing organizational structure, each procurement department has a strong unique identity (with low overall coherence) and knows exactly what the level of demand is for a specific product category, region, or services. Decisions can be made quickly in such an organizational structure, without bureaucratic procedures (Rozemeijer, 2000), as there is no formal decision required from a central purchasing office. Coordination and integration are required as otherwise departments focus solely on their own purchasing needs, and economies of scale, process, and knowledge are lost. This can, for example, be done by using tender boards with a consulting role, joint training programs, joint traineeships, or annual procurement days.

4.3 Joint Procurement

A public organization does not have to procure everything singlehandedly. They can also collaborate with others or combine purchasing activities in different ways. In the literature, joint procurement can be described as horizontal cooperative purchasing, group purchasing, group buying, collaborative purchasing, joint purchasing, and more (Schotanus, 2007). This joint procurement manifests in different forms in the public sector, but it usually involves tenders in which two or more public organizations participate.

Joint procurement is becoming more and more common practice in the European Union. It is, for example, used in times of crisis to jointly procure medical countermeasures and to prevent unwanted competition between EU Member States. Joint procurement is also used for sustainable or innovative purchases such as circular bridges, complex machinery, or making existing buildings sustainable, and where individual organizations lack sufficient knowledge or scale to procure this by themselves. However, joint procurement is most used for standard purchases, such as electricity and office materials.

Joint procurement is not new—in many European countries such as Sweden, Germany, and the Netherlands, public organizations have been jointly procuring for many years. However, only 11% of all public tender procedures in the EU are carried out through joint procurement (European Commission, 2019). Although joint procurement is not always suitable, in the healthcare sector, for example, much higher percentages of joint procurement are found in the United States (between 30 and 50%) and in Germany (about 80%). This indicates there is more potential for

joint procurement in the EU. This is also acknowledged by the European Commission as joint procurement is one of the six strategic policy priorities in the EC's public procurement strategy. Advantages to using joint procurement are potential savings of price and time and quality improvements. Price savings and difficulties regarding measuring such savings (e.g., how to determine the difference between individual and joint prices) are extensively debated in the literature. Most studies indicate that joint procurement can lead to savings ranging from 5% up to 37% (Carrera et al., 2021). However, a few studies also report increased costs or no effects. It is often assumed that better price-quality-impact ratios realized by aggregating purchasing volume are the result of economies of scale. In practice, more professional procurement enabled by increased volume (e.g., economies of knowledge) can be just as important for realizing better ratios. Sometimes joint procurement is required to get access to certain supplies, to initiate innovation and large investments by suppliers, or to prevent unwanted competition between EU Member States for scarce supplies. In addition, large joint tenders can be more interesting to participate in for suppliers, which increases competition and visibility, which could also prompt more cross-border sellers to participate in tenders.

Disadvantages of joint procurement include coordination costs, synchronization costs (e.g., changing specifications and extending contracts), higher complexity, less flexibility, and less control. Time savings can also disappear if the decision to participate in a joint contract is the outcome of a long and intensive decision-making process. In fact, the amount of time invested may increase if a lot of coordination effort is required to satisfy the different demands of all departments. Finally, joint tender can be less interesting for small- and medium-sized enterprises (SMEs), leading to less competition. If SME involvement is an issue, this can be resolved by tendering in lots. Another solution is to jointly prepare purchasing documents, but to tender individually.

In theory, the advantages of joint procurement outweigh the disadvantages for many different situations in the public sector. Compared to the private sector, joint procurement seems to be very interesting for the public sector, especially for organizations like ministries, hospitals, schools, or municipalities. These types of public organizations often have similar organizational structures, similar networks, similar purchasing needs, mutual trust, very little or no competition, a common external environment, and one common goal: to maximize the value and impact of taxpayers' money.

However, in practice it appears that joint procurement does not always succeed. Several studies identified potential obstacles for joint procurement (Erridge & Greer, 2002; Laing & Cotton, 1997; Nollet & Beaulieu, 2005; Schotanus et al., 2010). Lack of cooperation of buying group members, inadequate communication, unreliable spend or contract data, contract synchronization issues, lack of trust, lack of competence and resources for organizing joint procurement, lack of commitment, lack of internal support (such as resistance by budget holders or specific product preferences), no common objectives, no equal influence of the group members,

and unfair allocation of gains and cost are all obstacles to successful joint procurement. Joint procurement could also be hindered by issues such as a lack of consideration of the supply market and supplier resistance, such as suppliers who temporarily offer much better prices to large group members to prevent them from joining a buying group (Walker et al., 2013).

4.4 Forms of Joint Procurement

In practice, different types of joint procurement are observed. A theory that explains these differences is New Institutional Economics. This theory assumes, among other things, that there exists a wide range of different hybrid organizational forms which can be defined as ‘coordination by network’ and ranges between ‘coordination by hierarchy’ and ‘coordination by market’ (Jones & Hill, 1988; Kivisto et al., 2003; Thompson et al., 1991). This theory also applies to joint procurement. In some cases, an organizational form leaning to coordination by hierarchy may be suitable, for instance, when several organizations work together in a large exceptional purchasing project and all participants need to agree on the joint specifications and supplier choice. In other cases, an organizational form leaning to coordination by market may be suitable, such as when several organizations have the same purchasing need for electricity and agree to outsource most of the procurement steps to an external party or to one of the group members.

For analyzing different forms of buying groups the highway matrix (Schotanus & Telgen, 2007) can be used, as is shown in Figure 4.2. Road transport is used as a metaphor for the main forms which are named: Hitchhiking, Bus Ride, Carpooling, Convoy, and Formula 1 Team. In Figure 4.2 these four forms are plotted against ‘influence by all members’ and ‘the number of different activities for the initiative’. The vertical axis, ‘influence by all members’, is defined as the extent to which all group members can perform an ‘active’ role in the group. The higher the influence, the more the organizational form leans to coordination by hierarchy. The lower the intensiveness, the more the organizational form leans to coordination by market. The horizontal axis, the ‘number of different activities for the initiative’, ranges from undertaking ‘one occasional cooperative activity’ to ‘continuously undertaking different activities within the same buying group’. These activities can be carried out by an external party or by the members themselves. Combinations of forms apply when different members of the same initiative score differently on one or both factors.

Simple works, supplies, and services are better suited for the lower side of the matrix. Products for which the value is very low or products which are highly specific are less suitable for joint procurement. Within a more intensive form of joint procurement like an F1-team, more complex products and services can be bought together. Within these forms, an organizational range exists from loosely structured relationships under the control of institutional purchasing managers to highly structured business models with complete autonomy. The formality, number of participants, and so

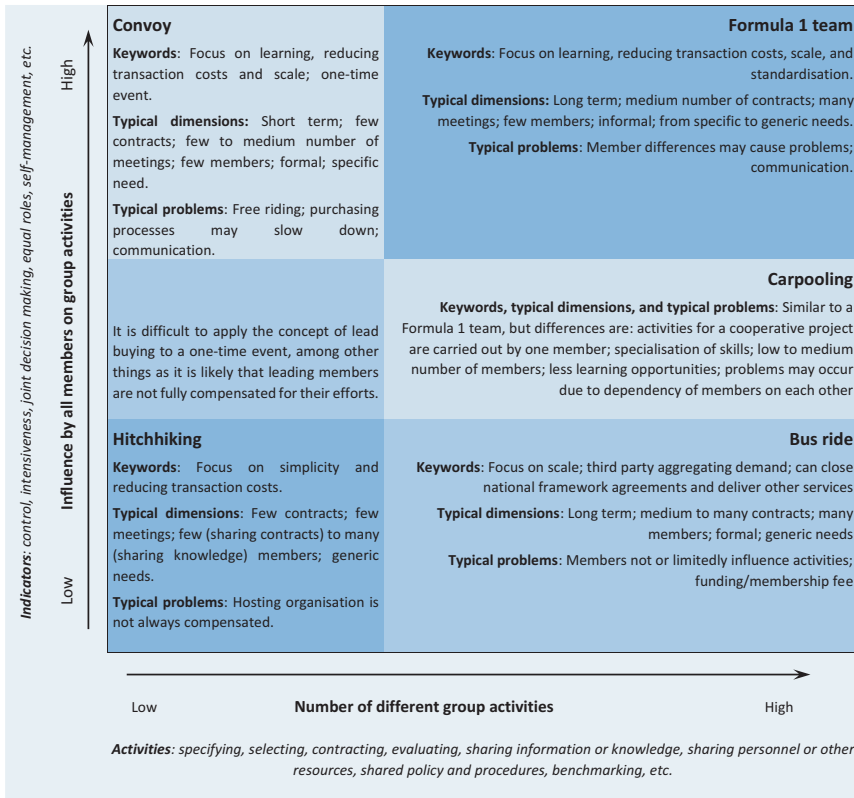


Figure 4.2 The Highway Matrix; a classification of forms of joint procurement

on may also differ per form. For instance, the more trust, commitment, experience, or knowledge on how to work together is available, the less formal agreements are necessary between the group members. More formality is needed with higher financial or juridical risks and interests, less organizational similarities, or a formal culture within one or more of the group members. Despite such differences per form, there are also several similarities *within* each of the forms in Figure 4.2. Lower prices and reduced transaction costs are potential advantages of all of the forms. Also note that in most forms of joint procurement, each group member has an individual contract with the joint supplier. Such indistinctive properties will not be discussed in the next subsections, alongside general properties and success factors of alliance theory that are not typical for joint procurement, like commitment, trust, and so on.

Hitchhiking

Hitchhiking can sometimes only involve the sharing of purchasing-related information with other organizations. However, most of the time it involves a large organization that establishes a contract on its own specifications, and this contract may be

used by other (smaller) group members who have a very similar purchasing need. The others usually cannot influence the specifications and supplier choice, just like a hitchhiker cannot influence the final destination of their ride. The names of the other group members and their potential purchasing volumes must be mentioned in the original tender documents. As a result, this is not a commonly used form of joint procurement.

Another difficulty may be that suppliers will not always allow smaller members to hitchhike on the contract of a large organization under the same conditions. This issue may be solved by a somewhat higher purchasing price and the other contract conditions unchanged. Despite a somewhat higher purchasing price, there are still reduced tender processing times and transaction cost savings, which are advantageous to both the supplier and the buyer. Another advantage for suppliers is that it might be beneficial to supply a whole region of cooperating organizations in one sector.

Example 4.1: A Hitchhiking Initiative for Sustainable Procurement

An example of a hitchhiking initiative is a buying group consisting of social housing associations. They have to make their buildings more sustainable, but under the condition that the rent will not increase. Some corporations lack sufficient capacity and knowledge to undertake this challenge. Individual corporations lack sufficient economies of scale to prevent rent increases while make their buildings more climate friendly.

The smaller housing associations make use of the buying power and capacity of one main buyer. This main buyer is relatively large compared to the other corporations and allows them to hitchhike on its contracts. When purchasing officers of the main buyer negotiate a new contract for their own organization, they state in their purchasing documents that smaller corporations will also use the contract under the same conditions.

Bus Rides

Bus rides mostly are group purchasing organizations (also known as GPOs) made possible by public or private external parties or central authorities. These parties can be for-profit organizations or non-profit organizations. They may host forum websites for purchasing-related discussions or establish agreements for common commodities on behalf of and for use through e-procurement or direct use by all their customers. The bidding process is based on the (expected) aggregate procurement volume and is carried out with the specific purchasing expertise of the external party (Harland et al., 2003). Most of the time there is no limit to the number of members or bus travelers and their geographical location, but they do have to pay a (membership) fee to cover related costs made by the third party.

The weakness of bus rides is that the members usually have no or hardly any control over the procurement process. Products and services which fit best with bus rides typically involve little alignment, are non-emotional and mostly standardized, and specifications of different group members are mostly the same.

Carpooling

Carpooling involves outsourcing tenders to one of the members: each tender is coordinated by the most suitable organization or external party according to their expertise, resources, or purchasing volume. The concept of carpooling is also known as external lead buying. This enables members to specialize in conducting typical tenders. Some consideration and evaluation will be necessary to determine which organization drives to which destination in the carpooling initiative. These meetings also allow the organizations to influence to some extent the tenders put out by the other members. Like bus rides, products and services which fit best with carpooling typically involve little alignment, are non-emotional, simple, and mostly standardized, and specifications are mostly the same. However, there is more room for customization as the group members typically meet regularly.

There are some typical risks involved in carpooling. One disadvantage is becoming dependent on the knowledge and skills of the other members. This especially applies to cooperatives in which the members differ in size and expertise. To become a successful carpooling cooperative, the members preferably have at least some similarities such as the same geographical location, sector, and network. As more consideration is necessary with carpooling than with hitchhiking or bus rides, carpooling initiatives usually have less members.

Convoy

A convoy is a more intensive form of joint purchasing and best suits one shared exceptional purchasing project. They can be useful tools to facilitate and stimulate more exceptional innovative or sustainable public procurement. Supply risks can be shared, and a larger body of knowledge can be used to deal with uncertainties. Typical convoys involve a considerable amount of consultation between the members to bring the specifications up to the same level, to agree with one another on the supplier choice, and so on. Convoys may be one-time events and the number of different cooperative activities for the initiative is therefore limited.

Due to the more exceptional character of a convoy, there are usually several learning moments during the joint project. It may also be difficult to work together with relatively unknown partners for one project. Organizational similarities and smaller mutual distances are therefore more important compared to less intensive

forms of joint procurement. For a convoy it is also especially important to try preventing potential ‘free rider problems’ or at least try to limit its effects. The free rider problem is the burden on one or more group members who do more or most of the work for the convoy, while other members do not do what is expected from them.

Example 4.2: A Convoy for Heavy Zero-Emission Vehicles

In this ‘big buyers initiative’, the municipalities of ten major European cities are working toward a joint market vision and strategy on zero-emission garbage trucks and cleaning vehicles (PIANOo, 2021). These cities jointly conduct market explorations, learn from each other’s experiences, and work together to develop specifications and award criteria, saving time. A common signal is being sent out to set the market in motion to develop zero-emission vehicles that fit a concrete need of these public buyers. Many more of such buyer groups have been initiated in several EU Member States.

Intensive joint procurement forms known as F1-teams often involve representatives of the management teams of the cooperating organizations meeting regularly in a steering committee to discuss joint projects. All parties usually can influence the specifications, supplier selection model, and so on. The project groups for these joint projects include at least one member of the steering committee and other representatives of most or all members. Together they carry out several steps of the procurement process and share the administrative work. Several F1-teams make use of a private or public external party to coordinate some of the activities. In practice, the costs and workload are often allocated equally or proportionally. For an F1-team, allocating the costs and workload equally is fairer and more stable on the long run (Schotanus et al., 2008). Cooperative initiatives like the F1-team can be informally or formally structured. Formal initiatives can be separate legal entities owned by their members. Criteria for highly structured initiatives are regular and organized meetings, several procedures, and rules such as joining and leaving rules, duties, and rights. In contrast with bus rides and carpooling, products and services jointly procured in an F1-team form involve alignment, can be emotional, complex, and customized and specifications can differ to a larger extent between different contracting authorities. Standardized products and services are not suitable for an F1-team, as F1-teams require too much coordination for such products and services. A carpooling initiative can be organized as an F1-team with one major difference: the project groups in a carpooling initiative consist of participants of *one* organization and not of *different* organizations.

4.5 Summary

This chapter introduced organizational structures for public procurement and explained that the procurement function of any organization is broad and involves not only the procurement department, but also other staff members and departments. To organize the procurement function, an organization has several options depending on their maturity and organizational coherence. The latter meaning the ability to use economies of scale, process, and knowledge. Coordinated purchasing is a common organizational form for smaller public organizations. Larger organizations that are mature and coherent are better suited to center-led purchasing. Both forms can facilitate the transition to sustainable and social public procurement, using among other things a central sustainable procurement policy and guidelines, offering resources, and sharing best practices, although this can be more difficult for a coordinated organization. This chapter ended by zooming in on joint procurement as a specific organizational form for cooperating independent public organizations and described four forms of joint procurement: Hitchhiking, Bus Ride, Carpooling, Convoy, and Formula 1 Team. Simple forms of joint procurement, such as Hitchhiking, can be used for commodities and simple or non-emotional tenders, whereas more intensive forms of joint procurement, such as the Formula-1 team, are considered more suitable for complex tenders. Joint procurement can create economies of scale, process, and knowledge; however, it can also make the purchasing process more complex, be less flexible, lead to coordination costs and group members having less control. Nevertheless, if organized well, the joint procurement has substantial potential value for public organizations and can become increasingly important.

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Public Procurement Policy and Purchasing Strategy

5

Fredo Schotanus and Jolien Grandia

Abstract

This chapter introduces the concepts of public procurement policy and public purchasing strategy. It explains that a procurement policy contains the resolutions and guidelines of a public organization for guiding and prescribing general procurement choices and utilizing its supply base. The cyclic procurement policy process is presented and described, including an explanation of how conflict and ambiguity affect the implementation of procurement policies. It is explained that the guidelines and framework provided by a procurement policy are used to develop a specific strategy for a tender or group of tenders. Subsequently, the Kraljic portfolio model is introduced in combination with Carter's customer portfolio model for setting a general direction for a purchasing strategy. This can, for instance, be to focus on collaboration (for strategic tenders), competition (for leverage tenders), supply certainty (for bottleneck tenders), or efficiency (for routine tenders). This chapter concludes with a description of several specific strategic decisions that a public buyer makes based on the general direction of a procurement strategy such as single or multiple sourcing, the length of the contract, the type of specifications, and the attractiveness of the tender.

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Keywords

Public procurement policy · Procurement policy process · Policy implementation · Demand and market analyses · (Public) purchasing strategy · Sales strategy · Strategic purchasing decisions

Learning Objectives

After studying this chapter, the reader will be able to:

- Describe what a public procurement policy is.
- Describe what a public purchasing strategy is.
- Understand the difference between procurement policy and purchasing strategy.
- Understand and explain the procurement policy process.
- Describe the resources that are available in the implementation of procurement policies.
- Explain what routine, leverage, bottleneck, and strategic purchasing strategies are.
- Understand how purchasing strategies and sales strategies affect each other.
- Explain in which situations, different purchasing strategies can be used and different strategic choices can be made.

5.1 Introduction

Governments try continuously to govern developments in society. The resolutions, choices, and actions of governments regarding the governance of specific societal developments are laid down in public policies which give meaning to the way governments try to create public value (Bovens et al., 2012). Where public procurement was first only about fulfilling a specific demand and providing what users needed in the right quantity and quality, at the right time, in the right place, and for the right price, it is now often also about making sure that procurement adds value to its environment (see also the seven development stages in Chapter 1). Public organizations nowadays use public procurement for reaching a multitude of societal goals, such as minimizing long-term unemployment, improving working conditions throughout the international supply chain, promoting small- and medium-sized enterprises (SMEs), social entrepreneurs, start-ups, or local businesses, stimulating innovation, and driving the market for sustainable supplies and services. This development means that public procurement is no longer just a means to an end, but also a policy tool that can be used to achieve desired outcomes in society. How public procurement could or should be used as a policy tool to reach the desired outcomes of which public policies are laid down in procurement policies (generally) and purchasing strategies (more specifically).

This chapter therefore discusses the topics of procurement policy and purchasing strategies more in-depth. A procurement policy contains the general resolutions, choices, and actions of a public organization regarding their procurement and utilizing its supply base. A purchasing strategy uses the guidelines provided by a general procurement policy to develop a specific strategy or action plan for a tender or a group of related tenders.

Section 5.2 elaborates on the topic of procurement policy. Sections 5.3 and 5.4 make the link between policy and strategy. In Sections 5.5 and 5.6, the purchasing strategy and related models are described which can be used to develop a purchasing strategy. Finally, Section 5.7 describes some important specific strategic purchasing decisions.

5.2 Procurement Policy

A procurement policy gives guidance to the way an organization procures works, supplies, or services and creates optimal value for the entire organization and in the case of public organizations: society. Public procurement policies, like any other public policy, can take different forms, such as *distributive policies* describing the allocation of responsibilities regarding certain matters, *regulatory policies* describing rights and obligations that should be taken into consideration when procuring, or *stimulating policies* providing information that can, for example, make procuring sustainably easier for public procurers (Bekkers et al., 2017). The policy process of procurement policy is like that of any public policy, which means that it is commonly considered to be a cyclic process (see Figure 5.1) that starts with agenda-setting (driven by a particular societal challenge), followed by policy development, policy decision-making, policy implementation and policy evaluation, before it loops back to agenda-setting (Anderson, 2003).

Agenda-Setting

Before a procurement policy can be developed, the problem that the policy addresses must attract the necessary attention and end up on the agenda of venues that can call for change and initiate policy development, such as parliament, the media, or society. Following Hoogerwerf's (1989) definition, a policy problem is a discrepancy between a benchmark—principle, norm, or goal—and the conception of the existing or expected situation. A policy problem that a public procurement policy could address is, for example, the discrepancy between vegetarian products being widely available in regular restaurants and supermarkets, many civil servants being vegetarian but *not* having any vegetarian food options in the company restaurant of a ministry. The new procurement policy could then indicate that when catering services are procured, vegetarian alternatives must be offered.

It is important to note here that perspectives on a benchmark can vary, and it is therefore often difficult to provide an objective definition of a policy problem

Figure 5.1 Policy process
(Anderson, 2003)



(Hoogerwerf, 1989). For example, while one stakeholder might consider a hybrid car a sustainable mode of transportation, this might not be what another stakeholder, who is thinking of public transport, would consider sustainable. The often-contested definitions of policy problems are one of the reasons why implementation and evaluation of public policies are often complex. Because how can you determine if the goal of the procurement policy has been reached if the problem is not agreed on?

Example 5.1: Example of a procurement policy: Responsible procurement in the City of London

The London City Corporation developed the ‘Responsible Procurement Policy’ that outlines 18 principal commitments they are making to drive positive change through their supply chain activities and make their procurement more responsible.

Examples of commitments listed in the policy are:

- Work with suppliers who take active steps to embed equality, diversity, and inclusion.
- Ensure that suppliers minimize air and noise pollution associated with our contracts.
- Achieve best value by assessing supplies, services, and works designs based on life cycle costing.
- Procure 100% renewable electricity and continuously reduce carbon intensity of gas and fuel.
- Eliminate single use plastics and minimize all waste internally and in supply chain operations.

In addition, the policy prescribes the societal priorities for different procurement categories, such as catering or building projects. For example, for catering, the policy is to focus on job creation, and for buildings the policy is to reduce CO₂-emissions. In line with the overall procurement policy, more specific policy action plans are drafted that explain how the policy will be implemented.

Procurement Policy Development and Decision-Making

If the need for change and the policy problem have been put on the agenda, a policy needs to be developed. The development of policies is often considered the result of a rational process, where policy makers use evidence-based information to determine what the best instrument is to reach the desired policy goal (Bekkers et al., 2017). Policy development however does not happen in a vacuum, but rather in an arena (or multiple arenas) where several stakeholders try to influence policy development. As such, policy development is also a political challenge where strategic behavior is displayed (Hoogerwerf, 1989). Think, for example, of a farming alliance lobbying for the redesign of buying standards for food to emphasize the importance of quality over cost. Moreover, procurement policies are developed within a specific institutional context that affects the possibilities that can be realized. Moreover, procurement policies are developed within a specific institutional context that affect the possibilities that can be realized. For example, green public procurement criteria that the European Commission drafted for their member states to use (mostly voluntary) can influence the national development of green procurement policies and the focus areas for sustainability therein.

In drafting a public (procurement) policy, a policy maker needs to answer several questions. Important questions are: ‘*Can it work?*’, ‘*Is it allowed?*’, ‘*Is it applicable?*’, and ‘*Is it appropriate?*’ (Bekkers et al., 2017). The first question, ‘*Can it work?*’ refers to the expected effectiveness and efficiency of the proposed policy in solving the policy problem (and thus reaching its goal). For example, a procurement policy proposing to award at least 60% of all European tenders to small- and medium-sized enterprises (SMEs), while in practice this is already 70% will not be effective in reaching the policy goal of awarding *more* contracts to SMEs.

The second question, ‘*Is it allowed?*’, refers to the legal frameworks that are in place. For example, public authorities in the European Union must comply with the rules of EU public procurement directives when purchasing works, supplies, or services on the market and as such affect the possibilities for procurement policies. For example, the national government might want to develop a procurement policy that prescribes that works, supplies, and services must be procured from local businesses to stimulate the local economy, however excluding foreign bidders from participating in a procurement procedure is generally not allowed.

The third question, ‘*Is it applicable?*’ refers to the applicability of the proposed policy. Can the procurement policy be implemented in practice, or will it cause problems or resistance from stakeholders? A public organization, for example, implemented a 100% organic food procurement policy years ago. The application

of the policy caused problems in practice as not all products had an organic alternative (yet). This created dissatisfaction among the staff that missed some of their favorite foods. While the procurement policy might be allowed and effective, it was too ambitious (at that time) to apply.

The fourth question, '*Is it appropriate*', relates to the legitimacy of government and trust of citizens in governments to deal with policy problems (Bekkers et al., 2017). This question requires policy makers to investigate the appropriateness of the proposed policy for a public organization spending taxpayers' money. A food procurement policy for an academic hospital that specifies that lunches served in the company restaurant must always have the quality of three Michelin stars might be allowed but not considered appropriate by society and other stakeholders.

Therefore, throughout the policy cycle there are numerous decisions that must be made, ranging from deciding what to do with the answers to the aforementioned questions (redesign, cancel, or continue) to approving the policy and moving toward formal implementation. These decision-making processes are often perceived as highly political processes that contain bargaining and negotiating by various stakeholders to ensure that the policy that best suits their interests is formally approved. Research, for example, showed that the more committed procurers are to sustainable public procurement, the more sustainable their tenders become (Grandia, 2015). However, research also shows that if social public procurement policies are excessive and imposed top-down, not considering the sector's compliance capacity, it is unlikely that the intended policy outcomes are realized (Loosemore et al., 2020). It is thus important to include relevant stakeholders in the design and decision-making process, making stakeholder identification and management a crucial element in the development of procurement policies (Bekkers et al., 2017).

Procurement Policy Implementation

Traditionally, policy implementation was considered a rational and linear process that followed from a formal decision to implement the designed policy and could be centrally steered. However, current insights show that policy implementation is seldomly that simple and straightforward, but complex and typically involves the collaboration and cooperation of numerous stakeholders (Hoogerwerf, 1989). Because factors that affect the implementation of procurement policies have been found to vary per context and procurement policy, a matrix is presented based on the work of Matland (1995). The matrix helps assess how difficult or complex implementing a particular procurement policy will be by looking at the expected level of (1) policy conflict and (2) policy ambiguity (see Figure 5.2).

Policy conflict occurs when multiple stakeholders view the policy as directly relevant to their interests but have incongruent views on it. The more incompatible the concerns and the higher the stakes for stakeholders are, the more intense the conflict will become. *Policy ambiguity* falls apart into two categories: ambiguity of goals and ambiguity of means. If there is a high level of goal ambiguity, this can cause misunderstanding and uncertainty among stakeholders, which can directly

		CONFLICT	
		Low	High
AMBIGUITY	Low	Administrative implementation <i>Resources</i>	Political implementation <i>Power</i>
	High	Experimental implementation <i>Contextual conditions</i>	Symbolic implementation <i>Coalition strength</i>

Figure 5.2 Ambiguity-conflict policy implementation matrix (adapted from Matland, 1995)

cause policy implementation failure. Ambiguity of means can occur when, for example, a technology or a product is required for implementation of the procurement policy that does not exist yet or when there is uncertainty about which stakeholders should be involved and what their role should be.

This results in four types of policy implementation: (1) administrative implementation, (2) political implementation, (3) experimental implementation, and (4) symbolic implementation.

Administrative implementation has the ideal conditions for implementation. There is no discussion about the goals of the policy or uncertainty about its key concepts, it is clear which stakeholders need to be involved, allowing them to work together smoothly and develop standard operating procedures. Implementation will almost certainly be a success and reach the desired policy goal, as long as there are sufficient resources. However, in practice those resources are frequently insufficient, making implementation still difficult. Research into public procurement, for example, shows that insufficient budgets, a lack of knowledge about sustainable procurement, lack of skills, but also pillarization in the organization can negatively affect procurement policy implementation (Grandia, 2015). Having a clearly written and procurement policy is another vital resource and thus key to successful implementation.

In the case of *political implementation*, stakeholders have a clear idea of what the policy is about (low level of ambiguity), but conflict arises between them, for example, regarding the costs for executing the policy or who should be tasked with implementing it. Stakeholders will have to resort to bargaining and negotiating to reach an agreement and implement the policy. Political implementation can as such be a procurement version of a ‘not in my backyard’ (NIMBY) problem. Everybody might, for example, agree that having a meatless procurement policy is a good idea, but when it becomes clear that implementing this policy means that a newly contracted supplier is forbidden to serve chicken burgers in the company restaurant, this might change. It then depends on which stakeholder is more powerful, whether the procurement policy will indeed be implemented, or if stakeholders will be able to negotiate some exceptions to the policy and how strong those exceptions will be.

In the case of *experimental implementation* of procurement policies there is high ambiguity—what are we trying to implement or how?—but little conflict between stakeholders. This is often the case when the goal is clear, but it is unclear how it can be achieved, for example, because the requested technology or instruments are missing. Think, for example, of the aforementioned 100% organic catering policy that was difficult to implement because not for every contracted product an organic version could be supplied. It then depends on the commitment of key stakeholders to the goal of the policy, the number of other demands on their time and attention, the perceptions regarding the policy, available resources, and possible economies of scale that can be achieved how successful implementation will be. As all these factors vary per public organization and tender, the implementation results will therefore also vary per public organization and tender.

In the case of *symbolic implementation*, a high level of conflict and ambiguity result in a policy that receives substantial attention in its agenda-setting and development stage but is ultimately implemented with little effect. The high degree of ambiguity means that stakeholders find it hard to agree on what the policy should aspire to and how to do that, and this combined with incongruent views, interdependency, and opposing interests between stakeholders results in a procurement policy that will unlikely reach the desired outcomes. Implementation in the end is therefore mostly determined by the strength of the local coalition of key stakeholders, who control the available resources and their willingness to address both conflict and ambiguity. Greenwashing is a clear example of symbolic policy implementation. While it seems that attention is paid to sustainability, in reality very little changes. This can, for example, happen in tender procedures when sustainable award criteria are included that have so little weight, they do not make any difference.

Procurement Policy Evaluation

Evaluation is a mechanism for monitoring, systematizing, and grading ongoing or just finished procurement policies, but also procurement strategies and tenders, so that procurers and other stakeholders in their future-oriented work will be able to act as responsibly, creatively, equitably, and economically as possible. In the case of procurement policy evaluation, this means that the merit, worth, and value of organization, content, administration, output, and/or effects of ongoing or finished procurement policies are carefully assessed (Vedung, 2015). Evaluation is a value-laden and normative process that can take various forms. In addition, to the basic economic evaluation models that assess the effectiveness and efficiency of the procurement policy in mere economics terms, there are other broader evaluation models (Vedung, 2015). As each model has its own particular advantages and disadvantages, the combination of different evaluation models is recommended. With the evaluation of the procurement policy, the loop of the policy cycle is closed and can start a new cycle by raising a need for change and a new policy problem to be put on the agenda.

5.3 From Procurement Policy to Purchasing Strategy

The effects of a well-implemented procurement policy can be substantial and lead to a substantial increase in tenders that stimulate the public policy-related values such as sustainability of social return. The fact that significant results are quickly visible could also indicate ‘supplier readiness’ of such values, as suppliers might be increasingly preparing themselves for governments to use sustainable and social procurement (Armann et al., 2014). Hence, developing a procurement policy which aligns organizational policies and market possibilities is essential to ensure that procurement practices support organizational aims.

These procurement practices consist, among others, of all sorts of tenders that are organized a public organization. For each tender, or group of related tenders, a purchasing strategy or action plan is required that translates, among other things, the broad direction of a procurement policy to specific strategic choices. Strategy is a nebulous concept with multiple definitions and little consensus regarding its makeup. One reason for this difficulty is that the term ‘strategy’ often refers to different levels, such as the organization as a whole, a department, a category, and the tender (Hansen et al., 2002).

There are many possibilities for practically organizing the translation of procurement policy to purchasing strategies. For instance, a public organization could have separate sustainable procurement policies for works (like roads and viaducts) and for supplies and services (such as copiers, engineering services, or software), but they might also have opted to create sustainable procurement policies for specific categories, or even subcategories, such as ICT, facilities, construction, and maintenance. For each sub-category or category, a grand purchasing strategy could be developed, based on one or more procurement policies. Tenders that fall within the category ‘facilities’, for example, are possible tenders for cleaning, catering, office supplies. Categories can differ per organization depending on the tenders they usually conduct. It is also important to note here that there can be multiple procurement policies that might need to be combined in a single procurement strategy (e.g., a policy on sustainability and a policy on involving SMEs).

In addition to the procurement policies that are translated into a purchasing strategy, the long-term goals of an organization are also described in the purchasing strategy and how they generally affect (individual) tenders. For example, if the organization aims for integrated facility management, then one large, clustered tender could be a suitable strategy. Furthermore, a purchasing strategy should be based on a spend and demand analysis of a specific purchasing category and a thorough analysis of the market of this category. These analyses describe what suppliers are operating on the market, what important developments are, and how demand is developing.

Spend and Market Analyses

Spend analyses have many purposes, including financial control and finding opportunities for new tenders. When using a spend analysis to develop a purchasing strategy, the spend analysis should analyze, among other things, the possible contract

value and potential suppliers. In most situations, public organizations already have contracts with one or more suppliers. For the strategy, it is relevant to know what the current contract value of these contracts is, how it developed over the years, what the contract compliance is, how many current suppliers there are, and how the contract value is divided over the suppliers. When more than one department is involved in a tender, it can also be useful to analyze contract values per department. For all quantitative data, further examination is required before a judgment can be passed (Telgen, 2004).

The spend analysis shows nothing of the contents of the current contracts or the purchases: it shows the volume of the purchases. It is not useful to judge or act based on a spend analysis alone (Stamm et al., 2019). One can, for instance, collect additional qualitative and quantitative data based on input from contract managers, input from end-users, input from other buyers and experts, and supplier ratings. Market analyses can be done using, among other things, market consultations, buyer consultations, and market reports. Many countries also have public websites that can be easily used for market analysis. Such websites show general developments in a market, such as common procurement procedures or the number of suppliers that participate in similar tenders. In Example 5.2 below, a few examples of market analyses are shown.

Example 5.2: Market analyses

Examples of a market analysis are included in Figures 5.3 and 5.4. These figures are instantly made by www.opentender.eu. The first figure shows how often certain procurement procedures are used for a particular EU Member State for clothing over the past years. The second figure shows what the contract values are for specific types of clothing. Such tools also allow the buyer to easily find similar tenders that can be used while preparing the tender at hand. Other types of analyses are analyzing ‘supply procurement scores’, tax haven risks, or commonly used award criteria used for the tender at hand, using www.opentender.eu, Tender Electronics Daily, or a national procurement platform.

5.4 Choosing a Purchasing Strategy

When a buyer has gathered sufficient information about demand and supply, the main strategic decisions for a tender can be made. Specific strategic choices for a tender are, for instance, how many suppliers to contract or what the contract length should be. The Kraljic portfolio model (Kraljic, 1983) plots tenders in a two-by-two matrix based on two dimensions and enables organizations to determine the most appropriate purchasing strategy as depicted in Figure 5.5. Although it is a general purchasing model, these quadrants can also be applied to public tenders and strategies. The horizontal axis in the Kraljic model relates to the supply risk related to the tender. The supply risk is high if there are a limited number of suppliers or buyers

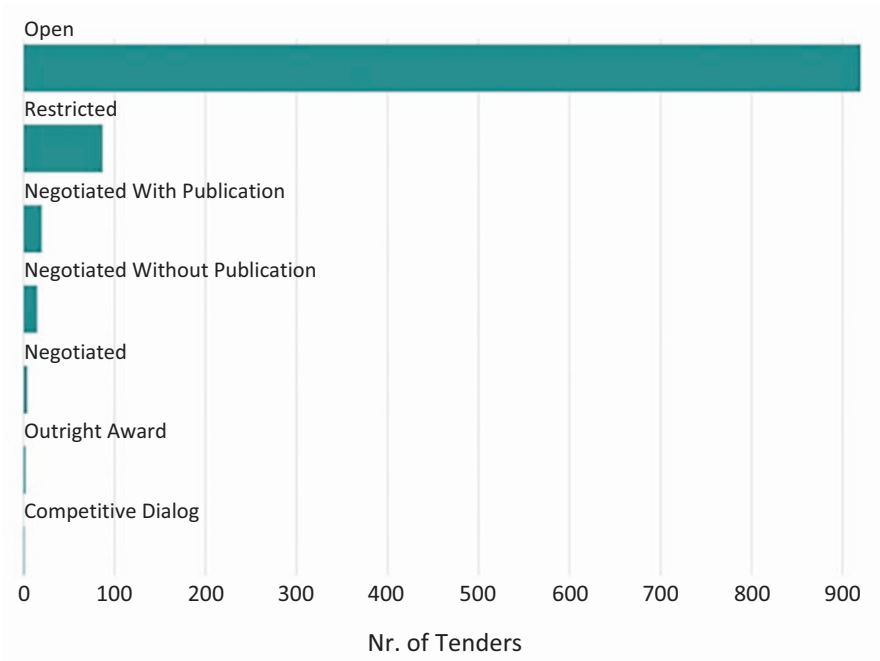


Figure 5.3 Example of market analyses (1/2)



Figure 5.4 Example of market analyses (2/2)

in the market, if the demanded work, supplies, or service is complex, or when there are many technological developments. Aspects such as entry barriers, possible supply chain interruptions, or shortages also influence supply risk (Montgomery et al., 2018). The vertical axis in the Kraljic model relates to public value and is often measured by the expected contract value or expected societal impact of a tender. Political sensitivity, (cyber) security, and criticality of supply can also affect the level of public value on the vertical axis. The matrix consists of four quadrants of

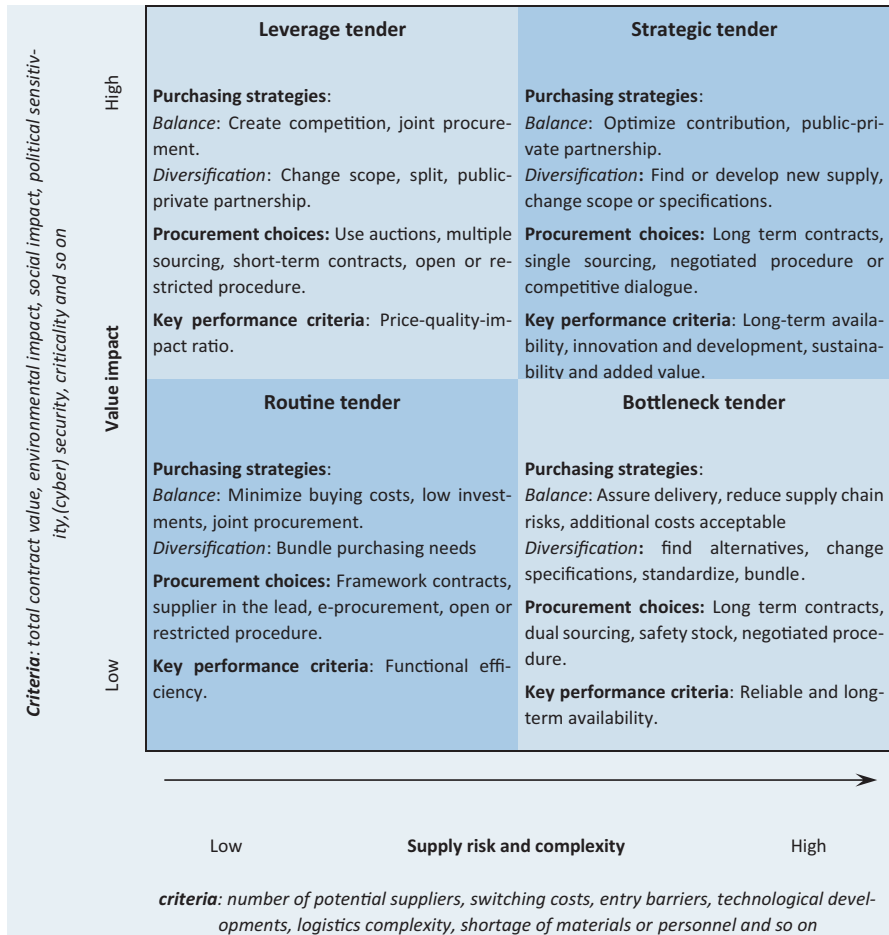


Figure 5.5 Kraljic purchasing portfolio model adapted to public procurement, including examples of purchasing strategies and procurement choices (Kraljic, 1983)

strategies: Bottleneck, Routine, Leverage, and Strategic. After a tender has been plotted into a quadrant, a purchasing strategy can be determined. The choice for a purchasing strategy also depends on whether the purchasing organization considers it desirable that the tender is in the relevant quadrant or whether it wants to move it to another quadrant.

Bottleneck Strategies

The bottleneck quadrant is characterized by low public value and a high vulnerability for the buyer. For this quadrant, securing supply, if necessary, at an additional cost, is often the highest priority. Long-term contracts can be used or contracts

could be closed with two or more suppliers (e.g., locally and globally) in order to secure supply. If this strategy is not possible or desired, the tender could be ‘moved’ to the routine quadrant if it is possible to standardize specifications.

Another option could be to split the tender in two or more separate lots. This can be a fruitful strategy when only part of the tender increases supply risk. By separating this part, the total contracted value in the bottleneck quadrant decreases. For example, a tender for standard and customized software could be positioned in the bottleneck quadrant in case the customized software creates high supply risk. If the tender is split in two lots, the standard software lot would move to the routine quadrant.

Another, more far-reaching, strategy is to find new suppliers (e.g., suppliers who currently do not do business with public organizations) or to invest in the interest of emerging (social) suppliers which reduces supply risks in the long term.

Routine Strategies

A routine tender does not have much value for a buyer. It involves relatively little money and risk. If the tender is plotted in the routine quadrant, it is appropriate to invest little time in this tender. The time that is invested can mainly be used to reduce administrative burdens. For instance, for office supplies, a buyer can decide to pay the supplier a fixed amount per month for a certain service level. This is an easier financial model than when the buyer decides to use fixed prices for each item that can be bought.

To move the tender to the leverage quadrant, an organization can, for example, bundle purchasing volumes by joining a purchasing group. An alternative strategy is to combine a few possible smaller tenders (e.g., tenders for catering, cleaning, and security) into one large tender (e.g., one facilitatory tender).

Leverage Strategies

Frequently used strategies for the leverage quadrant are the application of broad competition, (e-)auctions, short-term contracts, and joint procurement. The focus in these leverage categories is mainly on getting the best price-quality-impact ratio as possible.

To move the tender to the routine quadrant, an organization can split the tender in several smaller tenders. It is also possible to increase the strategic importance of the tender, for instance, by increasing social or sustainable innovation and investment possibilities for the supplier.

Strategic Strategies

In the strategic quadrant there are usually few tenders to be found, but these do have substantial public value. Appropriate strategies in this quadrant are, among other things, carefully selecting a supplier and building a supply relationship. Strategic

tenders often use more functional specifications than technical specifications, variants could be allowed, and quality is an important part of the supplier selection model.

For this quadrant, supply risks can be reduced, if desired, by looking for or developing new suppliers. The value (and risk) of the contract can be reduced by splitting the tender in multiple parts or by using new procurement models. For instance, instead of conducting a large ICT tender for specific customized software, a public organization could tender for open-source solutions using multiple lots.

5.5 The Effects of Sales Strategy on Purchasing Strategy

Although Kraljic's model is popular in procurement, it does not consider the possible strategies and reactions of suppliers to the buyer's strategies (Gelderman, 2003). Mismatches between buyer and supplier are likely to occur if one does not consider how a supplier would assess the situation. For example, when a public organization aims for a public-private partnership with a strategic tender, potential suppliers must be willing to work closely together as well. If there are no suppliers willing to do this, the buyer has to change its strategy.

Carter's customer portfolio model (Carter, 1995) allows suppliers to determine which *sales* strategy best suits their customers, or in this context the strategy of how public buying organizations 'sell' their tender potential, as visualized in Figure 5.6. The horizontal axis in the figure below shows the interest that the supplier has in having the public organization as a customer. This can be measured by the supplier based on profit margin, turnover, or impact that can be created by having the public organization as a customer. The vertical axis shows how attractive the public organization is for the supplier. The buying organization can increase its attractiveness by, for example, involving the supplier early in the development of new products, by making tenders easier accessible, or by helping the supplier to improve its quality or impact. Customer attractiveness is especially important in oligopolistic markets where suppliers have the luxury to be selective regarding which customers should be supplied (Schiele et al., 2010).

Combining these two axes of Carter's customer portfolio model leads to the following four customer quadrants of sales strategies:

- *Core customer*: the supplier will try its absolute best to retain this customer (Van Weele & Rozemeijer, 2022). Joint product development, exceptional service, and high price-quality ratios are key concepts.
- *Development customer*: the supplier will be inclined to offer extra services, to gain favor, or to withdraw if it no longer sees potential in this customer. Presenting alternative ideas, delivering added value, and jointly developing new services or products are key concepts here in order to expand a supplier's business (Rozemeijer, 2009).

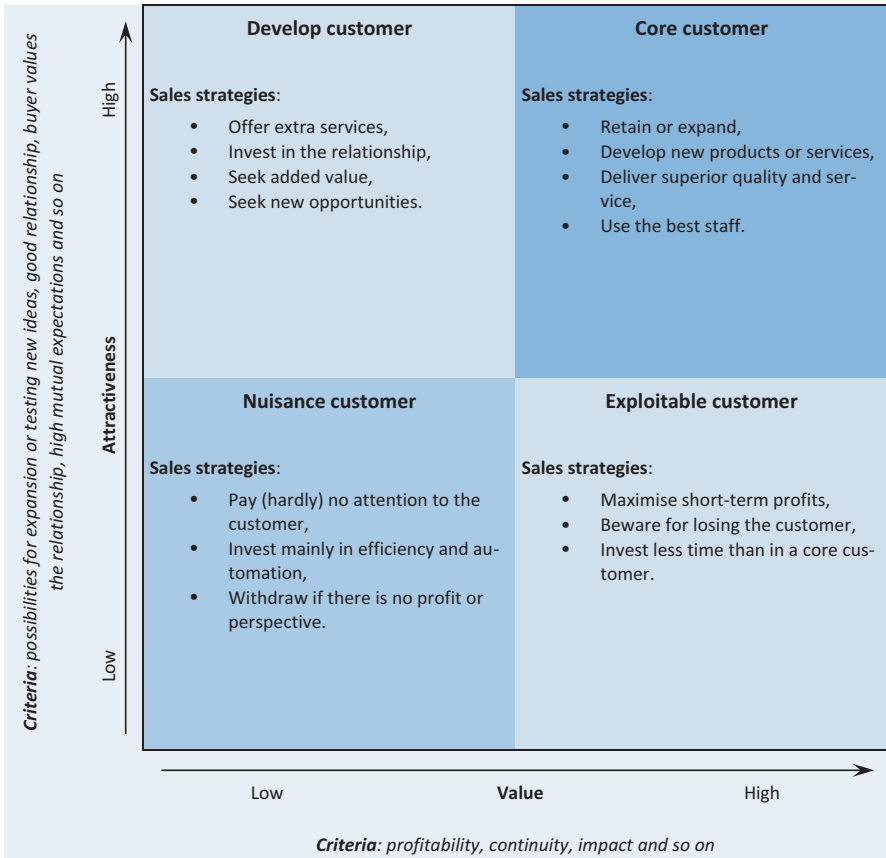


Figure 5.6 Carter’s customer portfolio model adapted to selling to public organizations, including examples of sales strategies (Carter, 1995)

- *Exploitable customer:* the supplier will give this customer less attention compared to core customers, although retaining the customer is important. Expanding the commercial position, calculating customer-specific prices, and being aware of the loss of the profitable customer are key concepts for the supplier (Montgomery et al., 2018).
- *Nuisance customer:* the supplier is inclined to give this customer little to no attention (Hansen et al., 2002). The key concepts here are expanding profit margins, realizing efficiency of the sales process, and withdrawing if the relationship is not profitable.

Kraljic’s purchasing portfolio model and Carter’s customer portfolio model can also be combined, creating more specific options for purchasing strategies. The combined model is especially useful when conflicting purchasing and sales strategies are expected. The model shown in Figure 5.7 shows a customized combination of the purchasing portfolio model of Kraljic with the customer portfolio model of Carter.

Suppose a buyer wants to determine an appropriate purchasing strategy for a tender that falls into the *leverage quadrant*. A buyer must first examine what the possible sales strategy of suppliers is for this tender. If the suppliers’ sales strategy is a *core customer strategy*, then a possible purchasing strategy for the buyer is to consolidate or intensify *cooperation*. For the tendering process, this may mean that the buyer pays attention to aspects such as cooperation potential and measures aimed to increase impact. A tender procedure that fits this situation could be a negotiated procedure or a competitive dialogue in case the context is complex. One of the

Nuisance	Secure Purchasing strategies: Increase attractiveness, aggregate, rationalise, conduct market consultation, make procurement documents more accessible, promote the tender, find new suppliers, change source of supply			
	Exploit Tender with a focus on best price-quality-impact ratio focus and realism			
Core	Collaborate Purchasing strategies: Invest in relationship during contract Tender with relationship focused criteria and techniques	Compete Purchasing strategies: Build competition and tender with best price-quality-impact ratio focus	Optimize Purchasing strategies: Maximize efficiency	
	Innovate Purchasing strategies: Develop during the contract in order to realize more public value. Tender with relationship and innovation focused criteria and techniques.	Develop Purchasing strategies: Develop during the contract in order to realize higher price-quality-impact ratio. Tender with future potential focused criteria and techniques.		
Development	Strategic	Bottleneck	Leverage	Routine

Figure 5.7 Carter’s combined model including examples of purchasing strategies adapted to public procurement (Carter, 1995)

challenges of working with the combined model for a buyer is that predicting sales strategies during the tender preparation phase may be difficult and can differ per supplier. A practical solution to this is to consider the most desired sales strategy of potential suppliers and to design a supplier selection model and contract management model that rewards such a sales strategy.

5.6 Specific Strategic Purchasing Decisions

Based on the generic purchasing strategy for a tender (e.g., aim for collaboration or aim for competition), a buyer needs to make several more specific strategic purchasing decisions. An overview with examples of specific strategic procurement decisions is included in Table 5.1.

Table 5.1 Overview with examples of specific purchasing decisions

Organization	Demand	Supply	Procedure	Contract
1. Who is responsible for the tender?	1. What is the scope and value of the contract?	1. What solutions are available?	1. How to consult suppliers before the tender?	1. What type of buyer-supplier relationship to aim for?
2. Who is in the tender team and assessment team?	2. What are the main price, quality, and impact goals of the tender and the contract?	2. What developments to expect?	2. How to create competition?	2. What type of contract to use?
3. How are stakeholders involved?	3. What developments to expect?	3. How many and what type of suppliers are expected to participate?	3. How to facilitate innovation?	3. When does the contract start, how long does it last (including extensions)?
4. How and when to make decisions?	4. Buy (as a service) new or used, hire or lease?	4. How many suppliers to contract?	4. What procedure to use?	4. What contract incentives to use?
5. What is the planning?	5. Buy individually or with other organizations?	5. In case of multiple sourcing, use the same contract for all suppliers or contract different types of suppliers?	5. How make the tender attractive?	5. How to deal with subcontractors?
6. Who manages the contract?		6. To what extent to aim for specific types of suppliers (e.g., start-ups, SMEs, social entrepreneurs)?	6. How many lots?	6. To what extent use technical and functional specifications?
7. How to manage risks?			7. Allow variants?	7. What funding model to use?
			8. What minimum criteria and exclusion grounds to use?	8. In case of multiple sourcing, how to allocate work?
			9. How to select suppliers using a supplier selection model?	9. What performance indicators to use?

Several of the decisions mentioned in the table are discussed elsewhere in this book. For instance, which tender procedure to use is an important strategic decision and is explained in more detail in Chapter 3 on public procurement. Joint procurement is described in Chapter 4 on the organizational aspects. Supplier selection models are discussed in Chapter 6, and relational characteristics and different contract types are discussed in Chapter 7. In the rest of this section, a few strategic decisions are explained that are not discussed in other parts of the book. These include decisions related to the number of suppliers to be contracted, whether to use lots, contract length, contract attractiveness, and whether to use functional or technical specifications.

Single Versus Multiple Sourcing and Tendering in Lots

The strategic decision in relation to single or multiple sourcing is how many suppliers the public organization wants to contract. Contracting multiple suppliers offers the possibility to create competition between providers during the contract period, which is a typical example of a leverage strategy. In addition, there is more (geographical) capacity when multiple suppliers are contracted, which could be a bottleneck strategy, as it can create a more secure supply. If multiple suppliers are contracted, it is important to decide how the work will be distributed among suppliers during the contract. For each project, a simple mini competition could be organized, but it is also possible to allocate projects randomly without competition (e.g., for small projects or when price, quality, and impact conditions are completely fixed).

Besides the decision regarding the number of suppliers to be contracted, they must also decide if the tender will be divided into different lots. For instance, a buyer could use one lot for technical temporary labor and one lot for facilitatory temporary labor. This can result in contracting one supplier who wins both lots or two separate suppliers for each lot. It is also an option to contract multiple suppliers for each lot. Dividing a tender into lots is, for example, useful for involving SMEs or specialized suppliers. Each lot could be considered as a separate tender, but an important advantage of tendering in lots, as compared to separate tenders, is that a buyer can assign specific conditions to awarding lots. For instance, if there are five lots, it can be stated that at least two suppliers will be contracted to prevent over-reliance on a single supplier or that suppliers are only allowed to submit a bid for a maximum of three lots.

Contracting one supplier or tendering without using multiple lots offers the following advantages:

- Clear, efficient process which reduces administrative burdens.
- Easier to coordinate and control and better suited to intensive collaboration.
- Well suited to low-value contracts or high (mutual) investments for the long term.
- May offer quantity discounts and other economies of scale.

Contracting a relatively large number of suppliers or dividing a tender in lots offers the following advantages:

- Avoiding over-reliance on a single provider.
- More flexible and spreads risks and opportunities for, for example, innovation.
- Reduces supply delivery risks in case of supply chain disruptions.
- Offers SMEs more opportunities to participate in a call for tenders.
- Can lead to better allocations which means that parts of the contract are carried out by the supplier who can do this best.
- When applying multiple sourcing, it offers possibilities for dividing the work through combinations of the following:
 - A buyer or citizen chooses a supplier, for instance, when the contract is healthcare related.
 - Choose a supplier randomly or in turn.
 - Select a supplier using a mini competition, a quick relatively simple sub-tender.

Contract Length

Buyers can opt for short or long contracts, but contracts *without* a contract period limit are not allowed in public procurement. As public buyers are spending public money, new or other suppliers should have the opportunity to submit a bid on a somewhat regular basis.

Long contracts have the advantage that the buyer and supplier can collaborate more intensively, therefore this strategy often used for strategic projects. This also reduces transaction costs as tendering is not conducted as frequently. This is a strategy more suitable for routine projects (see Section 5.4). When large investments need to be made for a contract, it is also common to use longer contract terms. Contract length can also be set at a similar length as the technical lifespan of a product. A risk of long-term contracts is that the supplier is not incentivized to keep performing. To reduce this risk, contract incentives need to be implemented, such as contract extensions or mid-term reviews that can also influence the pricing model.

Short-term contracts can be more appropriate for one-off purchases (e.g., a specific consultancy job). In markets with high development rates, it can also be useful to have contracts with shorter contract periods or more frequent contract extension moments. This way, it is easier for buyers to switch to other suppliers in case they start outperforming the current supplier. However, this type of strategy brings more risks for the buyer if the number of suppliers in a market is low.

Functional and Technical Specifications

An important decision for any tender is the extent in which functional and technical specifications are used in the requirements document. Technical specifications are detailed requirements and focus on the properties of a work, supply, or service or on

what it has. Examples are measurements and environmentally friendly material characteristics. In addition, technical requirements can be used for complex interfaces with existing equipment or software. They can also be suitable if the buyer has (hired) extensive knowledge about the project. The buyer could in this case tender using technical specifications and a simple supplier selection model, which could increase the tender attractiveness for small suppliers. An important disadvantage of technical specifications is that this could limit the possibilities suppliers have to differentiate on anything other than price. Also note that if a buyer makes a mistake in a technical requirement, the supplier could ask for compensation to solve this mistake.

Functional specifications are focused on what the work, supply, or service must do or provide rather than what it is (e.g., asking for light in the office, instead of a lamp). For functional specifications, compared to technical specification, it is more important to explain the context and the objective of the buyer. Functional specifications leave room for innovation and suppliers can distinguish themselves toward other suppliers, which is particularly useful for leverage and strategic projects. However, functional specifications can also leave room for interpretation. If the latter is the case, then technical requirements can be used as supplements or replacements. It is recommended to start with functional specifications and to add or replace them with technical specifications when this is necessary.

Finally, note that for services, a distinction is often made between input and throughput requirements versus output and outcome requirements (Axelsson & Wynstra, 2002), which is discussed further in Chapter 7. Input and throughput requirements are comparable to technical requirements. Output and outcome requirements are comparable to functional requirements.

Tender Attractiveness

Tenders are often formal processes and tender documents are complex, long, and use technical language. This does not have to be problematic in markets with competitive suppliers familiar with public tenders. A formal approach can reduce risks for buyers and suppliers, as well as reduce the risk for legal disputes. However, when a buyer wants to capture the interest of social entrepreneurs, SMEs, companies owned by socially or economically disadvantaged persons, or start-up companies, a more informal and accessible approach is often required. This can also be the case when a buyer operates in the bottleneck quadrant and is in need for suppliers. In such circumstances, it is also less likely that there are substantial tender risks that need to be managed or legal disputes that need to be prevented.

If a buyer decides to use a less formal and technical approach, it is recommended to use short tender documents, with a clear problem or challenge statement as shown in Example 5.3. Instead of requiring formal bids, bidders could in this case, for example, also be allowed to submit pitches. Also note that ‘unusual’ bidders are typically not found when using traditional purchasing platforms to announce a tender, therefore advertising the tender by other communication channels is also recommended when you want to attract them.

Example 5.3: A tender challenge

‘Our city has the following challenge. We have a lot of live video footage of our city. These video streams show, among other things, whether the streets are clean or not. However, we currently do not use this information automatically to instruct our city cleaners where to clean the streets.

Please:

- Describe/show your solution as specific as currently possible with a focus on the first development steps.
- Explain to what extent your solution is realistic and solves the challenge.

We will assess how specific your proposal is and how well you show that your solution is realistic and will solve the challenge. If we award you a contract, you will receive a fee as described in the contract’.

5.7 Summary

This chapter introduced the concepts of public procurement policy and public purchasing strategy. Public procurement policies contain the general resolutions and guidelines of a public organization for guiding and prescribing procurement choices and utilizing its supply base. The chapter described the procurement policy process as a cyclic process starting with agenda-setting (driven by a particular societal challenge), followed by policy development, policy decision-making, policy implementation, and policy evaluation, and then loops back to agenda-setting. Each phase of the policy process is described, including a discussion of important questions that have to be answered in developing the policy, such as ‘*Can it work?*’, ‘*Is it allowed?*’, ‘*Is it applicable?*’, and ‘*Is it appropriate?*’ and an explanation of how conflict and ambiguity affect implementation of policies. Subsequently it is explained that a purchasing strategy uses the guidelines and framework provided by a procurement policy to develop a specific strategy or action plan for a specific tender or a group of tenders. For developing a purchasing strategy, the Kraljic portfolio model in combination with Carter’s customer portfolio model can be used. When combined, the models help set a general direction for the strategy, such as a focus on collaboration, competition, or innovation. The chapter concludes with a description of specific strategic decisions, regarding, for example, single or multiple sourcing, the length of the contract, the type of specifications, and the attractiveness of the tender that have significant impact on the supplier selection process and the type of suppliers that are selected.

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Tendering and Supplier Selection

6

Leentje Volker and Fredo Schotanus

Abstract

This chapter introduces the topics tendering and supplier selection in more detail. It explains that in a procurement context, a tender procedure initiates a process in which decision-makers start to make sense of the potential match between supply and demand. A specific difficulty for supplier selection in public tenders is that the supplier selection model needs to be published before the bids are received and insights developed after reading the bids cannot be used to change the supplier selection model. This chapter explains that to prevent unexpected insights after the tender closes, a buyer should explore and consult the market before the tender starts and listen carefully to suppliers. It also presents a nine-step supplier selection model that public buyers can use to indicate their preferences, since can have a positive influence on the quantity and quality of bids as it can explain suppliers what is needed and important. The chapter concludes by explaining that only by translating the ambitions and views of the buyer in the organizational design of the tender as transparent as possible, the best possible bids will be received.

Keywords

Sensemaking · Decision-making process · Aligning demand and supply · Tender procedure · Tender process · Market consultation · Supplier selection model

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Learning Objectives

After studying this chapter, the reader will be able to:

- Understand that procurement decisions should be considered as sensemaking processes in which legal and social rationalities intertwine.
- Understand how demand and supply need to be matched in a tender process.
- Understand that it is challenging in the context of public procurement to select the best bids.
- Understand the role of decision-makers in tender processes.
- Apply a supplier selection model to a specific situation and understand its effects.
- Understand the differences between relative and absolute scoring methods.

6.1 Introduction

During the tender process, important decisions are made about awarding the contract to a specific supplier. As public procurement becomes more focused on value rather than price only, supplier selection becomes increasingly complex. Furthermore, different stakeholders might hold different perceptions on which part of the purchase is more or less important, who will be the best partner to collaborate with, and who should be involved in the award decision. Therefore, purchase decisions are often more complicated than anticipated and often go hand in hand with increasing insights on the importance of certain values.

Section 6.2 introduces why a tender process should be considered as a managerial decision-making process that facilitates sensemaking between demand and supply. Section 6.3 describes the most essential tender procedures and decisions regarding the tender process. Section 6.4 shows how to develop a supplier selection model in nine steps.

6.2 Considering a Tender as a Decision-Making Process

The principles of EU public procurement law, such as equality, transparency, and proportionality, should be applied to all the supplier models developed by public buyers. These principles are applied to execute the policies developed, to ensure their mission, and to support their primary processes. However, the interpretation and execution of these principles could clash with the other values and rationalities that play a role during procurement processes. The underlying logic of the legal rationality is, for example, that an open procurement market and free movement of supplies and services would ultimately benefit all citizens.

The complexity and uncertainty of selecting a supplier in these complex value frames makes that decision-makers need time to understand the actual aims and opportunities of a tender process (Volker, 2010). In this uncertain context, the use of a predefined and structured aggregation system could ensure equality and fairness. Due to the dynamics of the organizational context in which a decision is made, changes could have occurred in the basic assumptions that are originally framed in the call for proposals. From a rational perspective, a buyer should be aware of the characteristics that come with the nature of awarding a contract and that the aims could be easily expressed in the constitution of the award criteria. However, in social terms, this differentiation can be difficult. Therefore, it could happen that decision-makers start to realize the effect of their request for proposals only after they have received the proposals submitted by the suppliers. For example, a high sustainability-level requirement can limit the number of suppliers that express interest in the job. Another example is that a proposed solution by tenderers is more expensive than was estimated by the procurement department at the start of a tender. If these scenarios occur, then a buyer could decide to withdraw the tender and retender using different award criteria or an increased budget. These are not easy decisions since a retender will take extra time and increases the transactions costs for both buyer and supplier.

Sensemaking in Tender Situations

The theoretical concept of sensemaking is the process of making something sensible (Weick, 1995). This involves an ongoing retrospective development of plausible images that rationalize what people are doing and focuses on the interplay of action and interpretation rather than the influence of evaluation on choice. This social process of construction and reconstruction of meaning enables individuals to collectively create, maintain, and interpret the world through interacting with others. The decision-making perspective on procurement addresses how people make decisions in practice and which situational characteristics influence these processes (Volker, 2010). From this perspective, it could be that, for example, the information on which requirements are based have become obsolete by the time a judgment is made. This makes the identification of decision criteria and allocation of weight to the criteria more complex. Furthermore, in a tender situation using open or restricted procedures with a traditional contract, the decision alternatives are developed by suppliers who submit a tender proposal, with limited possibility for the buyer to influence or control these options.

The process of making sense of the procurement decision starts with the translation of the aims of the buyer into a tender brief and the analysis of the tender project environment (Volker, 2010). During this sensemaking process, a public buyer must analyze the distinctive dimensions of the domain in which the supplier operates to understand the competition. However, from a psychological perspective judging the qualities of an offer always results from the interaction between an individual decision-maker and the alternative that is proposed by the supplier. If you, for example, want to buy new shoes, you explore the Internet, try the shoes on in one or more

stores and compare your preferred options. This shapes your preferences. As a result, judgments about the quality of the proposed solutions are made in relation to the existing values, structures, ambitions, and needs of that individual stakeholder and the potential they perceive for the future situation, which is usually then shared with other decision-makers. Example 6.1 shows how this process developed in a tender for the design of a city hall. In a tender procedure, this psychological decision process must be formalized and officially announced beforehand.

Example 6.1: Sensemaking in the procurement process of a new city hall

When starting to think about an architect to design a new city hall in a middle-sized town, it seems that every employee still required their own room leading to a substantial number of square meters. Yet, after a strong political debate and some financial pitfalls, the city council decided to introduce shared office spaces. Furthermore, to save money the local library will make use of the town hall as well. In this case, the requirements of the tenders and adjacent budgets changed in the same period that the tender was announced.

The town assigned a special tender committee to assess the bids based on a well-structured and transparent assessment protocol. During the assessment process the decision-makers checked to which extent the proposals fulfilled all the criteria as communicated in the tender brief. During this process it was seen that a decision-maker with an architectural design background was more concerned with the feedback from the architectural community than that of the potential users, whereas the representative of the civil servants was more interested in the functionality and aesthetics of the designs. The project leader mainly focused on the efficiency and effectiveness of the construction process and the shared office spaces, while the head of building maintenance and services was more concerned with the product quality and sustainability. The final award decision was motivated by a report in which the diversity of the argumentation of the committee members was nicely integrated.

Matching Supply and Demand

It is important to realize that during a tender, the values of a buyer (the demand side) are connected to the opportunities that are offered by the supplier (the supply side), which in turn are to be matched with specific goals and plans of the buyer (Volker, 2010). This sensemaking process as an interaction between demand and supply is visualized in Figure 6.1. The left side depicts the decision steps from a buyer's perspective, starting with the initialization phase of identification of the tender requirements and criteria to be included in a tender brief or ambition statement (step 1). These requirements and criteria have to be based on demand and market possibilities. For the shoes example, this means a buyer browses the Internet and visits stores to see what is out there. Next, the bids are received based on the tender requirements and criteria, which can be considered a confrontation of demand and supply (step 2). The buyer then starts with value judgments and decision-making by the individual members of an assessment committee, to be finalized by group

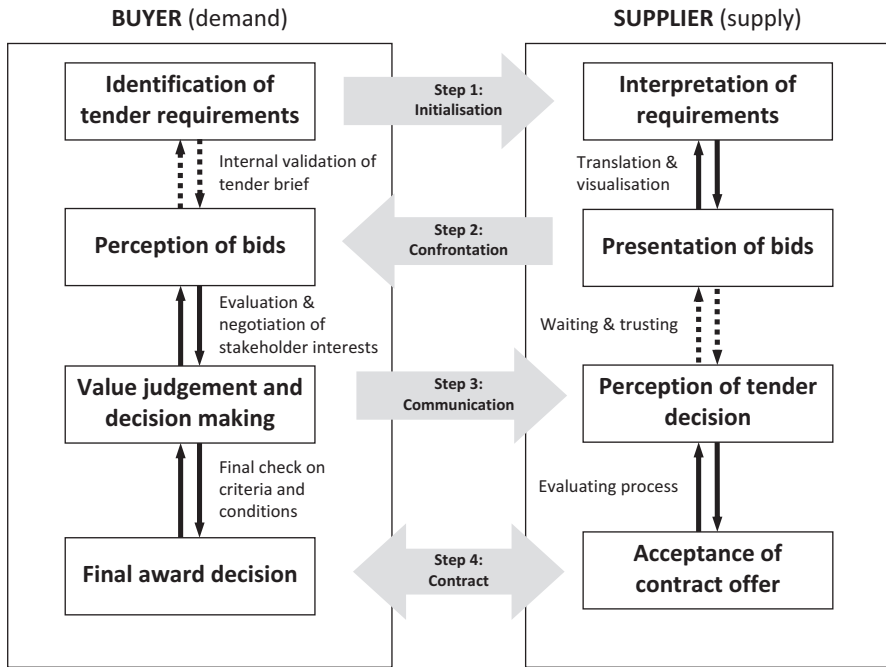


Figure 6.1 The decision processes of a tender as a result of the interaction between demand and supply (Volker, 2010)

decision-making within that committee to be communicated to the supplier (step 3) in order to award a contract to the supplier with the best bid (step 4).

The right side depicts the supplier’s perspective. For them the tender process starts with the interpretation of the tender brief and ambitions of the buyer (step 1), followed by the interpretation, translation, and visualization of the proposed work, supply, or service. The bids that are developed by the suppliers confront the buyer with the procurement options (step 2). While the buyer is assessing all bids, the supplier needs to wait until an award decision will be communicated and processed by the buyer (step 3). If none of the other bidders complain and preferred supplier accepts the contract offer, a purchase has been done (step 4). These four steps show how the interaction between potential suppliers and the buyer can affect both the course and the outcome of the tender process if both the legal conditions and the social dynamics of the tender are acknowledged.

Tensions in Tender Decisions

Public procurement decisions can be accompanied by emotions triggered by the interactions during the tender process, the variety of decision-makers involved, and the political and societal context in which they operate (Volker, 2010). Although tender processes need to be transparent, objective, non-discriminatory, and

proportional, building trust between the buyer and supplier can be a prominent part of the tender. Interactions between the buyers and suppliers in a tender process—for instance, through interviews with key representatives—can enable buyers and suppliers to validate assumptions, and discussions between both parties can change the interpretation and values of the requirements and bids. The rather soft and ambiguous characteristics of these human interactions could, however, also make suppliers feel that they were not treated equally, and assessments might be perceived as subjective. There are also risks for corruption and favoring incumbent suppliers. Involving independent experts or external procurement professionals in the tender process could help to prevent this. Their judgments are sometimes more easily accepted by other stakeholders, like citizens or political parties. Fortunately, tender processes can also leave buyers and suppliers satisfied with the outcome of the selection process because the decision ‘grows on them’ and they may consider themselves as future partners for the delivery or development of specific works, supplies, or services.

Finally, decision-making in procurement situations is complicated because an object can mean, and can be, different things to different people. This means that different decision-makers can see the object differently depending upon their competencies, responsibilities, and their technical interests. Due to the complexity of the field in which a procurement decision is made, it is sometimes hard to involve the right people at the right moment. When buying, for example, new software, the director of the IT department will probably not be actively participating in writing the actual tender documents. Hence, it is important that this person is somehow involved in the whole procurement process. For instance, for large tenders, a purchasing project can be supervised and guided by a steering committee. This steering committee usually consists of the line managers (such as the IT director) and several other main internal stakeholders. As some tenders have multiple aims, these judgments can be complicated, made even more so by the fact that social responsibility and sustainability are increasingly popular public values that need to be incorporated in procurement. These perspectives and values need to be balanced in the tender documents to reach a final judgment about the quality of the proposed solution from a supplier or the supplier itself. Hence, an award decision should not only be considered as a rational assessment process, but also as a holistic judgment about the characteristics of the potential supplier.

6.3 Tender Procedures and the Tender Process

Tender Procedures

A tender is a procedure in which several parties are invited to apply for a contract. As addressed in Chapter 3, the EU Public Procurement Directives contain different types of procedures for tenders with a contract value above the thresholds. Each procedure has its own requirements which relate to the aims and conditions of the purchase. For tenders with a contract value below the thresholds, only the public

procurement principles (e.g., transparency and objectivity), national public procurement law, and organizational policies apply. There are no additional restrictions regarding how to organize a tender procedure. This can be used to the advantage of the buyers, such as only inviting social or sustainable entrepreneurs to submit a bid and therefore preventing any suppliers with high external costs (e.g., high greenhouse gas emissions) from winning a tender.

The most common procedures for EU tenders are the open procedure (about 80%) and the restricted procedure (about 5%) but this ratio differs to a certain extent per industry and country. Other procedures are negotiated procedures, competitive dialogue, innovation partnership, and tender procedures that are not open to competition (Arrowsmith, 2014). The negotiated procedure, competitive dialogue procedure, and innovation partnership create more room for interaction between the buyer and suppliers in comparison to the open and restricted procedures. However, these procedures are for most sectors only allowed in specific cases of complex or unique projects. For the Defense and Utilities sectors, there are no special restrictions for applying the negotiated procedure (with advance notice). For social and other specific services, a buyer can develop its own procedure, including several dialogue rounds in which the options to fulfill the social requirements can be explored.

The preferred tender procedure often varies per industry (how many suppliers are there; how competitive or specific are the suppliers) and the type of purchase (what kind of services, supplies, or works are to be delivered; how complex or distinctive are these). For example, for a more complex product like the development of a new software system for a Ministry of Defense, procurers often prefer to have a stronger pre-selection and more interaction with the potential suppliers than for a tender for the delivery of office supplies. Before a tender is formally started, it is advised to conduct a market research and market consultation to better explain the ambitions of the planned tender and to ask tender candidates a few specific questions. In a market consultation, the buyer can also learn more about alternatives and how to assess them.

Different Phases of a Tender Process

To formally start a tender, the buyer must advertise the tender using a ‘call for participation’ or, in other words, a ‘call for expression of interest’ in the open European public procurement journal *Tender Electronics Daily* (TED) and on a national platform. The use of TED extends the potential supply market to include the entire European Union, although usually only national suppliers or international suppliers with a local office will participate. In the call, the buyers indicate objective and non-discriminatory criteria or requirements, the minimum number of candidates they intend to invite (usually at least five) and, where appropriate, the maximum number.

In an open procedure any supplier may submit a full bid. In a restricted procedure, any supplier may request to participate and only those suppliers invited by the contracting authority may submit a tender. Figure 6.2 visualizes the phases of a restricted tender procedure. A restricted procedure consists of two phases: a selection phase and a tender phase. In an open procedure, the selection and tender phases

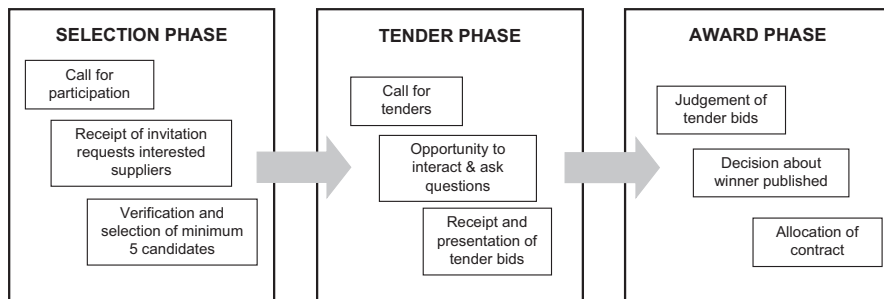


Figure 6.2 Phases and activities of a restricted tender procedure

are combined, which means that the submitted tenders are evaluated on their suitability and quality in the same deliberation. All tender processes close with an award phase.

During the *selection phase*, contracting authorities first must verify the suitability of potential suppliers. All suitable suppliers proceed to the next phase, or they can select suitable candidates using selection criteria, weights, scoring methods, and a selection method. Selection criteria are any general criteria not directly related to the subject matter of the public contract, such as environmental management standards, quality assurance, and references.

At the start of *the tender phase*, the contracting authority shares the relevant procurement documents for this phase. Based on these documents, suppliers can submit a bid. Before the tender phase, it is allowed to conduct an additional market consultation with the pre-selected tenderers. The advantage of such a market consultation is that the participants are involved to a larger extent with the project, as they are already pre-selected. In a restricted procedure, between the selection phase and the award phase suppliers must prepare their tenders. This is also called the tender phase. In an open procedure the selection and tender phases are integrated. The bid—which usually consists of an attractive proposal and a financial offer—needs to be submitted before a strict deadline. Sometimes suppliers can motivate these bids in a personal presentation. In other cases, the bids will have to speak for themselves.

During the tender, it is important to answer all questions from suppliers as clearly as possible, and it should be allowed for suppliers to ask follow-up questions. Typically, most questions can be asked and answered in such a way that no confidential information about the supplier is shared. In case the supplier does have a very specific question, it is allowed to ask a confidential question. A distinction needs to be made between static interaction to improve understanding by raising questions and providing answers during a tender, and a dynamic dialogue in which ideas are exchanged. In practice, written questions and answers are almost always used. Other forms such as a presentation by the buyer during an information meeting and visits to reference projects or suppliers are more common in certain domains than in other domains.

In the *award phase*, the contracting authority uses the supplier selection model to select a winner from the suitable candidates. The contract can be awarded based on either best price-quality ratio, lowest costs using a life cycle costing approach, or lowest price. If the contracting authority uses best price-quality ratio, a supplier selection model with award criteria, weights, scoring methods, and an award method are required. Award criteria must be linked to the subject matter of the public contract in question. Examples are quality, price, technical merit, aesthetic and functional characteristics, and environmental and social characteristics. All suppliers receive feedback from the contracting authority about their bid. The authority also explains why the winning supplier was selected. The following section explains how to develop a supplier selection model that supports the decisions made in the tender process.

6.4 Developing Supplier Selection Models

Many organizations in the public sector struggle with the pressure to make and explain sound supplier selection choices. Especially using sustainable and social criteria can be challenging because of the nature of such criteria, which is more often abstract and difficult (de Boer et al., 2006) to measure than monetary values such as price and tangible measurements such as technical strength or the number of certain characteristics. Nevertheless, it is important for public buyers to take such aspects into account, as is illustrated in Example 6.2.

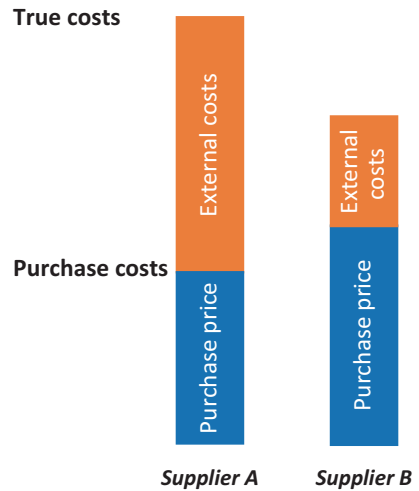
Example 6.2: True costs versus purchase costs only

This example illustrates the importance of taking the true costs of a tender into account. The true costs of a tender include not only the purchase costs and costs of use, but also the external costs. External costs are defined as costs created for others or society not included in the purchase price and the costs of use. Examples of external costs are greenhouse gas emissions or underpayment of staff. There can also be external *benefits* related to a bid from a supplier. These can be less challenging to consider. They can be part of the quality part of the bid of a supplier. Also note that a rational supplier has an incentive to ‘sell’ external benefits and ‘hide’ external costs.

Figure 6.3 shows two suppliers with different purchase prices and different external costs. Assuming that the level of quality is equal for both supplies, the more sustainable or social option is Supplier B. However, if price and quality are the only criteria, Supplier A would be selected.

Note that it is often the case that Supplier A can offer a lower purchase price than Supplier B, as Supplier B could have hidden expenses to prevent external costs. So, it is important for buyers to either pre-select only sustainable and social suppliers such as Supplier B, what would prevent suppliers such as Supplier A from participating in a public tender. Otherwise, buyers could include requirements and award criteria related to externalities, what would reward Supplier B’s lower external costs compared to Supplier A.

Figure 6.3 Example of different prices and external costs of suppliers



This section describes nine steps that need to be taken in order to develop a supplier selection model when a buyer uses best price-quality ratio to select the best bid based on normative decision theory:

- 1) Understand demand and supply possibilities;
- 2) Choose between lowest price, lowest costs, or best price-quality ratio;
- 3) Develop selection and award criteria;
- 4) Attach weight;
- 5) Draw scoring methods;
- 6) Choose a selection and award method;
- 7) Simulate bids;
- 8) Assess requests to participate and bids;
- 9) Justify tender decision.

As will be illustrated in this section, all steps can influence how suppliers develop their bid and which supplier wins a tender.

Step 1: Understand demand and supply possibilities

Before a buyer can develop a supplier selection model, they must understand what is needed and what the market has to offer. A buyer has several options to improve their understanding of supply and demand, such as analyzing spend, interviewing users, exploring the market, conducting a market and buyer consultation, and employing or hiring experts.

If it is not possible to develop a supplier selection model after using these tools, then an open and restricted procedure is unsuitable, and a negotiated procedure or a competitive dialogue should instead be explored. Alternatively, the buyer can choose to award the contract based on partner qualities (e.g., ability of the supplier to

cooperate) instead of qualities related to the project at hand. After having contracted the best suitable partner, there are more possibilities to collaborate while developing specific plans for the work, supplies, or services required.

Step 2: Choose how to award contracts

A buyer needs to decide on what basis the supplier will be awarded the contract. For choosing the Most Economically Advantageous Tender (MEAT), a buyer can use best price-quality ratio, lowest life cycle costs, or lowest price. With *Best Price-Quality Ratio (BPQR)* buyers award a contract based on price and quality criteria or on quality criteria only (in this case the price is determined by the buyer in the procurement documents). On average, about half of all EU tenders are based on best price-quality ratio. The other half uses lowest price only. There are large differences between EU Member States though. In countries such as France and the Netherlands, best price-quality ratio is more popular. In countries such as Germany and several Eastern European countries, lowest price is more popular. Note that in this book, the word (societal) impact is often added to best price-quality ratio, resulting in the best price-quality-impact ratio. Impact or external costs can be considered as part of the quality criteria, but as there are important differences between the quality of a purchase (such as the performance of a laptop) and the external impact it has on society (such as greenhouse gas emissions created by its production), quality and impact can also be considered as separate topics.

With *lowest life cycle costs (LCC)* buyers award a contract based on the lowest costs associated with the purchase during its complete lifetime, ranging from the purchase price, maintenance costs to external costs such as greenhouse gas emissions. Although several tools are available online, LCC can be a complex method to apply, as it is often difficult to quantify all related costs to a purchase. The method is rarely used in public procurement practice.

With *lowest price (LP)* buyers award a contract based on price only. A major risk of lowest price is that suppliers are selected with higher external costs or with lower quality standards. However, it can also be a suitable method. For instance, for simple commodities or for tenders in which no quality, environmental, and social differences between suppliers are expected. The method is simple to use and less prone to corruption and fraud than methods that include qualitative award criteria. It can also be a suitable method when the buyer has (hired) specific knowledge and prescribes the specifications. For instance, it can be prescribed that a new bridge should be build according to a certain design and that recycled materials should be used. A prescribed design typically limits innovation, but it also reduces transaction costs and makes it easier for SMEs to participate in public tenders. If a buyer uses LCC or lowest price only to award a contract, step 3 onward is not required.

Step 3: Develop selection and award criteria

If buyers understand what they can buy, they can start thinking about choosing the selection (if applicable) and award criteria that they will apply during the tender. Selection criteria and award criteria are quite distinct and are not to be confused. At

the selection phase the aim is to select those tenderers who are *capable* based on *general* properties. It should be relatively easy for tenderers to submit a request for participation for the selection phase and price is not a criterion. The tender phase assesses the *best tender* received from the pre-selected tenderers based on price and specific properties that must be related to the subject matter of the public contract in question (Arrowsmith, 2014).

In practice, criteria are often copied from the previous tender or are the result of brainstorm sessions. This can result in a broad set of (sub)criteria that may not always be distinctive and could overlap. Several techniques are available to prevent overlap, such as using tree structures or a goal setting technique. The latter means that the original (policy) goals related to a tender are translated to requirements and criteria. For example, the simplified goals of a tender for a public transport contract could be related to a fair price, more people using public transport instead of cars, and reduced CO₂-emissions to be measured with a tool like the CO₂ Performance Ladder (see Example 6.3).

Example 6.3: Stimulating carbon emissions by procurement

The CO₂ Performance Ladder is an instrument that helps organizations reduce their carbon emissions in the organization, in projects, and in the business sector (<https://www.co2-prestatieladder.nl/en>). Each organization certified on the ladder is subject to annual audits performed by independent and accredited Certifying Institutions (CI). Through these audits, a certified organization ensures the implementation of the CO₂ Performance Ladder in its management and projects. Furthermore, the certified organizations are evaluated annually for their ambitions and initiatives to reduce carbon emissions and continuous improvement.

Certified organizations receive a fictitious discount on the registration costs of tenders. The higher the level an organization has on the CO₂ Performance Ladder, the higher the award advantage. The buyer decides the award advantage an organization can receive on each level of the Ladder. Hence, the instrument is used as both a CO₂ management system and a procurement tool. This way the buyer encourages certified organizations to remain ambitious in their efforts to reduce carbon emissions.

Criteria can be quantitative (e.g., price) or qualitative (e.g., a plan of approach). For selection and award criteria several requirements apply, including (Arrowsmith, 2014):

- Criteria are not discriminatory.
- Award criteria should be assessable during the bid evaluation and during the contract period.
- The number of qualitative criteria should be limited to prevent excessive transaction costs for suppliers and assessors. Certain aspects that are not distinctive or are too detailed for the tender could be developed by the winning supplier during a verification or an implementation phase.

- It is allowed to tweak criteria during a tender in response to questions asked by suppliers, but significant changes could lead to an extension of the bid submission deadline.
- It is not allowed to change criteria after the bid submission deadline.

Finally, it is important that criteria are explained clearly and extensively in the procurement documents. A possible structure for the description for qualitative criteria is included in Example 6.4.

Example 6.4: Awarding public transport

- **Objective**
Increase the usage of public transport usage, without attracting those that currently walk or cycle.
- **Required input**
Please provide (1) a timetable; (2) a network map; (3) an explanation of differences between the new and current timetables; and (4) proof of why the plans are realistic and will contribute to the buyer's objective. A maximum of 10 pages is allowed.
- **Assessment method**
Bids that are specific, that show that they are realistic and can achieve the objective will receive better scores. Certain combinations of assessments lead to specific scores; a bid that is not specific will be assessed as insufficient; a bid that is specific, but lacks proof related to realism and effectiveness will be assessed as satisfactory; and a bid that is specific and shows that it is realistic and effective will be assessed as very good.

Step 4: Attach weight

The contracting authority must specify the relative weighting which it gives to each of the criteria chosen to determine the tender with the best price-quality ratio. Those weightings can be expressed by providing a range with an appropriate maximum spread. Where weighting is not possible for demonstrable reasons as determined by the contracting authority, they must indicate the criteria in descending order of importance.

Not all criteria need to be weighted the same. The weights of the different aspects (price, quality, and/or societal impact) are awarded based on the specific context of the work, supply, or service being procured. For instance, in certain situations, quality is more important than costs, and the criteria for quality will outweigh the cost criteria.

For those not trained as procurement officers, the weight of criteria is the most important indicator for the importance of a criterion. The announcement forms on *Tender Electronics Daily* also suggest this. However, as is shown in step 5 and 6, this is not always true. For instance, when a buyer uses a threshold for a criterion or when a certain selection method is used, this can considerably influence the supplier choice as well.

Determining weight can be a challenging task for a procurement team, as there is often a trade-off between different policy objectives. In practice, several methods are used for determining weight. They can be the result of business case calculations, where criteria that add most value receive higher weight. They can also be the result of developing fictive bids and discussing in a procurement team to what extent the fictive bids receive the ‘correct’ score depending on different weighting. Finally, the Analytic Hierarchy Process (AHP) can be used to determine initial weighting. AHP acknowledges that the human brain has difficulties with comparing the importance of several criteria simultaneously. Hence, to make a more reliable decision, AHP compares each criterion pairwise to each other criterion. This can be done at different scales (e.g., a 5-point scale or a 9-point scale) where the procurement team indicates for each pair of criteria whether they are equally important or whether one criterion is slightly to very much more important than the other one. AHP tools are widely available for free on the web.

Step 5: Draw scoring methods

Scoring methods are used to assign a score to supplier bids for each criterion. Scoring methods can be qualitative or quantitative and absolute or relative. All types are explained in more detail below.

Qualitative scoring methods (also known as scoring rules) are used for assessing plans, designs, interviews, and so on. Scores for such plans, designs, and so on can be determined relatively or absolutely. An example of a relative method is to state that Supplier A scores much higher on criterion 1 than Supplier B. With methods such as Weighted Sum Model (WSM), scores are determined in an absolute way. An example of an absolute scoring table for assessing quality is presented in Table 6.1. The scoring levels used in the table are in line with earlier research which suggests that people generally use four basic levels of quality assessment: under-performance, basic performance, added value, and excellence (Walden et al., 1993).

Note that the scores in the table are not linear. The buyer indicates that ‘good is good enough’: bids of very good quality or excellent quality are rewarded, but only relatively as the difference with good and very good is only 20%, while the difference between satisfactory and good is 40%. Applying such a technique to tenders can be a simple technique that can contribute to either lower prices or higher environmental and social impact. This is because there is little to no incentive for suppliers to aim for very good quality. Instead, they have more financial room to increase positive environmental and social impact or lower their price.

Table 6.1 Example of a scoring table

Qualitative assessment per criterion	Score
Contributes very good to realizing the objective (excellence)	100%
Contributes good to realizing the objective (added value)	80%
Contributes satisfactory to realizing the objective (basic performance)	40%
Does not or barely contribute to realizing the objective (under-performance)	0%

Table 6.2 Poor example of a scoring table for quality or impact

Qualitative assessment per criterion	Score
Contributes excellent to realizing the objective	100%
Contributes very good to realizing the objective	90%
Contributes good to realizing the objective	80%
Contributes fairly good to realizing the objective	70%
Contributes satisfactory to realizing the objective	60%
Contributes quite satisfactory to realizing the objective	50%
Contributes poorly to realizing the objective	40%
Contributes very poorly to realizing the objective	30%
Contributes extremely poorly to realizing the objective	20%
Does not contribute to realizing the objective	10%

In practice, many different types of scoring tables are used. Although there is no academic proof for which scoring table leads to the highest bid quality, it is important that the scoring ranges for different types of criteria are similar. For instance, if the scoring range for quality is assigned using Table 6.2 (in contrast to Table 6.1), it is likely that scores of most of the suppliers will rank between 80% (good) and 50% (quite satisfactory). This means that the scoring range for quality is limited (about 30%), what makes it difficult for suppliers to stand out on quality. This is especially the case when suppliers can score between 0 and 100% for price. Reduced qualitative scoring ranges lower the importance of a criterion the same as a lower weight.

Quantitative scoring methods are used for assessing tangible qualities such as prices, delivery times, and CO₂-reductions. Like qualitative criteria, quantitative criteria can be assessed relatively or absolutely. An example of a popular linear relative scoring method for price is:

$$2 * \text{max points} - \frac{\text{Price supplier } i}{\text{Lowest price}} * \text{max points}$$

An example of a curved relative scoring for price is:

$$\frac{\text{Lowest price}}{\text{Price supplier } i} * \text{max points}$$

As can be seen from the figures, the curved relative scoring method has a strong incentive for suppliers to offer as cheap or as expensive as possible, while compensating with over-the-top quality (Figure 6.4).

In contrast to relative scoring methods, absolute scoring methods are independent of how other suppliers bid. An example of a linear method is depicted in the left method in Figure 6.5 based on the following scoring method:

$$\text{max points} * \frac{10,000 - \text{Price supplier } i}{2000}$$

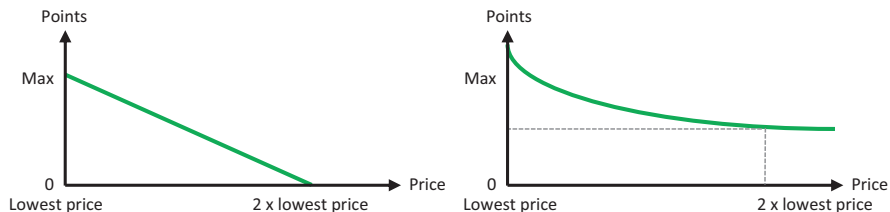


Figure 6.4 Effects of linear and curved relative scoring methods on number of points to be scored by suppliers depending on bid price

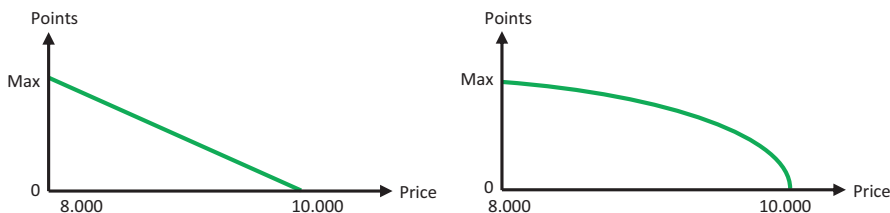


Figure 6.5 Effects of different absolute scoring methods on number of points to be scored by suppliers depending on bid price

The figure right shows the effects of:

$$\text{max points} - \frac{(\text{max points} \times (8000 - \text{Price supplier } i) / 2000)^2}{\text{max points}}$$

The effect of the figure on the right is that suppliers are incentivized to offer a lower price. However, this incentive decreases which in turn incentivizes suppliers to invest more in quality and impact compared to investing in an even lower price. Also note that absolute scoring methods provide more information to suppliers compared to relative methods, as minimum and maximum prices are indicated. Drawing such figures during the preparation phase of every best price-quality ratio tender is an important step, because it increases insight into the actual behavior of a mathematical formula.

In academic and professional literature, there is an intensive debate about the application and effects of *relative and absolute methods*. Relative methods are easy to apply as no market knowledge is required for setting a suitable minimum and maximum price. However, as relative scoring methods provide suppliers no guidance regarding an acceptable price range, there is a strong incentive for suppliers to offer low prices. With relative scoring methods, it is always interesting for a supplier to offer a lower price as it will increase its score and possibly lower the scores of the others. This focus on price reduces bid quality and environmental and social impact. Empirical data and mathematical modeling also show that relative scoring methods could lead to lower price-quality ratios compared to absolute methods (Albano et al., 2008; Telgen & Schotanus, 2010).

A specific issue related to many relative scoring methods is rank reversal. Rank reversal is a change in the ranking of bids from suppliers leading to a new winner after adding or removing a non-competitive bid (Schotanus et al., 2021). In supplier selection, rank reversal can occur when buyers use multi-criteria selection methods in combination with a relative scoring method for price. For suppliers, the possibility of rank reversal means that winning a tender can depend on whether a non-competitive supplier participates. In other words, there can be a non-competitive bid that influences who wins the tender. Relative scoring methods that allow rank reversal also conflict with the principles of transparency and equal treatment (Manunza, 2018).

Step 6: Choose a selection and award method

Setting up a selection and award method allows the buyer to make tender decisions. An example of a popular method is the Weighted Sum Model (WSM). In WSM, all suppliers are awarded scores on all criteria. These scores are multiplied with the respective weights of the criteria. The supplier with the highest total score wins the contract. Many variants of WSM are used in practice. An example of such a WSM variant for the tender phase is illustrated in Example 6.5.

Example 6.5: WSM variant highest impact method for supplier selection

The highest impact method involves two selection rounds. In round 1, the buyer assesses price and quality. In this example, the buyer has set high-quality requirements, leaving little room for quality in the award phase. Therefore, the highest weight is attached to price (30 points can be achieved for price and 5 points for quality). Price scores were calculated using an absolute scoring method. The buyer has indicated in its request for proposal that all bids with scores of 25 points or more proceed to the next round.

In this case, Supplier C is rejected as it does not meet the threshold for a decent price-quality ratio. In the next round only impact (e.g., social return) is considered. As there is only one criterion, no weights are required. The bid with the highest impact wins the tender, in this case Supplier B.

Note that alternative methods are possible that lead to similar results. For instance, a buyer could use WSM with three award criteria and use only one assessment round. The buyer could attach a very high weight to impact (e.g., 80%) and set a minimum threshold for the price-quality combination equal to 25.

Table 6.3 Example of highest impact method

Criteria	Price	Weighted price score	Weighted quality score	Subtotal
Bid A	1800 €	30	3.6	33.6
Bid B	2500 €	21.6	3.4	25.0
Bid C	2600 €	21	3.0	24.0

Table 6.4 Example of highest impact method after withdrawal of one supplier

Criteria	Impact score	Rank
Bid A	3.0	2
Bid B	7.0	1

Besides WSM, there are many more selection and award methods that could be applied in public procurement. The methods can be classified as following:

- *Compensatory versus non-compensatory or semi-compensatory methods* (De Boer et al., 2001): compensatory methods such as WSM allow suppliers that have a low score on one criterion to compensate this with a good score on another criterion. Non-compensatory methods are strict and do not allow (very) low scores to be compensated.
- *Monetary versus point methods* (Bergman & Lundberg, 2013): in WSM and many other methods, suppliers receive points for all criteria, including price. Another approach is to convert quality and impact assessments to money values, meaning that better assessments result in higher values. With a monetary method, quality and impact values can be deducted from the price of a supplier. The supplier with the lowest ‘virtual’ price wins the tender.

Award methods can influence which bid wins, but it is also important to realize that the bids themselves can differ if a different method is used. If a buyer uses the highest impact method, rational suppliers are likely to offer a decent price-quality ratio that aims to maximize positive impact (or minimize negative impact).

Step 7: Simulate bids and tweak the supplier selection model

After step 6, all elements of the supplier selection model have been developed. Before the supplier selection model is finished, a final check needs to be done using hypothetical bids. This final check means that a buyer checks whether the model as a whole functions as intended. To this end, the buyer can create different hypothetical bids and calculate whether the bid that is considered by the procurement team to have the best scores actually wins the tender. Examples of hypothetical bids are the bids described in Tables 6.3 and 6.4. Typically, the hypothetical bids cover a cheap bid with low quality and impact scores, an expensive bid with high quality and impact scores and one or two intermediate bids.

Step 8: Assess requests to participate and bids

When the tender closes, the bids received need to be assessed. Quantitative parts of bids, such as price, are usually easy to assess. It is often only a matter of filling in the price in the formula which was published in the tender documents. Qualitative parts of bids, such as a plan of approach, a planning, or a conceptual design, often need to be assessed by human assessors. Assessing such qualitative elements can be challenging for several reasons. It can be difficult to put into words why a certain bid is better than another, without revealing confidential information about the bid of a

winning supplier. In addition, assessors are often inexperienced, and assessments are completed in addition to their daily responsibilities. It is therefore important to prepare the assessment process early and explain it in detail to all those involved.

Two aspects are crucial in the organization of qualitative assessments. Firstly, how the bids will be assessed is explained in the procurement documents. New assessment criteria or elements cannot be added during the assessment process. It may be appealing to do so, especially when working with assessors who are not trained in procurement. An independent person (e.g., a procurement officer) who supervises the assessment process should check that no new elements have been added to the assessment and ensure that all assessment aspects mentioned in the procurement documents are assessed and mentioned in the feedback to the suppliers. The independent person can also make sure that the order in which the assessors speak alternates. Assessments are also done without knowledge of prices to prevent assessors being influenced by this information.

Secondly, several assessors (preferably at least three) should assess all bids individually. The judgment of a group of assessors can be considered as an inter-subjective consensus decision (Volker, 2010). The involvement of experts can also contribute to the quality of decisions and managing the decision process, especially when dealing with purchases that are not part of the daily routine. All assessors should start, where possible, by assessing different bids individually. The first bid is typically assessed somewhat differently than the last one, because of the knowledge gained during the assessment process, among other things. This principle should also be applied during plenary group meetings.

There are different ways to reach a common judgment for the group. Figure 6.6 shows that a distinction can be made between an individual judgment and multiple judgments of the decision-makers and between the separate qualities and holistic quality of a proposal (Volker, 2010). This leads to six different ways to reach a common judgment and two major decision approaches.

The first option to approach a decision is to aggregate the individual judgments without interaction between the different decision-makers in a form or system (e.g., Excel) and average the scores (Relation 2 and Relation 6 in Figure 6.6). From a legal perspective, this is referred to as the independent expert model. This method shows weaknesses in the measurement scales of the intangibles but shuts out social influences. It can therefore be perceived by the outside world as more accurate. Disadvantages of this method are that insights of other decision-makers are not shared, and decisions are not as easily accepted. Examples of methods that are based on this principle are the Delphi Method, which is based on a ranking of individual judgments of several design qualities without social interaction of the decision-makers (Relation 6) or the Song Festival Method, in which countries independently express their grades based on holistic individual judgments about the quality of the proposal (Relation 4). The Olympic Scoring System, used for sports such as gymnastics or figure-skating, is based on individual judgments about qualities (Relation 2) that are expressed as holistic judgments and compared to those of other members of the expert panel (Relation 3) to present a ranking that shows the final winner (Relation 4).

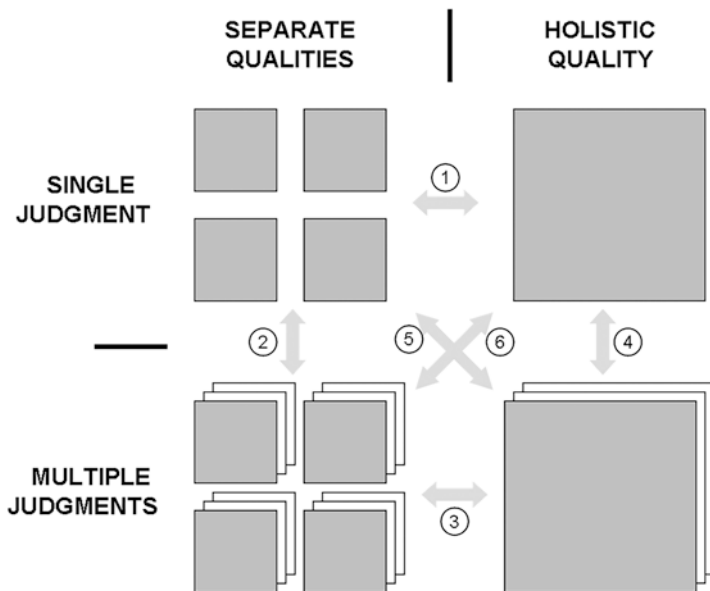


Figure 6.6 Four points of departure and interrelations for assessing the qualities of bids (Volker, 2010)

Another more interactive and preferable approach for public procurement decisions is to discuss the differences between the individual judgments on a holistic level and define one judgment for the group (Relation 4), discuss the separate qualities with the other jury members and then reach a decision (Relation 6), or discuss the proposals on a holistic level (Relation 3). The more differences in perspectives, the more difficult it is to discuss issues, but nonetheless in every situation a consensus or average outcome must be reached, as is acknowledged in case law. The consistency of the judgment means that arguably only using aspects that can be measured or assessed on a certain scale could be seen as a solid base for discussion. However, leaving out or quantifying the intangible characteristics does not benefit the validity of the judgment. The fact that more information can be put on the table during the discussion and discussions contribute to decision acceptance can be considered beneficial. At the same time, there is more pressure to conform, and the possibility of one or two members dominating increases the chances of groupthink and group shift.

In this context, a clear distinction should be made between an individual judgment, a judgment of a group, and a decision about the winning tender. Aggregation can turn individual judgments into group judgments and fragmented qualities into holistic qualities. This can be done through discussion and/or summation. In a discussion, the differences between the individual judgments are discussed first, and then one consensus judgment for the group is defined. An important disadvantage of a consensus judgment is that one assessor can intentionally (using hierarchy power) or unintentionally (the first assessor who explains its judgment can have an

unintentional effect on the others) influence the other assessors. Summation is a more quantitative process of adding up each individual judgment, either by voting or collecting individual preference statements, to take the calculatable average as the final decision. Both methods can be regarded as inter-subjective. Both these systems are acknowledged in case law as the consensus model and the individual assessor's model.

To prevent decision conflicts, it is important to align the decision frames throughout the process to other stakeholder groups, such as citizens, other political parties, or line management. Often experts are involved that could have a frame of reference with which they perceive the proposals. These experts are generally able to use their knowledge and experience in an efficient way, trusting other panel members not to overlook high-quality submissions or make invalid judgments. From previous research we know that experts are better at seeing the significance of information, identifying important cues for risks, estimating consequences, and judging autonomously (Volker, 2010). Experts also feel the need to discuss and harmonize their preferences with other members of the group, which contributes to legitimization of the decision to the participants and society. Additionally, less experienced decision-makers could benefit from a discussion to build up their own frame of reference which could enable them to speak the language of the experts involved in the selection process, better control their emotions, and use intuitive judgments.

Step 9: Justify the tender decision

The obligation to announce the selection and award criteria enable the tender candidates and tenderers to know what to expect during the assessment phase. For each tender, decision-makers need time to go through several iterative and incremental stages of decision-making, even more so when tender procedures take several months to execute (Volker, 2010). In this context, transparency about the actual decision processes (e.g., who was involved, when, what kind of perceptions were in place) is not always the same as the transparency required by the legal framework (e.g., which criteria will be applied, what is the weight of these criteria).

After a decision has been made, a public organization must justify the decision to their own organization, to the public, to society, and to the suppliers that participated in the tender. These multiple responsibilities are often described as 'the many hands that make it difficult to identify one single person responsible for a decision'. In justifying a decision, a decision-maker is simultaneously confronted with the legal structure of the decision procedure and the psychological decision process of sensemaking, as explained in Section 6.1. Justifying a decision requires expertise, however tender and award committees do not only consist of domain-specific procurement professionals, but often include numerous stakeholders with different backgrounds. Therefore, without strategic aims and suitable means, stakeholder involvement could merely increase the uncertainty during the decision process and decrease the support of a decision. It also increases the difficulty of explaining a decision and therefore the transparency of a tender decision. Additionally, the involvement of external advisory experts can change the power balance and culture within an organization or team, therefore the roles and responsibilities of the decision-makers should be addressed, and the decision panels trained in how to increase the level of trust and alignment among the stakeholders.

Current procurement law requires buyers to clearly motivate their decision and transparently communicate the ‘story’ behind the decision based on the original supplier selection model. This indicates that current public procurement law is based on assumptions like the first generation of rational decision theories from the field of organization sciences (Beach & Connolly, 2005). These models perceive the process of decision-making as a sequence of problem definition, identification of decision criteria, allocation of weight to the criteria, development of alternatives, and evaluation of alternatives with the use of the decision criteria as set out in the beginning.

This generally increases the level of trust in the buying authority and could therefore support the strength of the decision among stakeholders. Simply supplying a matrix sheet with some numbers does not fulfill this need because it does not offer the level of transparency that is desired by the stakeholders, including the suppliers. Hence, the procurement professional needs to be able to explicate the underlying tensions and dilemmas that have occurred during these often political and sensitive decision processes.

6.5 Summary

This chapter introduced the topics tendering and supplier selection in more detail from a decision-making perspective. It explained that in a procurement context, a tender procedure initiates a process in which decision-makers start to make sense of the potential match between supply and demand that enables the purchase of a work, supply, or service. Hence, supplier selection should be considered as a sensemaking process across different stakeholders with different interests and political aims. However, a specific difficulty for supplier selection in public tenders is that the supplier selection model needs to be published before the bids are received. Therefore, insights developed after reading the bids cannot be used to change the supplier selection model. To prevent major unexpected insights after the bid submission deadline, this chapter explained that a buyer should explore and consult the market before the start of a tender and listen carefully to potential suppliers during the tender procedure. This chapter subsequently explained that buyers can indicate their preferences in a nine-step supplier selection model. These combined steps have a positive influence on the quantity and quality of bids because they lead to supplier selection models that explain to potential suppliers what is needed and what is important. Only by translating the ambitions and views of the buyer in the design of the tender as transparent and structured as possible, the most promising bids will be received. The assessment process can be supported by a tender and award committee that judges the bids individually and then reaches a consensus as a group. This allows the public buyer to select the supplier that matches the demands on all levels of the organization and increases both the external and the internal support for a tender decision.

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Public Sector Contracting

7

Wendy van der Valk

Abstract

This chapter zooms in on contracting in a public sector context. The relationship and exchange between public buyers and suppliers are usually governed by formal contracts as well as by more relational mechanisms such as trust. This chapter explains that contract design choices and characteristics of the relationship together shape how contracts are subsequently implemented and managed, and hence the success of the ongoing exchange. It discusses considerations for contract design and subsequent management in light of relationship characteristics and its effects. Specific topics in this chapter include contract specification, remuneration and incentive schemes, and how learning from deviations and non-compliance may foster post-formation adjustments to contractual governance.

Keywords

Contractual governance · Relational governance · Supplier behavior · Contract specification · Rewards · Incentives · Contract implementation · Learning

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Learning Objectives

After studying this chapter, the reader will be able to:

- Describe different types of contracts.
- Explain how contracts can drive supplier behavior.
- Explain which contract types are most appropriate/effective for a given transaction.
- Understand that contracts always coexist with the relational characteristics that typify the buyer-supplier relationship being governed.
- Understand how contract implementation can be a source of learning and improved contract (re)design.

7.1 Introduction

Contracting involves the systematic and efficient creation, implementation, and management of contracts for the purposes of maximizing operational and financial performance and reducing risks. It thus refers to the ex-ante (e.g., in advance of contract signing) contract creation process in which public and private buyers arrive at a signed agreement regarding the conditions and characteristics of the proposed delivery of works, supplies, or services with specific suppliers.

Contracting also refers to the implementation and ex-post (e.g., after contract signing) management of the contract to execute the delivery and possible (re)use of the agreed works, supplies, or services. During contract implementation, various delivery aspects such as quality and cost need to be monitored and suppliers need to be paid. The basis for these monitoring and payment processes has been designed into the contract, such as monitoring and rewarding efforts and behaviors versus performance and outcomes.

Finally, contracting refers to analyzing any deviations that may occur so that they can properly be addressed, both in the short term (e.g., recovery of damage) and the long term (e.g., learning about the causes of deviations and how they could be prevented in the future). In some cases, recovery may not be possible, requiring organizations to develop alternative solutions that accommodate users, but potentially also to take more formal (e.g., legal) steps toward suppliers. Therefore, managing the supplier relationship after the contract has been signed is an important activity in the perform phase of the public procurement process. In brief: the contract lays down the foundations of a relationship between buyers and suppliers and is key in the purchase phase of the public procurement process.

In Section 7.2, contract design choices and implications for the subsequent implementation and management of the contract are discussed, focusing on the type and level of detail of contract specifications and on the remuneration schemes that are put in place. These choices are imperative for effective management of the

ongoing exchange process and the successful realization of the buyer's objectives. Next, in Section 7.3 the ex-post management of contracts is described, whereby attention is given to inter-organizational network structures, such as triads, that may arise in public sector contracting. In Section 7.4 contract design and contract management are addressed in terms of relational elements of buyer-supplier relationships, such as trust. Finally, attention is drawn to contract deviations and how they may be used for the purposes of learning and effective contract adjustments and redesign in Section 7.5.

7.2 Contract Specification

Contracts have traditionally been viewed as formal written documents that capture the agreements made between a public principal and one or more parties that deliver works, supplies, or services, thereby marking the end of the purchase phase in the public procurement process. While formal agreements may take various forms (written or verbal, implicit or explicit), formal contracts specifically refer to written agreements that are legally binding (Atiyah, 1989; Klein Woolthuis et al., 2005) and that typically entail obligations to perform particular actions (McNeil, 1978). In line with this notion, contracts include 'third-party enforcing' agreements such as legal courts, as well as formal self-enforcing agreements, such as arrangements regarding penalties and bonuses (Dyer & Singh, 1998). The term 'contractual governance' is used to indicate to what degree the relationship between the public buyer and suppliers is indeed governed by a formal contract (Ferguson et al., 2005; Gardet & Mothe, 2011). Extant work on contractual governance entails a strong body of knowledge in ex-ante contract design (Roehrich et al., 2021) and a growing body of knowledge in ex-post use of contracts (see Section 7.4).

In contract design, two key elements can be identified: (1) the specification and (2) the reward structure (see Section 7.3). Together, these two elements determine the nature and framing of the contract. Specific examples include lump sum and fixed price contracts, fixed price plus incentive fee contracts, cost-reimbursable contracts, unit rate contracts, and agreements with price adjustments (Table 7.1). The design of the contract also impacts the amount of risk transferred toward suppliers. Many organizations and industries draw on standard contracts with boilerplate terms (Roehrich et al., 2021), which are then customized. This variation in contracts has led to many classifications of contracts drawing on a variety of dimensions (Cao & Lumineau, 2015), such as 'simple' versus 'complex' contracts (Petersen & Ostergaard, 2018; Praxmarer-Carus, 2014), 'standardized' versus 'customized' contracts (Van der Hurk & Verhoest, 2016), or 'time and materials' versus 'performance-based' contracts (Glas & Essig, 2021). The type of contract also differs per industry or organization that designs the contract.

No matter the contract type, contracts provide the framework and boundaries for how contracting parties can and should work together during contract execution. Essentially, the contract lays the foundation for and therefore strongly influences the ongoing dealings between public buyers and their suppliers. Transaction cost theory

Table 7.1 Overview of common contract types

Contract type	Characterization
Lump sum/fixed price	Suppliers obtain a fixed remuneration for the work to be performed.
Fixed price plus incentive fee	Provides additional rewards when agreed performance is exceeded.
Cost-reimbursable	Builds on fixed hourly rates for labor and equipment, no bonus or penalty clauses. Used when work cannot be adequately specified or when a fixed price constitutes too big a risk for buyer and/ or supplier.
Unit rate contract	Builds on cost for standardized units (e.g., price per m ²). Used for standardized activities which are difficult to estimate in terms of volume and timing.
Agreement with price-adjustment (e.g., essentially an adaptation contract)	Used for long-term agreements or the purchase of price-sensitive materials.

suggests that a well-specified contract that stipulates the rights and obligations of both parties, and that explicitly states how various future situations will be handled, protects specific investments from opportunistic behavior (Williamson, 1985).

In addition to the notion of contracts as effective safeguarding devices, contracts can also be seen as coordination, or even adaptation, instruments (Schepker et al., 2014). Public-private relationships are increasingly in need of contracts that help them govern the business they undertake with each other. This is especially relevant in settings characterized by high uncertainty, such as long-term, complex, and/or innovative projects. Contracting increasingly becomes challenging, however, when transacting parties are confronted with large amounts of complexity and uncertainty, as it can be very costly to specify all contingencies. As a result, contracts are generally incomplete, thereby offering imperfect protection against opportunism. Nevertheless, contracts are usually quite extensive documents and have become even more extensive in the last decades. This is partly due to contracts needing to be increasingly legally effective. Many organizations seek to leverage contracts by incorporating many contractual safeguards intended to limit risks resulting from, for example, supplier opportunism.

Another stream of research on contractual specifications builds on agent-theoretical notions (Eisenhardt, 1989). This leads to a distinction between behavior-based contracts, on the one hand, and outcome-based contracts, on the other (see also Example 7.1). Behavior-based contracts are contracts in which contractual specifications focus on the behaviors, activities, and processes to be carried out by the supplier. According to agency theory, these types of specifications are used when buying organizations can proficiently describe the work that needs to be performed (e.g., task programmability is high) and when the outcomes to be obtained are highly uncertain or difficult to measure (Eisenhardt, 1989). In contrast, when task programmability is low, and outcome uncertainty and measurability are low and high, respectively, agency theory suggests opting for outcome-based contracts,

for example, contracts focusing on the outcomes to be obtained or results/performance to be realized. Adopting an outcome-based contract essentially entails shifting risk to the supplier, whereas under behavior-based contracts, risk remains with the buyer (Selviaridis & Wynstra, 2015).

Example 7.1: Behavior-Based Versus Outcome-Based Contracts

Infrastructure construction activities, such as developing, realizing, and maintaining an intersection between two highways, usually involve substantial risk because of their politically sensitive character in combination with the technical and processual risks of intervening in the built environment. While it may be relatively easy to describe the construction activities to be carried out, making a behavior-based contract an option, political decision-making processes surrounding the project are likely to decrease the programmability of tasks, and therefore buyers may be more inclined to opt for outcome-based contracts. There could also be challenges related to performance measurement, as measuring performance would require not only evaluating the technical quality of the intersection, but also the actual use of the intersection including the driving behavior of individual users. This would provide an even stronger argument for outcome-based contracts. However, as user driving behavior and political decision-making would be hard to control for suppliers, they would generally be reluctant to accept the risk that comes with outcome-based contracts.

The notion of contract type is closely connected to the type of specification underlying the purchase. The terms technical and functional specifications, for example, are common in the domain of procuring works and other more physical goods. In the area of business-to-business and business-to-government services, four ways of specifying services can be identified: input, throughput, output, and outcome specifications (Axelsson & Wynstra, 2002).

- Input and throughput specifications closely resonate with behavior-based specifications and entail the inputs needed for service delivery (e.g., a consultant with at least five years of experience in the public sector) and the processes that this service delivery entails (e.g., conducting interviews with group representatives in a certain municipality and drafting a report). Input and throughput specifications can be considered more similar to technical specifications.
- In contrast, output and outcome specifications closely resemble outcome-based specifications and focus on the results that should be achieved (e.g., policy advice for design of the public space) or the (monetary) outcomes that can be derived from those results (e.g., citizen happiness or satisfaction). Output and outcome specifications are more similar to functional specifications.

Especially these latter two types of specifications have become increasingly popular in recent years, with performance-based contracts (Martin, 2002) increasingly being adopted in public procurement as they allow risk to be shifted to suppliers and

thereby help to remedy problems that organizations usually experience when using more traditional contracts.

Under performance-based contracts, buyers specify functional outcomes to be achieved and leave it to suppliers to determine how to achieve those outcomes, see Example 7.2. This also means that if they make an error, the supplier is responsible for any consequences. In contrast, when failing to meet outcomes under behavior-based contracts, a supplier can always point a finger at the buyer, as they were the ones dictating the ‘how’.

Example 7.2: Outcome-Based Contracts

When (re)constructing a road under a behavior-based contract, the buyer would determine how the supplier would perform the logistics on the construction site, while under a performance-based contract, a buyer can ask the supplier to secure the traffic flows. This leaves the supplier with more flexibility in the solutions that they deliver but also with more responsibility.

For subsequent maintenance of the road, buyers may contract the number of vehicle movements rather than the maintenance activities, leaving the maintenance provider free to decide when and how to perform the maintenance, as long as a certain number of vehicles can continue to pass through the intersection.

At the same time, performance-based contracts are no panacea. Transaction characteristics (e.g., task programmability, outcome uncertainty, and outcome measurability) as well as relationship (e.g., alignment of buyer and supplier goals; prior experience) and organizational characteristics (e.g., buyer’s versus supplier’s risk averseness) determine whether performance-based contracts are or are not recommended (Wynstra, 2015). Table 7.2 provides an overview of characteristics that could influence the choice for a certain type of contract. While buyers may be

Table 7.2 Deciding on performance-based versus behavior-based contracting

Level	Characteristic	Performance-based contracts	Behavior-based contracts
Task	Information about processes to be executed is available		+
	Processes to be executed can be described well		+
	Outcomes can be predicted well	+	
	Outcomes can be measured well	+	
Relationship	Buyer and supplier goals are not aligned	+	
	Buyer and supplier know each other well		+
Organization	Buyer is risk-averse	+	-
	Supplier is risk-averse	-	+

interested in shifting risk to suppliers, suppliers in turn must be able and willing to deal with the risk profiles associated with performance-based contracts. One should therefore carefully consider the use of this contract type, or more specifically the type of contractual specification, given the characteristics of the transaction at hand. More generally, it is important to note that while the dichotomy of behavior-versus outcome-based is helpful in thinking about types of contracts, it also oversimplifies the context, as many contracts contain both behavior-based and outcome-based clauses. This notion underlines the importance of balancing the two types of contractual provisions, with the most appropriate ratio between outcome-based or performance-based and behavior-based clauses differing from contract to contract.

7.3 Rewards and Incentives

Another important element of contract design are the reward structures adopted, as these serve to incentivize suppliers to act in a certain way, such as displaying the specified or desired behaviors or achieving the agreed upon performance targets. Rewards are important in any type of contract but play a particularly important role in performance-based contracts, as these types of contracts tie at least part of the supplier's reward, including contract extensions and new contracts, to the extent to which the outputs, quality, and results are achieved (Martin, 2002).

Most commonly, rewards entail a specific form of remuneration, for example, fixed or variable compensation, or a combination thereof, which is subsequently tied to contractual specifications. Suppliers may receive a fully fixed fee upon completing a task, for example, one payment for the cleaning of an entire carpark. Alternatively, a variable fee that corresponds to demand may be offered, for example, the number of vehicles that need cleaning in a specific period. Finally, a combination of a partially fixed fee to compensate for a certain level of costs and a variable fee to compensate for the number of times an activity is performed may be pursued, for example, a compensation for the resources needed to clean 40 vehicles a month and an additional compensation for extra vehicles being cleaned. Compared to cost-reimbursable contracts, where the supplier can claim all their efforts and expenditures, the fixed and variable fee contracts entail more risk for suppliers: in the example, intensively used vehicles will take longer to clean, while compensation remains unchanged.

Rewards may also be tied to performance, such as only rewarding the supplier in case a certain level of cleanliness is achieved, to be verified using images of the desired result (i.e., what the vehicle should look like). Here, challenges regarding the evaluation of results increase the risk for suppliers: in the example, the assessment of the extent to which the image of the cleaned vehicle corresponds to the image in the reference picture is subjective. Based on this, one would expect that the increased risk associated with more performance-based contracts would make a supplier reluctant to engage in such agreements, and indeed, many suppliers are unwilling or unable to accept the increased levels of risk, for example, because they

feel they cannot fully control the result. While outcome uncertainty has traditionally been proposed to stem from external contingencies such as the economic climate and regulatory environment (Eisenhardt, 1989), or from force majeure, more recent insights reveal buyer inputs (Nullmeier et al., 2016) to be another important source of uncertainty. It is therefore important to not only consider specific Key Performance Indicators (KPIs) for suppliers, but also for buyers, as they fulfill specific roles through which they provide suppliers with inputs that are essential to their processes (Sampson & Froehle, 2006).

Example 7.3: Buyers as a Source of Outcome Uncertainty in a Dyadic Relationship

A large telecom company that launched a marketing campaign felt that the supplier's delivery performance fell substantially short of expectations. When confronting the supplier, they indicated that the briefing for the proposed design of the campaign had been returned over 20 times before it was finally approved and signed, which largely explained the delay of the detailed design and subsequent launch of the campaign.

In particular cases, it is not only the buyer that is a source of uncertainty, but also the buyer's customer(s). More and more, public buyers operate in triads rather than dyads (Choi & Wu, 2009), for example, when an executive agency outsources the maintenance to road infrastructure that is used by the general public to a specialist supplier. As a result, a triadic structure (e.g., the smallest unit of a network) emerges involving the buyer, the buyer's customer, and the supplier, and such triadic structures become more and more common. Think, for example, of the cleaning of public transport vehicles or the food catering in hospitals. In the example of outsourcing road maintenance, users are not only confronted with the result of maintenance (e.g., how long before the road starts to deteriorate) but also with the process of maintenance, for example, when maintenance activities require roads to be partially or fully closed. Users are a source of uncertainty for the supplier as their driving behavior greatly impacts the quality deterioration of the road and hence impacts the timing of maintenance. Users may even impact the maintenance activities being carried out, for example, when they do not sufficiently slow down when passing road works.

Example 7.4: Buyers as a Source of Outcome Uncertainty in a Triadic Relationship

In public transportation, the cleaning of vehicles (trains, buses) is subject to the buyer's planning capabilities: vehicles that are delayed or redirected may leave the supplier with a surplus of staff at one location, while being short-staffed on another. Note that in this case, the buyer's customer (passengers) is an important additional source of uncertainty, for example, do they dispose of their trash in the bin or leave things on the seats and floor.

Triadic structures also bring challenges in terms of contractual relationships. While users have a certain arrangement with the buyer to use the services provided by utilities such as roads (equivalent to but not necessarily a contract), the buyer has a formal contract with the supplier for performing maintenance. Users and suppliers interact during maintenance, but have no agreement or arrangement. This means that buyers have to make sure that their contracts with suppliers are aligned with the agreements with and obligations to users (e.g., availability of the road for users should be a priority for the supplier as well as for the buyer). Hence, in the absence of agreements or contracts on every dyad in the triad, managing all three actors in the triad remains challenging. This is, for example, the case with the speeding on economic infrastructures: roads deteriorate faster and require more maintenance, thereby limiting the availability of these infrastructures. Neither the buyer nor the supplier are to blame here, but they have to deal with the consequences. Such challenges become even more prominent and larger when considering larger networks or ecosystems, which involve many direct and indirect relationships with various kinds of stakeholders (Tsujiimoto et al., 2018). All these stakeholders need to somehow be governed in the same direction, which requires goal alignment, and sometimes tradeoffs between parties to align one party's interests with the other in view of the greater whole (Aarikka-Stenroos & Ritala, 2017).

Turning back to performance-based contracts, their use has been growing but is still quite limited compared to fixed price and cost-reimbursable contracts (Sumo et al., 2016). Buying organizations give several reasons for why this is the case: a fear of losing control, insufficient expertise to effectively pursue a performance-based contract, and implementation challenges, as performance-based contracts typically require different contract management and performance measurement approaches. The type of remuneration selected is likely to affect the supplier's efforts and behaviors. Under a fixed fee, suppliers will be inclined to increase efficiency to maximize the economic value that the transaction will bring them. In contrast, under cost-reimbursable fees, suppliers have no incentive to work faster, in fact, they might move slower.

Performance-based contracts usually involve additional incentives on top of the basic reward structure in the form of bonuses (e.g., 10% extra payment in case 80% of the vehicles receives the qualification 'very good') or penalties (e.g., a 10% deduction in case less than 80% of the vehicles qualify as 'very good'). While these two examples may look similar, they involve different 'frames' (Weber & Mayer, 2011) and are therefore quite different. In the case of the bonus, the supplier has something to gain with good performance, while poor(er) performance has no consequences. In contrast, under the penalty, the supplier has no real incentive to score much higher than the target, but they do have an interest in avoiding underperformance. Consequently, bonus and penalty regimes will trigger different types of behaviors with suppliers and in turn also affect the development of the relationship between the buyer and supplier (Selviaridis & Van der Valk, 2019). The size of the bonus or penalty clearly plays a significant role, therefore the use of (a combination of) bonuses and penalties should be proportional to the efforts required from the supplier to realize the bonus or avoid the penalty.

7.4 Contract Execution and Management

After drawing up and signing the contract, the contract execution stage starts. The term contract execution refers to the implementation and subsequent management of the contract and the supplier relationship. While implementation means ‘doing the work’ as agreed in the contract, contract management encompasses activities related to contract monitoring, enforcing, coordination, and cooperation (Nullmeier, 2019). Contract monitoring relates to establishing the extent to which contractual agreements are complied with, also known as compliance monitoring (Heide, 1994), but also to gathering supplier performance information (e.g., through audits or customer satisfaction surveys) and providing feedback. Compliance monitoring offers more opportunities for enforcement actions than performance monitoring does. Enforcing entails a buyer’s response to contract violations and may include warnings or invoking penalties. Finally, contract management also involves activities aimed at coordinating actions of buyer and supplier, such as by means of alignment or adaptation, and at facilitating interest (re)alignment, such as aligning objectives and incentives.

The ex-ante design of contracts greatly impacts their ex-post use in the execution stage, as the objects for monitoring, the enforceability of contracts, and the extent to which the original agreements allow for the adaptations that may facilitate alignment reside in the various contractual clauses that have been drawn up. For example, the type of specification (e.g., behavior- vs outcome-based) determines whether behaviors or outcomes will be monitored and evaluated. The focus of evaluation is clearly reflected in the KPIs that the buyer uses to determine to what extent contract execution is in line with what was agreed upon and the supplier performance. The execution of payment schemes is usually dependent on the evaluation. The level of detail and clarity of contractual provisions will determine the extent to which the buyer is able to identify deviations and whether these constitute violations, and if so, what enforcement actions are available. It is also important to note here that not all contract violations stem from supplier opportunism—honest incompetence could also lead to the deviations that underlie contract violations. The more specific a contract is, the more information it may contain regarding how to align actions and interests. At the same time, very specific clauses may provide very specific directions for buyers, thereby excluding alternatives from being considered, let alone implemented. In contrast, clauses that are less specific may facilitate the adjustments and adaptations that are typically non-contractable in the sense that organizations cannot devise and enforce contracts on these behaviors (Miller et al., 2022), but such freedom may also be consciously or unconsciously misused.

Alternatively, organizations may resort to a ‘social contract’, for example, the unwritten rules and expectations regarding behaviors and ongoing interactions. Every contracting decision takes place in the context of a specific relationship, existing or new, continued or interrupted, previously successful or unsuccessful, and so on. Hence, relationships between buyers and suppliers are also partly governed by ‘relational’ aspects such as trust and social norms, the foundations for which can already be laid out in the social contract. This relational context will drive

Table 7.3 The informal side of contracts versus the formal side of relationships

Level of codification of governance mechanisms ruling principles	Ways to enforce principles	
	<i>Contractual</i>	<i>Relational</i>
<i>Formal</i>	Codified enforceable promises regarding rights and obligations (e.g., regarding termination)	Codified patterns of expected behaviors (e.g., regarding meeting procedures)
<i>Informal</i>	Uncodified enforceable promises regarding rights and obligations (e.g., regarding division of tasks)	Uncodified patterns of expected behaviors (e.g., regarding trust)

to what extent formal and informal mechanisms are deployed, and the ease with which these mechanisms can be established. In enduring relationships, which are generally more successful, it will be easier to explicate and obtain a mutual understanding of unwritten rules and expectations than in new relationships. In other words, the supplier relationship will usually be managed both formally (e.g., compliance and performance monitoring, and subsequent alignment and/or enforcement) and more informally (e.g., through relational mechanisms such as trust and social norms). Note however that formal here is not the same as contractual and that informal is not the same as relational: rather, formal (e.g., written) relates to agreements being legally enforceable. Legally enforceable means that the contract includes clauses regarding performance, for example, or codified expectations regarding behaviors to be displayed, such as relational norms (Keller et al., 2021). This is depicted in Table 7.3. Organizations may therefore consider to what extent they could and should explicate desired behaviors relating to the task-at-hand or to more general organizational practices such as communication and escalation procedures.

Whether it is contractual or relational governance that is most effective in driving performance, or both, it is important to note that any contracting situation will involve a contract agreement and a relationship. Contractual implementation is more a matter of effectively combining contractual and relational governance mechanisms (Warsen, 2021), which requires a careful balance between and tuning of both mechanisms. Governance design is therefore not a one-size-fits-all activity, but one which is highly tailored for each and every contracting situation. It is also not an activity that only takes place during contract design, but one which requires ongoing attention during contract execution, as both mechanisms may (need to) dynamically evolve.

7.5 Contract Analysis for Redesign and Learning

The writing, interpretation, and application of contracts may drive relationships into cooperation and flexibility or into escalation and distance (Abdi & Aulakh, 2017). In some cases, contracts need to be terminated before the actual contract period has expired. Deviations from what was agreed upon in the contract may trigger

discussions that cannot easily be resolved. Contract disagreements are a leading reason for litigation across industries, accounting for as much as 70% of legal disputes in sectors such as infrastructure, mining, or energy (Fullbright, 2020). Discussions usually focus on who is responsible for the deviation and to what extent that party can be held accountable for direct and indirect performance effects and therefore is liable to cover any associated costs. In other words: whether the contract has been violated and by whom. The large risks involved for both parties, usually in the form of large financial consequences and/or reputational damage, result in buyers and suppliers resorting to a legal rather than a content-based discussion and opting for arbitration or even litigation rather than more private dispute resolution procedures such as negotiation or mediation (Lumineau & Oxley, 2012). While legal procedures may provide clear outcomes that are binding for both parties, such rulings usually do not help to identify and eliminate root causes and can instead put further stress on the relationship, thereby frustrating any future collaboration (Fang, 2019).

For this reason, more and more organizations nowadays opt for more problem-solving and learning-oriented approaches to deviations and as such avoid disputes or at least prevent them from being so severe that they cannot be overcome. Obviously, incidents that occur need to be addressed for contract execution to continue, and guidance for addressing (certain types of) deviations may already be provided in the contract. For example, continuing to invoke penalties while the supplier cannot be held (fully) accountable for performance deviations could frustrate the current relationship and reduce the chances of successful future collaborations. Therefore, rather than merely addressing these incidents, organizations may also opt for trying to understand why incidents occur as to prevent them from occurring in the future. Perhaps specifications are not clear enough, the role of the buyer is not optimal, or the reality is different from what was anticipated when the contract was drawn up. All such observations may enhance organizations' understanding of the effectiveness of contracts and may subsequently lead to more flexible contract application, improved design of future contracts, or even current contract redesign (Faems et al., 2008). In contrast, the 'blame game' discussed earlier usually results in a loss of communication and in organizations disconnecting, dodging responsibility, and focusing on damage control and/or contract termination.

In situations where organizations are highly dependent on each other, a focus on adaptation and learning is expected to be more productive. Previous research (Nikulina, 2021) has highlighted the need to distinguish between inter-contract learning (e.g., how do organizations learn from one contract to another (Vanneste & Puranam, 2010)) and intra-contract learning (e.g., dynamically improving a contract during execution). The latter has typically received less scholarly attention than the former, which could point to a general lack of awareness of the possibility to adjust contracts, mainly because in general, public organizations think they are not allowed by law to make such adjustments. To facilitate adjustments derived from learning, organizations could, for example, think about how and to what extent the contract could be designed to accommodate this? Designing contractual clauses in ways that allow for adjustment would involve thinking through what scenarios

would realistically require adjustments (resolvable by content experts without legal repercussions) or a substantive change (e.g., having legal repercussions and hence requiring the involvement of legal experts), and subsequently specifying procedures for implementing these adjustments/substantive changes (e.g., processes to follow, stakeholders to involve, who are the decision-makers).

7.6 Summary

This chapter discussed contracting in a public sector context. In terms of contract design choices, a wide variety of contracts are available, each with specific advantages and disadvantages, and contexts in which they are appropriate. Therefore, contract design warrants careful thinking on the side of the buying organization in assessing the applicability of different contract types for the transaction at hand and trading off their respective pros and cons in terms of risk, degrees of freedom, and expected supplier behavior. The contract cannot be viewed in isolation from the relationship between the buyer and supplier, and organizations need to effectively deploy both the contract and the relationship to maximize relational outcomes. The effect the contract can have on the level of trust between the two parties needs to be carefully considered, such as when does the contract make the relationship redundant and when could it even harm the relationship? Finally, this chapter explained that a contract should not be viewed as a one-off effort preceding the exchange; rather, it should be a living document, which is proactively used to monitor and manage the exchange process and take corrective actions when needed.

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Ways Forward in Public Procurement

8

Jolien Grandia and Leentje Volker

Abstract

This chapter summarizes the topics discussed in this public procurement book. It subsequently discusses developments and the ways in which public procurement is moving forward and has increasingly become a strategic asset for societal change. The move toward more value-driven, smart, life cycle-oriented, and relational ecosystem procurement processes has implications for the public procurement practices of the future, requiring more flexible and adaptive governance, integration of public value, different capabilities and competences, and a rebalancing of the different perspectives on public procurement. This chapter and book finish by explaining the need for change agents to emerge and challenge the reader to become one and bring public procurement into a new era and fully utilize its potential for achieving public value.

Keywords

Trends and developments · Change agents · Value-driven procurement · Sustainable procurement · Relational ecosystems · Life cycle orientation · Governance · Public value · Procurement capabilities and competences · Multifaceted public procurement

Based on significant input from all other authors.

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Learning Objectives

After studying this chapter, the reader will be able to:

- Describe the topics discussed in this book on theories, practices, and tools of contemporary public procurement.
- Describe important trends and developments in the field of public procurement.
- Understand the implications of these trends and developments for the field of public procurement.
- Understand the need to become a change agent themselves.

8.1 Introduction

Society is currently facing several challenges, like inclusive and secure societies, food security, sustainable energy supply, and a more circular economy. Although in its core, public procurement is about fulfilling a demand or need of a public organization for a specific work, supply, or service by buying from the market, in this book we explained that public procurement has matured into something that can achieve much more. Hence, we believe that public procurement can and should be used as a policy tool to drive innovation and contribute to the achievement of societal goals such as sustainable cities and communities, reduced inequalities, responsible consumption, and production, or increased good health and well-being of people.

In Chapter 1 of this book, we described a circular procurement process model and indicated how the procurement function can mature over time, from only fulfilling a demand to now contributing more and more to society. In Chapter 2 we identified different types of public values and explained how to deal with these when in conflict. We showed that EU public procurement law in the European Union allows for plenty of opportunities to purchase social and sustainable outcomes in Chapter 3. Next, we explained how different ways of organizing the procurement function and organizing joint procurement affect aspects such as local influence, flexibility, and economies of scale, process, and knowledge in Chapter 4. In Chapter 5, we discussed the importance of implementation issues and effects of an up-to-date procurement policy on sustainability or other important topics for a government. We also discussed how to develop a purchasing strategy and how several strategic decisions can be made. Moreover, in Chapter 6 we described how to conduct a tender, how to develop an effective supplier selection model, and explained specific sensemaking challenges for public procurement in the context of supplier selection. Finally, we discussed the important aspects of and considerations in contract design, as well as the importance of proactive and ongoing contract management for realizing objectives in relation to the applicable public values in the perform stage of procurement in Chapter 7.

Hence, public procurement can be a valuable instrument for achieving change, both inside and outside the organization, and thereby creating more public value that benefits society. In this chapter, we discuss ways in which public procurement is moving forward and has increasingly become a strategic asset for societal change. We thereby challenge you, the reader, to act as a change agent and help public procurement reach its full potential in this new era.

In Section 8.2, four trends and developments in the public procurement field are presented that affect how public procurement is organized and how it impacts society. Subsequently, we discuss the implications of these developments for the field in Section 8.3. The chapter concludes in Section 8.4 with a discussion of how adopting the role of a change agent can help drive public procurement forward into a new era.

8.2 Trends and Developments in Public Procurement

We identify the following main trends and developments in public procurement:

- From efficiency and cost-based thinking toward value-driven and sustainability-oriented procurement processes.
- From administrative procurement decisions toward digitalized and smart decision-making.
- From procurement as a front-end practical purchasing instrument to a strategic life cycle engagement process.
- From procuring formal dyadic supply chain relations to public procurement that facilitates relational ecosystems.

From Efficiency and Cost-Based Thinking Toward Value-Driven and Sustainability-Oriented Procurement Processes

As explained in previous chapters, the function of public procurement is evolving from an operational management function focused on fulfilling a need in a cost-efficient way to a policy instrument that can be used for collaborative value creation in society. While buying for the lowest price is still the norm in many EU Member States and countries outside Europe, we believe that governments should move toward a field where quality and value creation become more important. Developing applications for citizen participation can, for example, help to increase inclusiveness of stakeholders although it might not directly reduce the prize of a service. Worldwide, governments are increasingly acquiring works, supplies, or services in a way that ensures that there is minimum impact on society and the environment throughout the full life cycle of the product (Meehan & Bryde, 2011). Recent examples include changing over to changeable batteries or bioethanol for inland vessels or construction machinery to reduce CO₂-emissions. Public sector procurement can make a difference to a more sustainable, circular, and innovative economy by opting for more specific solutions the market offers and developing legal frameworks that

stimulate a certain kind of behavior. At the same time, such relatively new alternatives are often still perceived as being more expensive. Overall, this is true and likely to be somewhere between 1 and 6%, but evidence suggests it need not necessarily be so for individual contracts. For instance, when a government decides to purchase second-hand office furniture, this can reduce both costs and environmental impact.

Although this development is taking place in the public procurement field, this does not mean that all public organizations have transformed to value-driven and sustainable procurement. For such transitions to continue and expand, careful attention must be paid to various conditions that may drive or enable organizations to increasingly opt for a more socially and environmentally sustainable solution. Such conditions include government regulations and subsidy schemes, organization and purchasing strategy, human resource management, functional and individual processes, procedures, and incentive schemes. Hence, the transition to value-driven and sustainable procurement requires change to occur at both the macro and micro level regarding, for example, the resources, competences, and capabilities of the staff, the overall public organization, and the relationship between buyers and suppliers.

Interestingly, it seems that the law is moving toward making sustainable and social procurement the ‘new standard’ (Janssen, 2020), thereby removing—in time—the choice to procure sustainable and social outcomes. It means that contracting authorities will be faced with mandatory requirements that have to be included in a public procurement procedure in addition to the existing rules on public procurement, as described in Chapter 3. An example of this type of legislation is the Clean Vehicles Directive (2019/1161), which among other things contains minimum targets for the EU Member States to create cleaner fleets of vehicles owned by contracting authorities. Other legislative initiatives are—at least—expected based on the EU Green Deal for the field of construction, food, and batteries. This has the potential to be a substantial driver of the development toward value-driven procurement.

The traditional approach of maintaining a clear line of demarcation between buyer and supplier responsibilities, or in other words, the idea that ‘you pay, the supplier takes care of everything, and you will get the required product’ is no longer sufficient in value-driven procurement. Joint competences are more often required—especially for large or specific contracts—as the complexity and pluralism of new procurement values highlight the interdependency between buyer and supplier and, as a result, a need to cooperate more often to come to the best solution. More integrated and performance-based contract models require dialogue about the division of responsibility between a buyer and a supplier, as well as an understanding of how public and private entities vary in how they perceive accountability and value delivery. Hence, to develop for certain projects from efficiency and cost-based thinking toward value-driven and sustainable oriented would require more social dialogue and collaboration rather than formality and competition.

From Administrative Procurement Decisions Toward Digitalized and Smart Decision-Making

The uptake of digital technology is expected to fundamentally alter the field of public procurement on an individual, organizational, and societal level. Digitalization is already occurring in the procurement process itself. Think, for example, of electronic invoicing systems, automated contract renewal, automated data input (robotization), smart data gathering, automated answers to questions of suppliers, the use of AI in the assessment of offers, and perhaps even automated tendering for simple purchases. This opens opportunities to change the traditionally rather operational and administrative function of procurement within public organizations into fully digitalized and smart processes that support and optimize not only the purchase itself but also the management of the contract throughout its life cycle. This creates more time for public officers to invest in more tactical and strategic activities and increases the stability of buyer-supplier relations. It also enables innovation on topics such as performance-based service contracts and other long-term commitments that could reduce transaction costs.

Digitalization of public procurement is also expected to affect the power balance in buyer-supplier relationships. While information asymmetry has always been present in buyer-supplier relationships, access to data and, for example, data gathering via smart devices (e.g., smart maintenance of bridges and locks) can increase the information asymmetry (e.g., the supplier gathering the data but not necessarily sharing that data with the buyer). The implementation of digital technologies therefore warrants consideration of data ownership, how to organize data sharing, and how to deal with data-driven intellectual property and security aspects. In the context of performance- or outcome-based contracting, digital technologies are also expected to affect the measurability of performance outcomes, providing more accurate real-time data on all kinds of parameters that together determine the outcome. This impacts the importance and quality of contract management.

Finally, there is an increasing drive from citizens, journalists, researchers, public officers, and companies to make public procurement more transparent. Examples of data fields that are often still closed but could be made more accessible are data fields about names and contract values of all tenderers, identities of (sub-)sub-contractors, contract performance, contract amendments, and so on. Open public procurement data will improve transparency about public spending, increase competition, reduce collusion and corruption, and create more possibilities for research and sharing best practices. On the other hand, and especially when not organized efficiently, it will also create administrative costs and raise confidentiality issues in some cases (Schotanus, 2022). Interestingly, more developed countries in public procurement tend to be more reluctant in making procurement data open, on the one hand because of a lack of awareness and on the other because of a lack of confidence in how to address the issue of commercially sensitive information (Open Contracting Partnership, 2018). Countries that share most public procurement data are in Eastern Europe (Georgia, Slovakia, and Ukraine) and in Latin America (Chile and Colombia). In those countries, the general rule seems to be that contracting

information is public information by default, although exemptions on grounds of commercial sensitivity, privacy, and security apply. Some countries even developed a hybrid electronic open-source government e-procurement system because of a partnership between business, government, and civil society. Not only do such systems affect transparency, but they also help in fighting corruption, increasing competition, reducing tender costs, and improving price-quality ratios.

From Front-End Practical Purchasing Instrument to Strategic Life Cycle Engagement

Traditionally, public procurement used to be an operational function, supported by practical tooling to fulfill a specific need of the organization. This need for a supply, service, or public work primarily initiates the procurement process. However, as public procurement is becoming a more and more strategic asset to fulfill societal development goals, the whole procurement process also needs to become more focused on these goals. By leading by example, the public sector can set the tone for more socially responsible ways of organizing, by taking matters such as business decency, due diligence, honest competition, and sustainability into account. In this, public procurement has an important role to fulfill as a role model for other organizations.

This starts with the make-or-buy decision. Within public procurement, it should become routine to not simply replace what is already there when the life cycle ends, or directly procure something new when a need arises, but also to look for alternative ways to fulfill the need (Andhov et al., 2021). For example, by:

- Buying as a service.
- Sharing instead of buying.
- Stimulating extending the lifetime of a product.
- Considering reuse as an alternative.
- Changing demand to more sustainable options.
- Stimulating supply to offer more (new) sustainable options.

It should also become routine to think what would characterize suitable potential suppliers and sub-contractors before the start of a tender. Below the EU public procurement thresholds, public buyers usually only invite the suppliers who satisfy certain criteria related to social aspects, security aspects, sustainability aspects, and so on. Above the thresholds, buyers can use (customized) exclusion grounds, requirements, and supplier selection models for filtering suppliers.

By redefining procurement requirements, public procurement can actively contribute to a more circular, inclusive, and sustainable economy (McCrudden, 2004). This also requires more life cycle-focused procurement tenders. Think, for example, of requiring suppliers to contribute to broader societal goals (e.g., circularity and employment) in addition to fulfilling a specific need (e.g., a place to work). A life cycle perspective would also alter the role of contract management. If we really want to create public value, it no longer suffices to check if what has been ordered

is delivered, one also needs to monitor if public value is achieved and the policy goals have been met (Keller et al., 2021). This would require a more proactive collaborative attitude of both buyer and supplier to jointly realize the desired value but also sometimes stricter measures to comply with a contract.

From Procuring Formal Dyadic Supply Chain Relations to Facilitating Relational Ecosystems

Tendering is often turned into a rather formalized way of coordinating supply and demand. Current procurement systems are often focused on single dyadic relationships: a particular buyer that agrees with a specific supplier on the delivery of a certain work, supply, or service under specific conditions. If an ecosystem perspective was to be adopted, this would certainly lead to a recalibration of the EU procurement law. Ecosystems refer to the collaborative arrangements through which interconnected and interdependent public and private network actors combine their individual offerings in a coherent solution focused on value creation (Adner, 2017). Other than interorganizational networks, which focus on existing ties between stakeholders involved in dyads, ecosystems draw attention to the notions of an overarching purpose for the total set of relationships for stakeholders to be included and of technical interdependence and complementarities between stakeholders. This generally requires a set of stakeholders with varying degrees of multilateral, non-generic complementarities that are coordinated by sets of roles with similar rules (Jacobides et al., 2018). Since ecosystems are network based rather than dyadic, they often avoid the need to enter into tailor-made contractual agreements with each individual partner. Ecosystem thinking assumes that each system consists of a unique set of stakeholders and interactions and therefore evolves in its own way (Valkokari et al., 2017). As the system is only partially designed and enforced, existing internal forces are responsible for keeping it in balance. Also, ownership and use are not necessarily linked, which can bring about major change for many sectors, such as construction, energy provision and drinking water supplies (Vosman et al., 2023).

Collaboration in networks and systems can replace traditional procurement and tendering because performance should not only be determined by a buying organization, but also by the end users in close cooperation with the government. Adaptive service-based contracts and collaboration agreements can therefore better match the dynamic of society's need for values. In a world where formal procurement guidelines and contracts are still dominant, relying on social processes to ensure that resources flow through actor-to-actor connections and considering agreements and rules as just informalities is another matter. For instance, complex work will be based more on open, explorative, and evolving connections like in an innovation partnership or Small Business Innovation Research (SBIR). For more common purchases, buyers will regularly use market consultations with a small number of focused questions, will increase their knowledge about market possibilities (to bring supply in connection with demand), close more contracts using joint procurement,

and work more closely with suppliers after the contract has been closed. This can mean an extension from a procurement system with a predominantly legal basis to a more social and less formal system that brings supply and demand together.

The role of the public buyer would also change structurally when moving toward collaboration in ecosystems. For example, while dyadic relations nowadays increasingly start with a pre-announced market consultation focused on potential main suppliers, a procurement professional in an ecosystem should proactively connect to numerous parties and act as an explorer and accelerator of collaborative processes. As a driving force in the creation of an ecosystem, public buyers should be increasingly aware of the active players in the market, their distinctiveness, and the values that they could deliver to the system. This requires knowledge of business models to understand the motives of the parties and to be able to arrive at balanced commitments.

8.3 Implications for Public Procurement Practice in a New Era

The trend toward more value-driven, smart, life cycle-oriented, and relational procurement processes will have implications for the public procurement practices of the future. We identify the following four main implications or challenges for public procurement that need to be addressed to bring public procurement into a new era:

- More flexible and adaptive ways of governing the relationship between buyer and supplier.
- Integration of public procurement values in all parts of the public organization.
- A need for public procurers with different capabilities and competences.
- Rebalancing the multiple perspectives on public procurement.

Flexible and Adaptive Ways of Governing Relations Between Buyer and Supplier

New developments, such as digitalization but also the transition toward a more circular economy or value-driven procurement, affect the power balance and relationship between buyers and suppliers. While the relationship between buyers and suppliers has been predominantly governed via contracts, awareness of the importance of the relational aspects is increasing. Given that—in most cases—the combination of formal contract management and social contract management is more effective than only managing a legal contract with formal incentives and sanctions, we expect to see an increase in relational governance mechanisms. Examples of such mechanisms are the introduction and use of social agreements (including goals and expectations of each party and agreements on how to communicate and provide feedback), appointing mediators where necessary and putting the relationship status on the agenda of regular project meetings.

Because relational governance is based on the idea that interorganizational exchanges are embedded in social relationships with interdependencies between

partners, it is much better equipped to deal with uncertainty, innovation, conflict resolution, and complexity (Cao & Lumineau, 2015). Relational governance mechanisms such as information sharing, open communication, and joint problem solving allow stakeholders to adopt a more flexible and forward-looking attitude. Trust is often an important element of relational governance. We therefore envisage a need for more relational and flexible ways of governing the relationship between buyer and supplier, to deal with the four public procurement developments described in this chapter. Similarly, we expect that suppliers that do show opportunistic behavior or that are not open to this new way of working will be more often exposed (by using open data) and less often invited or selected in tender procedures.

Integration of Public Procurement Values in the Organization

The development of value-driven and sustainable procurement, life cycle engagement, but also smart decision-making and relational ecosystems implies that public procurement should become integrated in all parts of the organization and its network. This raises the managerial question of how to organize procurement. The answer to this question depends heavily on the purchasing maturity of the organization and its organizational coherence. For many public organizations, a step toward coordinated purchasing will already make a difference. For larger and more mature and coherent public organizations, procurement should move toward a more local-led or center-led type of organization, where decentralized expert teams from different sections work together. This would generally better ensure the necessary collaboration and integration to achieve public values together, such as a reduction of CO₂-emissions or increasing the degree of digitalization, which fit with higher development stages of public procurement.

New values do not necessarily fit into the existing organizational governance mechanisms. In this context, building on existing value management tools appears to be more effective than creating totally new systems. This implies that public organizations should put increased focus on embedding new value systems into their procurement processes and reduce focus on changing existing value systems. In order ‘to lean in without falling over’ (Kuitert, 2021), innovation through integration could be counterbalanced by sustaining and defending the separation of existing value systems. An example of this is the use of an integral program at an organizational level to implement specific values, like circularity or social responsibility, while simultaneously translating these values into programmatic frames at the level of the department or project. On a national level, inspiring societal missions could be started that focus and bundle all (innovation) activities related to public procurement. Hence, the focal point for buyers should be to lean into intrinsic motivation of the procurement professional and act as a responsible procurement organization.

Finally, the role of the government as an internal buyer needs to change. Public procurement should no longer be viewed as a stand-alone process for the delivery of specific works, supplies, or services, but rather as a strategic asset in linking

government policy, strategic goals of the organization, and developments in society. This requires true alignment with the developments in markets, other countries, and networks. This also implies that public procurement should be an active stakeholder in driving societal change and achieving public value. For instance, by giving social enterprises better opportunities to really participate in public tenders, rather than being socially desirable solutions to lobbying conflicts or other more political aims. Public procurement needs to have an active and more directive role in steering procurement toward specific values and behaviors, rather than executing policies that have been created by others and reacting on institutional demands from the past.

Changing Capabilities and Competences of Procurement Professionals

Developments like digitalization, relational contracting, and sustainable procurement all require organizational routines to change. Organizational routines are rules that allow people to select elements of a repertoire in order to construct sequences of behavior that make sense to others in the organization (Feldman & Pentland, 2003). Introducing change in an organization questions existing routines (and thus behavior) and leads to new practices (new behavior) which, if it becomes embedded in the organization, forms a new organizational routine. For example, circular procurement requires a vastly different approach than the old linear way of procuring; collaborative value-driven procurement requires public procurers to become network managers rather than administrators; and smart procurement requires competence in new ways of information sharing, while the old capabilities and competences, such as operational capabilities and fundamental legal knowledge, are becoming less central. Although more and more procurers and contract managers have begun to recognize their role in contributing to these changes, previous procurement policies and capacity shortages have made several public officers develop risk-averse behavior. Sometimes public procurers and contract managers regard legislation as complicated and, therefore, choose to play it safe to avoid situations where suppliers might appeal a contract award. Even though procurement has been acknowledged as a professional field, it has not necessarily always been classified as a profession. In those instances where it is classified as a profession, it tends to be fragmented across the organization or overlook the impact it can have both internally and externally. The developments in public procurement however require that public procurers and contract managers either change their behavior or the hiring and staff that already have the required capabilities and competences.

Rebalancing the Multiple Perspectives on Public Procurement

Throughout this book we have seen how in the past the financial and legal perspectives have been dominant in public procurement, with a lowest price focus and contractual governance as drivers for the design and implementation of the public procurement system and the political cycle as societal driver of the policy agenda to

which procurement needs to contribute. However, the development toward strategic, smart, value-driven, and sustainable procurement implies that the societal importance of procurement practices is becoming more prominent. This requires a rebalancing of the disciplinary perspectives.

For example, the legal perspective should rebalance its priorities and move from a ‘cannot’ mentality to a ‘can do’ mentality where not necessarily the legally safest option is advised, but the safest one that creates the most public value. Price considerations will always remain important in purchasing decisions (taxpayers’ money should not be squandered), however, the focus should move toward getting the most value for your money, rather than spending the least. This entails a shift from a focus on purchase price to a life cycle perspective on quality and capturing the most public value from a transaction.

Societal challenges have a lot to do with how politicians make decisions and how to act upon them. In most European countries, politicians represent the democratic values and expectations of the people. The political system has been driving the policy agenda as well as financial frameworks and resulting budgets. To be able to move toward a more innovative and circular way of procuring with stable supplier relations, a forward-looking and less political way of governing seems necessary. One that is less focused on the short term and election cycles, but more visionary and programmatic with long-term partnerships, and an emphasis on human well-being and value co-creation rather than economic prosperity.

8.4 Conclusion: Become a Change Agent

The developments in the field of public procurement and subsequent implications for public procurement practices and organizations suggest major changes in our procurement systems. Truly bringing public procurement forward into a new era requires change agents to drive these changes. A change agent can be anybody, an individual or a team, from inside or outside the organization, that takes responsibility for initiating, sponsoring, directing, managing, or implementing a change (Caldwell, 2003). This responsibility is something that does not have to be imposed on the change agent (it not necessarily part of the job) but is often a task that change agents take up, out of a desire to do something and make change happen (Grandia, 2015). If one thinks of change agents, the image of a top or senior manager might also spring to mind. However, studies show that anybody at any level can become a change agent, from interns to director generals. It merely requires a person to act (Caldwell, 2003; Kendra & Taplin, 2004).

There are many actions that change agents can carry out to effect change, such as envisioning, initiating, sponsoring, adapting, or carrying forward change. One could also build support, provide advice, expertise, or process skills, or contribute by interviewing, directing, managing, speaking, or presenting. Furthermore, listening, reflecting, writing, cooperating, refining, giving feedback, and/or training or educating are important activities that change agents perform. The mentioned actions remain rather vague, as there is no universal change agent model that shows what kind of actions are required in which situations and under which circumstances (Caldwell, 2003).

Becoming a successful change agent, however, does not necessarily require enormous actions or plans, even the smallest initiatives can ignite a change or offer a breakthrough. Sometimes merely asking questions about why things go a certain way can, in the end, lead to major changes. Long-term gradual accumulation of many small changes has been found to successfully lead to large changes in the end.

We therefore challenge you, the reader, to become an agent of change and help drive public procurement forward into the new era. As an agent of change you could, for example, present new ideas to create more public value with procurement (initiate), talk enthusiastically about the possibilities and necessity of the change (motivate), share knowledge about developments or new alternatives (educate), advise on how to incorporate new knowledge (advise), or arrange the necessary tools to make it happen (solve problems). All these types of actions can help make other stakeholders in the procurement process more willing and able to make changes and use the potential of public procurement for achieving societal impact. Let's be this change together.

8.5 Summary

This chapter first shortly summarized the topics discussed in the book, followed by a discussion of the four main trends and developments in the field of public procurement that can be identified. First, a move from efficiency and cost-based thinking toward value-driven and sustainable oriented procurement processes could be observed. Second, a move from a focus on administrative operational thinking toward digitalized and smart decision-making in procurement processes seems visible. Third, procurement appears to move from a front-end practical purchasing instrumental perspective to procurement as a strategic life cycle engagement process. And fourth, procurement moves from supporting the formal dyadic supply chain relations to public procurement to facilitating relational networks and ecosystems. This chapter then explained that the trend toward more value-driven, smart, life cycle-oriented, and relational ecosystem procurement processes has implications for the public procurement practices of the future. The following four main implications or challenges for public procurement that need to be addressed to bring public procurement forward were identified: (1) more flexible and adaptive ways of governing the relationship between buyer and supplier, (2) integration of public procurement values in all parts of the public organization, (3) a need for public procurers with different capabilities and competences, and (4) rebalancing the multiple perspectives on public procurement. The final chapter of this book finished with an explanation of why it is important that change agents step up and help public procurement move into a new era and challenge the reader to become such a change agent themselves.

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