

## COMMON CONDITIONS IN PROCUREMENT AND THE MARKET: AN AMSTERDAM CASE

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**ABSTRACT.** Due to the economic crisis and recession, building co-operations are experiencing a decreasing demand in their fields of operations. Public procurement, both local and otherwise, seems to have become a breeding ground for constructors' and suppliers' competition strategies. This has as its effect an increase in judicial conflicts and trials.

Amsterdam/Waternet has learned to avoid litigation and improve competition conditions by using unilateral as well as bilateral conditions in procurements, in combination with thorough market reconnaissance. The acknowledgement and smart bestowal of risks, in accordance with the variety of specific markets, are main elements in the strategic application of general conditions in Waternet's public procurement.

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### **THE ECONOMIC CRISIS, CONSTRUCTION FRAUD AND CURRENT COMPETITION IN THE NETHERLANDS**

Litigation in procurement had been almost non-existent for the specific governmental water authority of Amsterdam called Waternet, since contractors and suppliers preferred and favoured a steady business relation, and feared to compromise their chances in future procurement.

In 2002 the Netherlands was captivated by the Dutch parliament's investigation into wide-spread construction fraud. The investigating parliamentary commission concluded that building co-operations illegally and on a large scale agreed on prices in public procurement, and therefore willingly excluded competition. It was estimated that an average of 8,8 percent of all government spending in procurement hence had been lost. The legal countermeasures of the Dutch government brought an end to most of this fraud, which left a Dutch constructors market with a new financial balance.

Secondly, of course, the worldwide economical crisis has left its mark on the (construction) market in the Netherlands. According to the so-called Zürich Euroconstruct Country Report of 2009 the Dutch construction market faces, after a relapse of 6 percent in 2009, another drastic decrease of 9 percent in 2010, and so on. This is significantly worse than the comparable markets in its neighbouring countries (2). Hence the construction market and the connected suppliers' markets in the Netherlands nowadays are characterized by a certain hard-grained competition.

### **PROCUREMENT BY AMSTERDAM/WATERNET**

Amsterdam/Waternet specializes in watergovernment. Waternet is the first public authority in the Netherlands that combines all thinkable water services under one roof. Waternet therefore is responsible for the production of high quality drinking water, the cleaning of waste water, the protection of surface water and

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guaranteeing public safety behind regional and national embankments. Waternet works mainly in and around the Amsterdam area.

Amsterdam/Waternet has a considerable interest in a competing market of engineering, as it grants yearly tenths of million of euros on constructions and engineering in these specific fields of operations. A special branch of this organization is World Waternet. World Waternet helps to achieve the millennium-goals as set by the United Nations, specifically the set out millennium-goal of sanitation. World Waternet deals with all aspects of the water cycle in projects in development countries, including clean drinking water, safe soil water levels, reliable sewerage, waste water purification and the realization of practical water-treatment plants. By providing an integral, sustainable approach it faces the growing water crisis in the world.

The given solution is a long-term teamwork with local water operators, municipalities, universities, engineering agencies, technology suppliers and financiers. This year World Waternet accomplishes projects in Egypt, South Africa, Indonesia, Latvia, Turkey, Suriname, and the Dutch Antilles.

Amsterdam/Waternet characterizes therefore as a specific technological company, with a keen eye on new developments of waste water purification and the production of drinking water. Because of the broad variety in its projects, in procurement Waternet deals with a large quantity of different suppliers, as well as different supplier markets, in a national and international context.

#### **BILATERAL AND UNILATERAL COMMON CONDITIONS IN THE NETHERLANDS, AND THE UNILATERAL COMMON CONDITIONS OF WATERNET/AMSTERDAM**

In the Netherlands it is common practice in procurement to apply fixed collections of general conditions, both on procurement itself, as on the different ways to establish the required realization of public works contracts, public supply contracts and public service contracts.

These conditions can be divided in common conditions that haven been edited by the contracting public authorities, mostly in close cooperation with suppliers and contractors , and on the other hand the contractual common conditions that have been realized unilaterally by contractors and suppliers themselves, or by the public authorities, without any mutual consent.

The Dutch national government has drafted its own general purchase conditions in close cooperation with the different branches of industry. These conditions can be typified as a balanced set of conditions, in which the interests of the governmental purchasers relate healthily, in a bilateral sense, to the interests of suppliers. The national government, by own volition, keeps an ear out for common response and criticism of the corporate sector, and, in combined effort, periodically evaluates all used general conditions. Thus the national government has enacted common conditions for public services and supplies in general, as well as specific conditions in the field of information and communication technology (ARVODI-2011, ARIV-2011 and ARBIT). Within the construction branches public authorities and constructors have drafted joint common conditions, the so called uniform administrative conditions for realization of constructions (UAV 1989). These conditions, a combination of purchasing and supply conditions are commonly applied in the field of construction, and have grown to become a national standard. In other market segments tenderers have drawn up there own branche-related common conditions, like the catering sector (UVH), and especially the advisors in technical markets, architect and engineering agencies (DNR). These conditions are characterized by a distinctive one-sidedness.

In 2006 the city of Amsterdam has drafted its own common conditions. Civil servants came up with different packages of conditions, covering the fields of supplies and services, as well as information and communication technology, and the hiring of personnel. The philosophy behind it being that suppliers, although they are repeatedly faced with a multitude of municipal authorities, can rely on doing business under consequently applied, similar conditions.

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A witty aspect of this approach was that although originally it was meant as a safety parachute for the municipality, and was drafted as a client-oriented paper, it actually led to a stunning one-sided set of conditions. In case certain aspects of rendered services were no part of the actual drawn agreement, it was therefore still possible to rely with certain confidence on the own, Amsterdam conditions.

To assure this internal trust the conditions were drafted by the administration in a peculiar one-side sense, protecting the judicial positions of the city, and barely acknowledging the interests of suppliers and contractors. Over the years these safety parachute conditions were more and more applied in general procurement, and from a certain point Amsterdam/Waternet added the conditions as standard terms to almost all invitations to tender.

In contracting procedures Amsterdam Waternet cut off the main sharp edges of these terms by sometimes granting a few divergences in one or two so-called information rounds with the tenderers. By complying like this to comments, supplements or suggested alterations of tenderers the most disadvantageous stipulations in a procurement were, inherent quite randomly, just slightly altered.

### **COMMON CONDITIONS IN PROCUREMENT AND THE MARKET: AN AMSTERDAM CASE**

Water distribution and sewer networks are an essential link in the rural, urban, and industrial water-economy. The design, use, and maintenance of these water networks is a specialty in itself. It demands an integrated knowledge of the design, maintenance, renovation, and extension of networks. Partly, Amsterdam/Waternet provides in its own engineering, using its own engineering office, partly, and formerly randomly, specialized knowledge is obtained from the engineering common market. Every year millions of euro's are thus spent on engineering services.

Out of efficiency and a more purposive approach Amsterdam/Waternet decided in 2010 to put a contract for tender

concerning all engineering services at once, and over a considerable period.

The conditions of the engineering branche, the so called DNR, were deliberately considered not applicable, because of the supposed one-sided nature of the terms.

The organization withdrew behind its old protective walls, and entered the market with a certain arrogance, strictly applying its own unilateral conditions , trusting its own belief that the competition between engineering agencies would coerce the tenderers to a relatively fast acceptance of the presented terms. The market would prove otherwise.

The tendering engineering agencies were definitely interested in the nature and extent of the assignment, which was cut up in different factions. But the submitted common conditions turned out to miss an essential link with the market actuality, and the customary stipulations and premises of the engineering market. Conditions in the field of intellectual property, on the aspects of liability, and stipulations concerning applicable fines in case of a breach of contract deterred potential tenderers.

In certain cases engineering agencies even decided to not tender for a contract at all, because their companies philosophies did not match the prescribed contractual relation, that was meant to establish a relatively long term intense cooperation. More importantly, the assignment of risks between the contracting authority and the preferred tenderers did not comply with the common practice on the engineering market. This led to an exceptional large amount of questions and remarks of engineering agencies in an early tendering stage and in the information rounds. This also led to higher pricing, and to other, administrative cunning devices, in which all kinds of insurance schemes were included.

The original purpose of Amsterdam/Waternet, the combining in free competition of a total of engineering services, cut up in specializations, and open to the market, therefore failed completely by a total discompliance of the prescribed common conditions.

### **SOLUTIONS: MARKET RECONNAISSANCE AND THE ACKNOWLEDGEMENT OF RISKS**

By now the organization has learned to avoid litigation and conflict, and improve competition conditions by thorough market reconnaissance, in combination with different ways of temporarily altering the available contractual common conditions.

A vital condition is market reconnaissance. In general, market explorations examine market characteristics more closely. These include characteristics such as market volume, segments, distribution chains, market developments, branch culture, and market size estimation. The presumptions in tenders in certain market segments, especially those concerning risks and the integration of risks in prices, as well as research including market price levels, are both awarded special attention. In the local field of operations of Amsterdam/ Waternet this means primarily that the built up experience with contractors over the years is being used to understand the specific market on these diverging, above mentioned aspects. With the obtained information it is up to the authors of the specifications and conditions in the succeeding procurements to alter the specifically used common conditions.

Amsterdam/ Waternet has opted for an utmost nuanced approach. The outcomes of the reconnaissance are leading for a conscious choice concerning the division of risk between Amsterdam/Waternet and the future tenderers. First an explicit inventory is made of the known risks in the specific market segment. Then the question is answered whether within this segment these risks are commonly attributed to the tenderer. Subsequently the expected consequences of shifting risks between Amsterdam/Waternet and tenderers on their tenders, and especially their prices, are being evaluated.

Then a decision is being made on the application of conditions, especially whether to use unilateral or bilateral conditions. Thus the Amsterdam /Waternet conditions, national conditions or conditions of the industry branches can be applied.

Finally it is decided upon which exceptional provisions and special clauses need to be added to meet the most unwanted, expected consequences of this shifting of risks. Depending on the market developments at hand Amsterdam/Waternet thus applies different sets of common conditions in different situations, both unilateral and bilateral, with the required exceptions. Although it cannot be ruled out that this provisional altering of procurement conditions allows a market mismatch in a particular procurement procedure, this mismatch itself would be used as market reconnaissance, in order to improve knowledge and future procurement.

Amsterdam/Waternet has learned at first hand that markets are not only being designed by constructors and suppliers. Procurement authorities themselves are able to improve competition conditions on markets if necessary, applying a flexible and measured approach of their common conditions.

## REFERENCES

- 1) Report of the investigating Dutch parliamentary commission, 2002 , [www.parlement.com](http://www.parlement.com)
- 2) Cobouw, November 27<sup>th</sup>, 2009, Zürich Euroconstruct Country Report, November 26-27, 2009