



Strengthening the Efficiency of Public Procurement

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Public procurement, the generic term used to refer to procurement contracts (traditional procurement), public service delegations (including concessions) and public private partnerships, currently represents today significant amounts of money as it is believed to account for nearly 15% of the GDP in France. Whilst the public procurement system must strive to achieve the best possible performance in terms of cost and service, its inefficiency is highlighted on a regular basis. In (actual) fact, substantial gains could be achieved through a more efficient management of the system. The present *Note* examines potential avenues of action, in the framework of the regulatory changes currently under way at European level, with the aim of increasing the efficiency of the public procurement system.

The contracts upon which the public procurement system is based are subject to certain asymmetries of information (in that the company is more familiar with its costs and the economic environment than the public party) and contractual incompleteness (since it is impossible to foresee every possible event that might arise during the execution of the contract). This being the case, the economic analysis recommends that competitive forces be used wherever possible when it comes to selecting partners and that incentive mechanisms be put in place to establish a real commitment of the parties concerned.

New European Directives regarding procurement contracts and concessions, approved in 2014 and expected to be transposed by 2016, will give public authorities greater flexibility to negotiate with companies at both the selection

stage and the execution stage (renegotiation). We believe this change to be a positive and economically justified one. It is, however, crucial that it be supported by specific terms governing its management that are not currently outlined in the Directives. Our recommendations are based on three key avenues, namely transparency, competition and expertise.

The negotiation procedure must be supported by transparent information both prior to and following negotiation. During the execution stage, it must be possible for amendments to contracts to be contested without debilitating the process by facilitating an increase in the number of futile appeals. We also put forward a number of recommendations designed to encourage greater transparency where public procurement is concerned.

For the purposes of intensifying competition at the tendering stage it would be useful to limit the number of electronic information platforms and to merge them towards a high-performance standardised model. At the same time, it is advisable to simplify procedures, to increase the professionalisation of public buyers and to centralise the most standard of purchases in order to benefit from economies of scale and pool the experience of public buyers.

Finally, with regards to large-scale projects, we would recommend that a comparative evaluation be performed beforehand in order to determine the most appropriate public procurement tool to meet the needs of the public authorities concerned. The agency responsible for this prior evaluation would also perform *ex post* evaluations with a view to drawing lessons regarding the various tools and procedures available.

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Do it yourself or delegate it? This is the first question a public administration must answer when looking at providing a new infrastructure or public service. Once it has decided to outsource the task (delegate), the public authority finds itself faced with a second choice, namely how to outsource it, i.e. by means of a procurement contract (traditional procurement), public service delegation (concession or lease contracts) or a public private partnerships, options that we will refer to here under the generic term of “public procurement” (see *infra*). Finally, having selected the type of outsourcing operation to be implemented, there comes the need to determine the way in which prospective bidders will be pitted against one another, the design of the contract, and how it will be monitored throughout the various stages of the project.

Existing research into public procurement suggests that outsourcing has mixed effects in terms of service quality and cost.¹ However, it is not so much the decision to outsource as the method of outsourcing –and above all its implementation– that present a problem. Indeed, risk-sharing as laid down in the contract is a central issue. The present Note explores various ways of improving the efficiency of the public procurement system once the decision to call upon an external partner has been made. The amounts at stake, whilst somewhat difficult to determine, are certainly significant, with public administration purchases in 2011 accounting for some 15% of the GDP in France, as well as in the United Kingdom and Germany.²

Risk-sharing in public contracts: contributions from economic analysis

Risk-sharing between public and private entities needs above all else to take account of the asymmetry of information that exists between these two players. The company is naturally more familiar with the technology available, the cost of supplying what is required and indeed the demand for the products and services concerned by the public procurement operation in question. Furthermore, cost and demand are to some extent linked to its decisions with regards to managing human resources, choosing production capacities, research and development, service quality, risk management, etc. In order to overcome these asymmetries of information, it may, for example, prove worthwhile to benchmark the company’s performance against that of similar companies operating in different markets, or indeed to auction a public service concession in order to identify the company offering the best levels of performance.

The sharing of risk between the contracting parties is central in situations in which there is an asymmetry of information since it determines both the level of accountability of the company and its potential profit earnings. Take, for example, cost-risk. There are two potential contractual models (as well as in-between models) in terms of cost-sharing:³

- the first involves reimbursing the company for the costs incurred, accompanied by a predetermined payment, in the form of a “cost-plus” contract for non-market services and a “cost-of-service” regulation contract for market services. This first model relieves the company of its responsibility but does limit potential profit;
- the second involves a “fixed-price” contract in the case of non-market public projects or, for market services, a “price cap” regulation contract, in other words one that is not index-linked to the actual cost of production. This second model allocates a fixed sum to the contractor, regardless of the actual costs incurred and of the level of demand. This requires greater effort on the part of the contractor with regards to controlling costs but does leave it with a substantial profit if its costs happen to be particularly low (or demand particularly high), irrespective of the amount of effort required on its part.

The contractor can be held accountable in a number of ways, including with regards to the cost of constructing the work, its operating costs and demand, among other things. In the case of an infrastructure project, one means of holding the contractor accountable is to link the design and construction stages with the future operation of the infrastructure, since the contractor then has nothing to gain from squeezing costs too much on the first part of the contract if this will have to be compensated for in the form of maintenance costs at the operational stage. It can, however, be difficult for the public authority to put in place enforceable long-term contracts, which require good visibility of both the economic environment and the contractor’s ability to fulfil its role with no renegotiation at a later date.

The three tools of public procurement

Traditional procurement

According to the *Observatoire économique de l’achat public* (OEAP, French Economic Observatory of Public Procurement), procurement contracts, which are designed to

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¹ Australian Industry Commission (1996): *Competitive Tendering and Contracting by Public Sector Agencies*, Australian Government Publishing Service, Report no 48.

² According to the definition adopted by the OECD, public procurement covers intermediate purchases by public administrations, investment expenditure and social transfers in kind by means of commercial services (excluding Social Security). Other measures are also possible, based on national accounting or contract inventories. Discrepancies between different measurements can be significant owing to differences in scope or accounting conventions or indeed as a result of the very fragmented gathering of information relating to contracts.

³ See Laffont J-J. and J. Tirole (1993): *A Theory of Incentives in Procurement and Regulation*, MIT Press.

satisfy needs for works, supplies or services, accounted for around EUR72 billion exclusive of tax in France in 2013 (for some 96,500 contracts). The OEAP data, however, is incomplete owing to the declaration threshold of EUR90,000 and the absence of any control or penalty in the event of failure to submit the required declaration. Furthermore, the OEAP does not take into account the expenses incurred by state operators and state-owned companies, or even those incurred by companies with public service delegations (such as motorway concessionary companies and mixed economy companies, for example). With this in mind, procurement contracts are believed to amount to some EUR200 billion a year in France, or 10% of the GDP.⁴

Public service delegations

Public service delegations (PSDs) encompass all contracts (primarily leasing and concession contracts) whereby a public legal entity entrusts the management of a public service for which it is responsible to a public or private delegate –the contractor– in return for a payment that depends largely on the results of the service operation. PSDs are used for mass-catering, water and sanitation, district heating, transport, sports facilities, etc. Unfortunately, there is no PSD observatory in France to inventory calls for tenders and contracts signed and thereby evaluate the weight that they hold within the French economy. It is estimated that PSDs in France account for a volume of business amounting to over EUR100 million a year for operators alone⁵ in terms of value, or around 5% of the GDP (around half of which is generated by transport initiatives).⁶

Public private partnerships

Launched in June 2004, public private partnerships –similar to private finance initiative (PFI) contracts in the UK– enables a public entity to entrust a company with a global project as part of a long-term contract and in return for a staggered payment from the public entity. It is used for major construction projects (educational establishments, train stations, etc.), urban infrastructure (street lighting, roads, etc.) and even sports and cultural facilities (theatres, stadiums, swimming pools, etc.). The introduction of public private partnerships was primarily designed to help France catch-up to other countries such as the United Kingdom, which has used this type of tool since the early 1990s. Great progress was made in the number of public private partnerships signed between 2005 and 2012, at which point they accounted for up to 5% of public investment in France, despite still falling a long way behind the other two public procurement tools available (around 0.2% of the GDP).

The three tools from a risk-sharing perspective

The three public procurement tools outlined above differ with regards to risk-sharing between the public authority and the contractor executing the contract (see table). The PSD, for example, involves a payment that is both deferred and made by the user rather than by the public authority, meaning that the demand-side risk is born by the delegate contractor. In the case of public private partnerships, meanwhile, payment is deferred but always made by the public authority, which therefore bears the risk associated with demand.

The transfer of risk in the various public procurement tools^a

	Public contracts	Public service delegations	Public private partnerships
Payment deferred	No	Yes generally by the user	Yes by the public authority
Transfer of production risk (associated with the service or infrastructure)	Yes	Yes	Yes
Transfer of demand-related risk	No	Yes	No, or very little
Transfer of risk associated with operating costs	Yes in service contracts	Yes	Yes partially
Global contract	No, with the exception of CREMs ^b	Yes	Yes
Project management	Public	Private	Private
Duration of contract	Short-medium term	Medium-long term	Long term

Notes: ^a ‘Transfer of risk’ is to be understood as a transfer to the contractor, meaning that it then becomes responsible in this respect (cost or demand); ^b CREMs are global public contracts whereby a public entity can entrust a general mission to a single successful tenderer. This could relate to the design and construction of structures (design and creation contracts) or indeed to design and/or construction, operation and maintenance (CREM/REM). Unlike public private partnerships, such contracts remain subject to the rules regarding traditional procurement contracts. Having been added to the *Code des marchés publics* (Public Procurement Code) toolbox in 2011, the use of CREMs and REMs (Art. 73) is somewhat limited in regulatory terms and rather uncommon at present.

Source: Authors.

⁴ See, for example, the French public contract mediation site: www.economie.gouv.fr/mediation-des-marches-publics/guide-osez-commande-publique

⁵ The price the consumer pays does not always go entirely to private operators but can go to the authorities involved in the event that they are funding part of the investment.

⁶ French Institute of Delegated Management (IGD) (2011): *Aspects économiques et comptables des investissements dans les PPP*.

These three forms of contract agreement can indeed be combined to create what is actually a continuum of potential contracts. For example, in order to take the risk of traffic into account without transferring said risk entirely to the delegate, and in accordance with the recommendation put forward by some economists,⁷ the duration of concession contracts (DSPs) is sometimes itself dependent upon profitability in that the contract is terminated upon reaching a given profitability threshold. Such is the case of the Millau viaduct contract, for example, which was signed for a duration of 78 years but offers the option, valid from 2044 onwards, that the contract be terminated early, once the actual cumulative turnover generated exceeds three hundred and seventy-five million euros. The duration of the contract is therefore adapted to reflect the levels of traffic generated, meaning that the demand-side risk is no longer born solely by the contractor.

Managing public contracts: observations and foreseeable changes

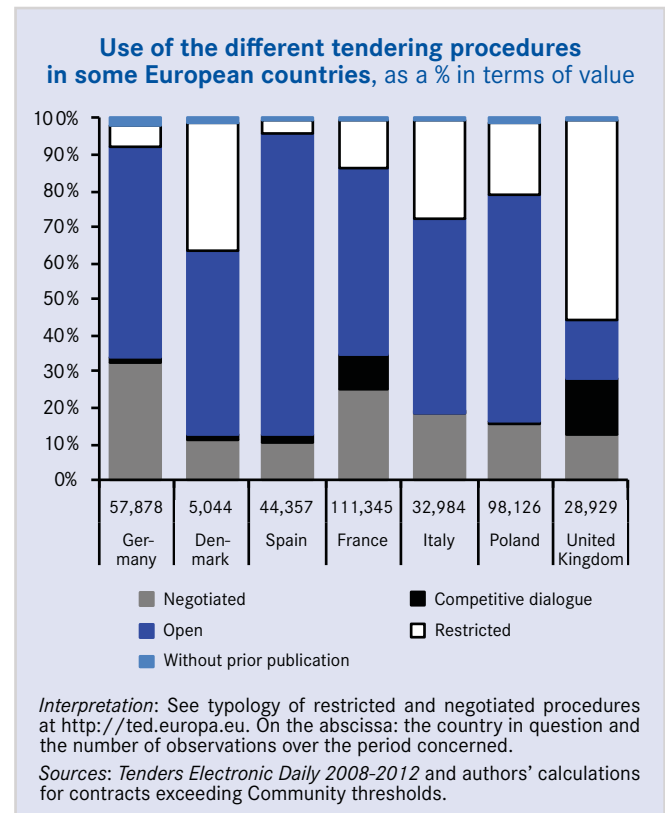
Contracts are generally signed following some form of competitive process and give rise to issues associated with management and expertise at every stage of the contract from selection to execution monitoring and closure. The difficulty for the public authority lies in the fact that neither can it directly observe the contractor's performance (asymmetry of information) and nor can it foresee all of the hazards to which the contract will be subject over the course of its execution.

Contract negotiation and renegotiation

The difficulty begins at the company selection stage, which generally involves a tendering process, with the risk of collusion in the case of concentrated markets,⁸ the risk of "the winner's curse" (where the best offer is made by the most optimistic company and not the most efficient), the risk of receiving overly aggressive offers designed solely to ensure selection, with the aim of renegotiating the contract at a later date, and the risk of corruption.⁹

The partner selection stage is particularly difficult in that the public authority cannot always limit itself, in an invitation to tender, to the lowest bidder without any negotiation or even "competitive dialogue" (*cf.* inset). As Germany, France places significant importance on invitations to tender with negotiation (accounting for 30% of procurement contracts in terms

of value if negotiated procedures and competitive dialogue are combined), although open invitations to tender without negotiation is still the rule (see figure). In the United Kingdom, meanwhile, restricted invitations to tender are more common.



Observation 1. Negotiated selection procedures are not commonly used in Europe.

The process of selecting companies is made even more difficult by the frequent renegotiation of contracts after they are signed, a practice that is particularly widespread in the case of PSDs (with renegotiation levels varying between 40% and 92% depending on the sector and country in question).¹⁰ Renegotiation weakens invitations to tender by encouraging opportunistic behaviour (aggressive bids in which the companies willingly submit a low bid in anticipation of the fact that they will renegotiate the contract during the execution stage). The invitation to tender mechanism, therefore, no longer necessarily results in the best candidate being selected (in other words, the lowest bidder or the one offering the

⁷ Engel E., R. Fischer and A. Galetovic (2001): 'Least-Present-Value-of-Revenue Auctions and Highway Franchising', *Journal of Political Economy*, vol. 109, no 5, October, pp. 993-1020.

⁸ In the field of procurement contracts, the example of secondary schools in the Paris region is a good illustration of the strategies that companies can implement in order to eliminate the competition when it comes to invitations to tender (see the 2007 decision no 07-D-15 by the *Autorité de la concurrence*, French Competition Authority); with regards to PSDs, see, for example, the case of public urban passenger transport (2005 decision no 05-D-38 by the *Autorité de la concurrence*).

⁹ The European Union, in its anti-corruption report (COM(2014) 38 final), noted that corruption alone costs the European economy some EUR120 billion a year and that public contracts are particularly affected. Corruption could increase the cost of public procurement by 20-25%, and in certain, more limited, cases, by up to 50%. The OECD points out that "the financial interests at stake, and the close interaction between the public and private sectors, make public procurement a major risk area [...]", p. 21.

¹⁰ Estache A. and S. Saussier (2014): 'Public-Private Partnerships and Efficiency: A Short Assessment', *CESifo DICE Report*, no 3/2014, pp. 8-13.

best value for money) but rather the one that has the greatest faith in their power of renegotiation.¹¹ It is also very difficult to introduce a truly incentive contract under such conditions. The renegotiation of contracts therefore tends to limit or even eliminate the benefits of competitive tendering procedures.¹²

Observation 2. A significant proportion of public contracts with private partners are later renegotiated.

Renegotiations are, however, useful when they enable the contract to reflect new circumstances, notably in the case of complex and long-term contracts. The aim is therefore to encourage beneficial changes whilst fighting opportunistic renegotiations, which requires transparency and competency on the part of the public party.

Transparency and competency

A study carried out by the OECD¹³ observes certain failings in public contracts with regards to transparency. Information regarding amendments to contracts and the monitoring of expenditure in public contracts in particular is difficult to access in many countries, something that is true of all of the public procurement tools.

Transparency is, of course, crucial at every stage of the public procurement process for the purposes of ensuring freedom of access (possibility of being fully aware of the needs expressed by the public entity) and equality of treatment (prohibition of any form of discrimination that concerns all stages of the procedure). It should also be possible that the renegotiation of contracts be monitored by the taxpayers that fund them. Whilst transparency comes at an immediate cost to both the public authorities and private operators, it is essential to ensuring that the principles on which the public procurement system is based are upheld as well as it is crucial to assessing its performance. The issue is then one of enabling a faster and wider dissemination of information regarding the awarding and execution stages of any form of public procurement contract.

Observation 3. There is a lack of data for monitoring changes in the public procurement system and analysing its performance, meaning that the *ex ante* and *ex post* control of contracts is consequently limited.

Refined management of public contracts requires informed and independent players that also have the expertise to deal with situations that are sometimes complex. In its report on integrity in public contracts, the OECD refers to both the

The official procedures for the awarding of public procurement contracts (exceeding EU/Community thresholds)^a

An invitation to tender is a public procurement procedure whereby the public entity rules in favour of the most advantageous economic offer. The selection process does not involve any negotiation and is based on a series of specific objective criteria of which the applicant is aware. The invitation to tender is said to be open in the event that any company can submit a bid.

In the case of a restricted invitation to tender, only applicants that have been pre-selected based on their capabilities (turnover, human resources, etc.) are invited to submit a bid. The negotiated procedure, which follows the submission of bids, involves the contracting authority negotiating bids based on their technical and/or financial aspects with one or several applicants. There is a possibility of negotiation in network sectors, whereas in other sectors it is only permitted above a certain threshold determined at European level and in exceptional cases.

In the event that the public entity is not in a position to obtain the technical resources to express its needs or to make the necessary legal and financial arrangements for the project alone, it can choose to follow a so-called competitive dialogue procedure. In this case, it selects a certain number of applicants and undertakes a series of dialogue-based stages in order to better identify its needs and existing technical solutions with the chosen applicants prior to launching the invitation to tender.

^a The directives apply only to contracts that exceed Community thresholds; in the case of works contracts, the invitation to tender procedure applies to contracts valued at EUR5.186 million exclusive of tax with no distinction between bodies or sectors. In the case of contracts for services and supplies, meanwhile, the threshold is EUR207,000 exclusive of tax for regional authorities, EUR134,000 exclusive of tax for State organisations and EUR414,000 exclusive of tax for network sectors. Below these thresholds, the buyers are free to implement their procedure as they see fit, in accordance with the constitutional principles of freedom of access to public procurement, equality in the treatment of applicants and procedural transparency.

lack and mismatch of expert skills on the part of the agents responsible for public procurement. The roles of buyer and project manager require not only proficiency in the field of law but also in the fields of economic analysis and financial management. The need for these multiple areas of expertise is vital both at the awarding stage (in terms of planning, budgeting, contractual choices and risk management) and at the execution stage (in order to protect the project against unjustified delays, additional costs or the risk of seeing the contracting company build up its own benefits were the public party to lose interest in the day-to-day management of the delegation). The management of public procurement operations is often entrusted to those with an exclusively legal

¹¹ See Athias L. and A. Nuñez (2008): 'Winner's Curse in Toll Road Concessions', *Economics Letters*, vol. 101, no 3, December, pp. 172-174.

¹² See Guasch J-L. (2004): *Granting and Renegotiating Infrastructure Concession: Doing It Right*, The World Bank. This conclusion has been drawn from the analysis of over 1,000 concession contracts signed in Latin America.

¹³ OECD (2011): *Government at a Glance*, OECD Publishing, p. 157.

background. Furthermore, frequent changes in the allocation of personnel also limit the effectiveness of “on-the-job” learning and “institutional memory”, which in turn limits the ability of the public authority to effectively monitor and control contracts that can sometimes span several decades. There is therefore a certain dual asymmetry in terms of expertise and information which favours the private entity and encourages opportunistic renegotiations of the company with the aim of securing a larger proportion of the annuity.

Observation 4. The expertise and incentives of the public buyer are too limited in a context of ubiquitous asymmetries of information and in which contractual details are significant.

New European directives in favour of negotiation, simplification and renegotiation

The new European legislative package on public contracts, which is due to be transposed before 18 April 2016,¹⁴ represents an opportunity to develop the public procurement system in France. This comprises the rules that govern all of the public procurement tools, including public private partnerships (that are considered similar to traditional procurement contracts at the European level), during the contract awarding and execution stages in particular. The ease of resorting to negotiation is one of the primary contributions that will be made by the new 2014 procurement contract directives. The negotiated procedure, now known as a “competitive procedure with negotiation”, and competitive dialogue can now be used in the event that the needs of the contracting authority cannot be met using the solutions that are immediately available, that service provision relates to a design project or innovative solutions, or even in the case of a “complex” contract. The use of a simple invitation to tender will only be mandatory in the case of purchases of standard products, services or works. This relaxing of the conditions governing the use of negotiated procedures brings the “classic sectors” directive closer into line with the directive on network sectors. Furthermore, the negotiated procedure is becoming the standard framework for the awarding of concession contracts.

The directives will make the sworn statement system more widespread for the purposes of alleviating the administrative burden that companies bidding for public contracts must bear. This statement will be based on a standardised European form known as the European Single Procurement

Document (ESPD), the template of which was presented by the Commission in January 2015. Only the bidder to whom the contract is to be awarded should be obliged to provide proof of the accuracy of the information contained in the ESPD. Furthermore, it will be compulsory for the information exchanged in the framework of such procedures to be made paperless as of 18 October 2018.

Directives on public contracts had thus far been limited to the rules governing the awarding of contracts. The new directives now outline the potential situations in which contracts may be modified over the course of their execution. Modifications amounting to less than 10% of the initial value of the contract for supplies and services and 15% for works are permitted, along with modifications that are either not substantial or had been incorporated in the contract in the form of price revision clauses or clear options, regardless of their value. Moreover, amendments can be concluded in the case of unforeseen events or where additional services have become necessary and a change of contracting party is not possible or would represent a major drawback, provided that the modification does not alter the general nature of the contract and that it does not result in more than a 50% increase in the value of the contract. In the event of successive modifications, the directive stipulates that this threshold of 50% shall apply to each modification and not to their cumulative value. Concessions can also be significantly modified under the same conditions and to the same extent as procurement contracts.

Observation 5. The forthcoming transposition of European directives will relax the rules governing public procurement contracts whilst developing negotiation at the awarding stage and facilitating renegotiation at the execution stage.

Improving public contract management

The new provisions associated with the directives on traditional procurement and concession contracts are indicative of a move towards a new vision of public service management that grants greater freedom to contracting authorities. In order to take full advantage of this development in terms of public procurement efficiency, however, it is essential that progress be made simultaneously in three complementary aspects, namely transparency, competition and expertise, whilst clarifying the objectives of the public procurement system.¹⁵

¹⁴ Directives 2014/24/EU regarding the awarding of public procurement contracts (so-called ‘classic’ sectors) and 2014/25/EU regarding the awarding of contracts in the water, energy, transport and postal services sectors (so-called ‘special’ sectors), cf. Official Journal of the European Union, 28 March 2014. Furthermore, the Directive of the European Parliament and the *Conseil sur l’attribution des concessions* (Council on the Awarding of Concessions, which correspond to the French public service delegations), namely Directive 2014/23/EU, was adopted by the European Parliament on 15 January 2014 and by the Council of the European Union on 11 February 2014.

¹⁵ The recommendations outlined thereafter apply only to those contracts and PSDs affected by the European directives, that are those whose values exceed the Community thresholds (see inset).

Clarifying the objectives of the public procurement system

As we have seen above, the significant amounts at stake in the public procurement system make it a potential lever for achieving social, environmental and innovation-related objectives, in which case the public authority must incorporate these criteria at the contractor selection stage. The new directives on traditional procurement and concession contracts leave it up to the States to decide whether these objectives are compulsory or optional. It is important to note that the public authority has at its disposal a number of more direct and effective ways of achieving the objectives pursued (by means of taxes and/or subsidies), without challenging the legitimacy of such objectives. It is incongruous, for example, to barely tax carbon emissions whilst incorporating vague environmental sustainability criteria into public contracts.

Using public procurement to achieve social, environmental and innovation-related objectives is ineffective for a number of reasons. Firstly, a policy designed to rectify a market failure must be uniform and comprehensive if it is to be effective. Conversely, and by way of an example, incorporating greenhouse gas emission criteria into public procurement operations amounts to placing a greater value on a tonne of carbon than does the carbon tax or the market value of tradable emission rights, which is ineffective for two reasons. On the one hand, as is the case with any policy that entails differentiated carbon prices, this increases the overall cost of achieving the environmental objective. On the other hand, a low-emission company will specialise in public contracts, in which it will have a competitive advantage, whilst its higher-emission counterpart will specialise in other contracts, whether public or private, that are not bound to this objective; as a result, contracts are not necessarily shared rationally and the reduction in pollutant emissions is minimal.

Furthermore, such objectives give rise to certain difficulties with regards to measurement. Unlike the State, local public authorities do not necessarily have the means to measure pollution. Moreover, companies often operate in a number of markets, both public and private, so how does one establish whether such pollution is linked to the activity in question or to another (since the company will always choose the most beneficial allowance)? Furthermore, differentiation between companies will be more intense as a result, thus reducing the intensity of the competition between them. Finally, taking into account various objectives increases the (ever-present) risk of favouritism. A public authority can, for example, place great importance on the implications in terms of local employment.

Recommendation 1. Recognise that the aim of public procurement, regardless of the values at stake, is primarily to meet an identified need by achieving the best possible performance in terms of cost and service or expected functionalities. Entrusting the public procurement system with the task of achieving social, environmental and innovation-related objectives is ineffective.

Increasing competition

Managing negotiation at the bid selection stage

European directives leave much room for negotiation at the bid selection stage. Provided that it is well managed, such negotiation can be highly beneficial to the public procurement process in the following ways:

- in the case of complex operations, negotiation has the potential to improve the fine-tuning of contracts by helping the public party to express its needs and by identifying unforeseen competitive and potentially innovative solutions;¹⁶
- negotiation at the selection stage reduces the likelihood of the contract being renegotiated at a later date¹⁷ without necessarily increasing prices;¹⁸
- contractors are required to justify the various components of their bids at the negotiation stage, which reduces the risk of collusion and cover bids (bids that are intentionally overvalued with the aim of encouraging the public authority to select the company chosen by the agreement).

All things considered, we believe that introducing a negotiation stage between the contracting parties is a positive move. From a theoretical perspective, the *ex ante* transaction costs associated with negotiated procedures help create more comprehensive contracts that are consequently more robust when it comes to renegotiation.¹⁹

Nevertheless, aside from the risk of favouritism, the negotiated procedure has another potential pitfall, and the authorities may wish to use this to bring prices down if the negotiation stage involves only the financial proposal put forward by bidders. In anticipation of this, companies will initially raise their bid to a higher level, rendering the negotiation meaningless unless it changes the technical characteristics that the authorities seek. If the negotiation relates to the technical

¹⁶ Bajari P., R.S. McMillan and S. Tadelis (2009): 'Auctions versus Negotiations in Procurement: An Empirical Analysis', *Journal of Law, Economics, and Organization*, vol. 25, no 2, pp. 372-399.

¹⁷ Guasch J-L., J-J. Laffont and S. Straub (2008): 'Renegotiation of Concession Contracts in Latin America: Evidence from the Water and Transport Sectors', *International Journal of Industrial Organization*, vol. 26, no 2, pp. 421-442.

¹⁸ Chever L. and J. Moore (2012): 'Negotiated Procedures Overrated? Evidence from France Questions the Commission's Approach in the Latest Procurement Reforms', *European Procurement and Public Private Partnership Law Review*, vol. 4, pp. 228-241.

¹⁹ Tirole J. (2009): 'Cognition and Incomplete Contracts', *American Economic Review*, vol. 99, no 1, March, pp. 265-294.

aspects of the bids, however, it can benefit a competitor by enabling them to improve their original bid. The negotiated procedure is therefore accompanied by the risk of competitors' ideas being "plundered".

European law lays down a principle of traceability and transparency of negotiation, yet fails to outline the accurate terms. The transposition of the directives represents an opportunity to implement measurements that enable negotiations to be more effectively controlled.

In order to implement the principle of traceability and thus avoid the pitfalls associated with the negotiated procedure, we would suggest that the authorities be required to produce two summary reports, the first focusing on the analysis of the bids prior to the start of negotiations, the second on the analysis of the bids once negotiations have ended. These two reports already exist in the framework of the "Sapin" procedure that applies to public service delegations in France and would be extended to all negotiated procedures. In the case of public service delegations, the originality would lie in the obligation to indicate the outcomes of the negotiations, particularly with regards to the technical aspects of the bids and the content of the commitments made by the applicants. In the case of public procurement contracts, the additional work that such reports would create would be offset by the likely reduction in the depth of the report justifying the use of negotiation procedures.

Recommendation 2. Make it compulsory for the public party to provide and publish online two summary reports on the analysis of the bids both prior to and following the negotiation stage.

Competition and reputation of applicants

The directives on public contracts provides for the possibility of ruling out a tendering company having defaulted on a past contract.²⁰ This provision is designed to encourage companies to honour their contractual commitments and can help prevent strategic behaviour looking at winning a contract by under-estimating the costs involved, for example. The more

complex the contract, and therefore the greater the likelihood of renegotiation, the more important this provision is to the public party.²¹ The benefits of this mechanism have already been confirmed by an empirical study conducted on a major Italian public utility that had introduced an experimental scoring system for its sub-contractors and subsequently used a reputation-related criterion in its selection procedures. The study concluded that this resulted in improved quality and that basic rules of scoring based on reputation can prevent favouritism and the creation of barriers to entry for new arrivals with no prior experience with the public contracting party.²² These results, whilst not of general applicability to all sectors and all countries, suggest that contractors value their reputation and that it can be useful to take it into account during the selection procedure.

Efforts must, however, be made in order to make information regarding a contractor's reputation more easily accessible to public authorities and to ensure that such information is both objective and verifiable in order to prevent any authorities that might use it from finding themselves in a difficult position (their decision to rule out a given contractor could be contested as being unfounded and restricting competition). Such systems for sharing information exist in the United States²³ and in South Korea.²⁴ Without necessarily orchestrating the temporary exclusion of companies from invitations to tender as is the case in South Korea, the centralisation and more accessible sharing of information regarding their performance over the past five years, by means of a dedicated national platform or an extension of the existing *Plate-forme des achats de l'État* (PLACE, French Public Procurement Platform), could improve the efficiency of the public procurement system, which would facilitate the possibility offered by the new directives of ruling a company out based on its past performance.

Recommendation 3. Centralise information regarding the past performance of contractors for the purposes of facilitating and encouraging the use of such information at the awarding stage so as to penalise less reliable companies in accordance with the terms outlined in the directive without running any legal risks.

²⁰ In accordance with Article 57 of the directive, exclusion is permitted "where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions".

²¹ Tadelis S. (2006): *Incentives and Award Procedures: Competitive Tendering versus Negotiations in Procurement*, Handbook of Procurement, Cambridge University Press, pp. 121-139.

²² Spagnolo G. (2012): 'Reputation, Competition and Entry in Procurement', *International Journal of Industrial Organization*, vol. 30, no 3, pp. 291-296.

²³ In the United States, and since 2010, the Federal Awardee Performance and Integrity Information System (FAPIIS) Internet application has been combining multiple sources of information (including the Past Performance Information Retrieval, PPIRS, and the Contractor Performance System, CPS) and helping the federal departments responsible for purchasing to select their suppliers by providing them with relevant and up-to-date information on a company's background over the past five years.

²⁴ Under the aegis of the public agency responsible for all of the purchases made by the State and by public administrations, companies that fail to observe contractual deadlines are 'blacklisted' for three months if the delay in delivery is less than a month, for six months for delays of less than six months and for a year for delays upwards of six months. In the event of failure to observe quality requirements, the company is sanctioned for a period of one year.

Paperless contracts

Paperless contracts (the possibility of entering into contracts electronically, either by means of email or using an online platform) promote a faster and wider circulation of information. Around 11% of the total value of contracts in France are paperless, according to the OEAP, although the European directives require that all contracts will be paperless by 2018. Alongside this objective, thought must be given to the number of electronic advertising and application platforms available. Nowadays, such platforms exist at all administrative levels –local, departmental, regional and now even national with the introduction of the PLACE platform. Whilst turning to paperless contracts is designed to facilitate access to the public procurement process, the dispersal of information across various websites requires companies to fund services to research contracts that might interest them, thus restricting their participation (particularly where SMEs are concerned) in invitations to tender. Furthermore, each platform has its own characteristics and the documents required are not always the same, which increases the cost to prospective bidders.

In this respect, the example of Korea, where the Public Procurement Service (PPS) developed an electronic platform known as KONEPS (Korea ON-line E-Procurement System) set up in 2002, is instructive. KONEPS managed over 55.5 billion euros' worth of public procurement transactions in 2013, or around 65% of the country's total public procurement transactions. The platform is used by over 267,000 companies and 46,000 public organisations and improves both transparency and provision of information to the relevant parties and has significantly simplified the procedures involved in submitting a bid (with tenderers having only one application to complete for all future applications).

Recommendation 4. Introduce (or maintain) electronic advertising and application platforms only at regional level and upload all of the information to a national platform. Bring the practices adopted by the different platforms into line with the most effective regional initiatives.

Increasing transparency

The following proposals are intended to increase transparency with regards to the placing and execution of public contracts. What is important is not improving transparency as such (since greater transparency can sometimes have a negative impact by facilitating agreements, for example) but rather improving the accountability of public decision-makers.

Transparency and accountability of public buyers

Greater transparency within the public procurement system has to go hand in hand with more flexible awarding procedures and a greater possibility of renegotiating contracts. Beyond the developments suggested above, public authorities should be required to systematically publish data relating to public procurement, particularly with regards to the reasons behind their choices. Indeed, provided that the most economically advantageous bid²⁵ is selected, in accordance with the criterion/criteria outlined in the public invitation to tender notice or in the bidding rules and regulations, it is useful to inform the unsuccessful applicants, as well as the stakeholders, of the reasons for which the public authority has chosen one bid over another. The choice is made by the *Commission d'appel d'offres* (CAO, Tender Commission) for local and regional authorities. Even if no text explicitly provides for any report in particular, the Ministry of the Economy has nevertheless published online a standard bid analysis report and minutes from the CAO meeting in accordance with which it selects the best bid. Reports can currently only be provided at the request of companies whose bids have not been successful. An appeal may be submitted to the *Commission d'accès aux documents administratifs* (CADA, Commission on Access to Administrative Documents) in the event of a refusal being opposed by the public entity. For the purposes of improving transparency and establishing an element of accountability on the part of public buyers, we would suggest that such reports, which already exist in the vast majority of cases, be made public. Paperless contracts and the introduction of platforms designed to centralise bids can promote transparency among public contracts and provide a place for publishing said reports.

Recommendation 5. Make it compulsory for a bid analysis report to be published online, along with the relevant legal information (procedure, selected bid, number of bidders, etc.).

Managing and ensuring transparency in renegotiation

The new European directives recognise that public procurement contracts are incomplete and leave a great deal of room for potential renegotiation at the contract execution stage. Whilst this initiative is certainly a welcome one with regards to adapting to unforeseen events, it is nevertheless important that the parties feel bound by the contract. In the absence of any firm commitment, either party stands to lose the value of any contract-specific investment, the initial tendering process can be distorted and the taxpayer or user wronged. It is therefore important to offer the ordering party and contracting companies some form of incentive

²⁵ The most economically advantageous bid is the one that best meets all of the criteria governing the awarding of the contract. It depends on the weighting of the criteria, which is itself subjective, and on the scoring of the bid, which is also partly subjective, by the buyer in relation to each of the criteria. One alternative to choosing the most advantageous economic offer is choosing the lowest bid, based solely on the financial aspect and therefore leaving the buyer no room for discretion.

to clearly outline the nature of the contract and to clearly link the latter to the achievement of observable exogenous variables (such as inflation) in order to limit the potential for renegotiation as much as possible. Nevertheless, the risk of renegotiation cannot be eliminated altogether. Indeed, renegotiation can also help to improve the initial contract. Improving the transparency of renegotiation procedures would help limit this problem and ensure that the rules governing renegotiation are adhered to.

One simple and inexpensive way of increasing transparency would be to introduce a specific disputes procedure for amendments to public procurement contracts in the form of an “amendment summary” procedure. This procedure would be quick, as are pre-contractual and contractual summary proceedings,²⁶ and would improve transparency and accountability on the part of public authorities. The “amendment summary” procedure would enable any interested third party (prefect, elected representative, company, citizen, etc.) to request that an amendment be cancelled. Any failure to observe the legal rules (threshold calculation, modification of the object of the contract, fraud, etc.) and unjustified additional costs would constitute reasons that might be invoked. The time limit for appeal could be set at one month from the date on which the ‘amendment notice’ is published via a medium that would make any interested third party aware of its execution (such as in the *Bulletin officiel des annonces des marchés publics*, BOAMP, Official Bulletin of Publication of Public Procurement Notices, for example).²⁷ Amendment proposals would be simultaneously published and sent electronically to applicant companies, to a pre-established list of interested third-parties and more generally to any third party that might have so requested beforehand. The publication would notably have to specify the initial value of the contract, the value of the increase and the object of the amendment in order for this solution to be effective. Any person who so requests would be able to receive notification of the amendment and of its characteristics. The time limit for appeal of one month would, as is the case with pre-contractual summary proceedings, be a standstill period (meaning that the amendment would only come into force once the time limit had expired). In return, once the time limit has passed, it would no longer be possible to contest the amendment on its purely legal aspects.²⁸

The amendment summary procedure would come into effect beforehand and would therefore be more effective than an a posteriori evaluation. The use of the procedure is not, howe-

ver, self-evident. Firstly, there is the issue of free riders, in that the gains associated with making the right decision in the framework of the amendment summary procedure are scattered. Then, of course, companies in the sector will not always be willing to contest the validity of a renegotiation process since they generally stand to gain very little whilst risking getting on the wrong side of the ordering party.²⁹

With this in mind, the possibility of filing *amicus curia e* comments with the judge during the amendment summary procedure could prove useful. It is also important to consider the possibility of making such comments confidentially (meaning that the identity of the disclosing party is not divulged to the ordering party in order to avoid any retaliation in future contracts). Conversely, of course, it is important to prevent a situation in which the judge is swamped by a landslide of information. Short documents summarising the main argument (possibly complemented by relevant appendices) could be used to help achieve this objective.

Recommendation 6. Make it compulsory to publish an ‘amendment notice’ as soon as the value of the contract varies by more than 10%, and introduce a quick amendment summary procedure that is open to stakeholders. Consider the potential introduction of mechanisms designed to guarantee the anonymity of the parties responsible for the procedure.

(Concurrently) introducing greater transparency with regards to publicly managed activities

As we have seen above, the public authority may also choose to “do the work themselves” rather than to “delegate”, and many local authorities have for example chosen in recent years to manage their water systems themselves internally. In order to correctly evaluate the various public procurement tools available, it is important that the transparency requirements outlined above be extended to those activities managed directly by the public authority in the event that such activities could have been covered by a contract with an external service provider (water management, catering halls, parking, etc.).³⁰

²⁶ Pre-contractual and contractual summary proceedings involve a quick procedure offering the possibility of requesting that a court completely or partially annul a procedure or a contract. There were just under 1,100 of these in 2013 with an average decision period of 21 days, cf. Conseil d’État (2014): *Le juge administratif et la commande publique*, Special Report, June, p. 4.

²⁷ In the case of traditional procurement and concession contracts that exceed European thresholds, the new ‘traditional procurement’ and ‘concession’ contracts directives make it compulsory for the local public authority to publish a ‘notice of modification’ to the contractor concession – Art. 43 of directive 2014/23/EU, Art. 72 of directive 2014/24/EU and Art. 89 of directive 2014/25/EU.

²⁸ The administrative judge would have the power to order the annulment of the amendment. The decision would have to be made within a reduced time frame so as not to hinder the progress of projects that require the amendment to be quickly executed. The only form of appeal would be the remedy of judicial review, as is the case with pre-contractual and contractual summary proceedings.

²⁹ One could make the analogy here with the right to whistle-blow within a company – employees and auditors, for example, have more to lose than they have to win, whilst those who are the most strongly encouraged to expose reprehensible acts are journalists and employees benefiting from the *qui tam* system (that is those receiving a percentage of the savings made in this way): see Dyck A., A. Morse and L. Zingales (2010): ‘Who Blows the Whistle on Corporate Fraud?’, *Journal of Finance*, vol. 65, no 6, pp. 2213-2253. Of course, we do not argue that the two situations are similar, but the case of whistle-blowing clearly shows that incentives to participate in the process must be considered.

³⁰ Such as the *Organisme national de l’eau et des milieux aquatiques* (ONEMA, National Body for Water and Aquatic Environments), which gathers and publishes online information relating to the cost, quality and characteristics of public water services, whether managed as a public utility company or as a public service delegation, although the information gathered is still incomplete owing to the lack of any obligation or penalties.

Recommendation 7. Apply transparency requirements to directly managed activities, along with appropriate incentives and penalties; make it possible to evaluate such activities on a similar basis to those delegated to a private partner.

Recommendation 8. Increase the professionalisation and expertise of public buyers and project managers. Enhance the appeal of such professions by means of professional development opportunities.

Enhancing the expertise of the public party

Professionalising public buyers

In the majority of OECD countries, the occupation of Public Buyer is not specifically recognised. In France it has only featured in the *Répertoire interministériel des métiers* (Interministerial Directory of Occupations) since 2010. Administrations have long been rebuked for entrusting the management of their public contracts to persons with an exclusively legal background, which is essential to ensuring that the procedures comply with the relevant legislation but not enough to truly optimise the public procurement system. This is not so much the case today, with a recent study by the *Union des groupements d'achats publics* (UGAP, French Public Procurement Grouping Union) revealing that 63% of public buyers do not have a legal profile.³¹ This same study, however, indicates that 61% of public buyers joined a purchasing department following a period of internal mobility, with no prior experience in the field, and that only 39% undertook any form of course or training resulting in qualification in the field of purchasing. Finally, the study shows that over two-thirds of buyers acknowledge the fact that they are not very familiar with the economic and industrial fabric and nearly half admit that they do not monitor economic or technological developments. Increasing the professionalisation of these roles and the accountability of public procurement managers and buyers therefore constitute avenues for streamlining the procurement process. At the same time, giving agents the opportunity to progress and acquire new skills by means of training initiatives could lead to a reduction in turnover and therefore an accumulation of experience and contract “memory”.

In the case of more complex concession-type contracts and public private partnerships, professionalisation should focus in particular on the *ex post* monitoring of contracts. Indeed, it is important to understand and to monitor the information provided by delegates and to have a comprehensive overview of both the economic and technical issues associated with a project. This should facilitate the adaptability of the contract (renegotiations are essential in the case of long-term contracts) whilst strengthening the bargaining power of the public party.³²

Centralising purchases wherever possible and accumulating experience

Centralising the purchasing function (particularly in the case of traditional procurement contracts for services and supplies but also, to a lesser extent, for works) can result in substantial savings. Indeed, centralisation helps achieve economies of scale by capitalising upon and developing good practices, by pooling procedures (reduction in operating and awarding costs) and by facilitating collective purchasing. The example of South Korea is an interesting one. Of the EUR85 billion of public procurement transactions made in 2013, the Korean PPS managed over 28 billion. The PPS is thus pursuing economic efficiency objectives (economies of scale, transparency, simplification, competition, etc.) by grouping together public procurement transactions and managing invitations to tender. It is also pursuing objectives relating to developing the expertise of public administrations (training, lessons learned, etc.) and of Korean companies (training and support in order to succeed in foreign markets). This being the case, over 66% of the total value of public contracts managed by the PPS went to SMEs in 2013 (49% in the case of works contracts).

In France, meanwhile, the UGAP, a French central public procurement body run under the joint supervision of the Ministry for the Economy, Finance and Industry and the Ministry for National Education, is the only non-specialized central public procurement body. Its influence is also somewhat limited since it places only 2 billion euros' worth of orders a year.

It is important to determine at what level the centralisation of purchases would be relevant. The public authority could therefore arrange for resources and expertise to be pooled within joint service centres managed by regions or inter-communalities³³. The existence of such joint services would enable smaller authorities and public institutions (chambers of trade, prefectures, courts, hospitals, etc.), that would not necessarily have the means to recruit specific buyers, to professionalise their purchasing operations.³⁴

The issue of centralisation is, nevertheless, a complex one. On the one hand, centralisation can result in significant

³¹ Survey undertaken by the UGAP and *Décision Achats Magazine* over the second quarter of 2011, to which 370 purchasing managers responded.

³² With regards to public service delegations, the majority of local public authorities call upon the services of specialist firms (contracting authority support) to help them prepare the invitation to tender and analyse the responses received from applicants.

³³ CKS More Institute and Public formulate a similar proposal in their 2003 report « 150 milliards pour quoi faire ? 10 actions pour faire de la commande publique un vrai moteur de croissance ».

³⁴ The collective purchasing of electronic communications services by the *Syndicat intercommunal de la périphérie de Paris* (SIPPEREC, Intercommunal Syndicate for the Parisian Periphery for Energy and Communications Networks) is a good example of this.

gains in terms of efficiency (more valuable lessons learned/greater staff specialisation, professionalism and finally greater negotiation power); on the other hand it removes the element of accountability and can eventually lead to higher prices, as demonstrated by many of the complaints received regarding central purchases (the decision-maker is only partly responsible for the payment), delays in execution or a limited offering that is not flexible enough to meet specific needs.

There are a number of potential solutions when it comes to dealing with the problem associated with this removal of accountability, none of which are perfect. These include an “opt-out” clause, which protects the lower echelons against a lack of responsiveness but also reduces efficiency and professionalism gains on the part of the ordering party, and competition between a number of central buyers all seeking to secure a “market share” by increasing their efficiency. One of the dangers of the latter solution is the risk of choices being made on a more political than economic basis; it is important, therefore, to ensure that central purchasing bodies are independent not only of subcontracting companies but also of ordering parties.

All things considered, we believe that the centralisation of purchases should be further developed, particularly where standard goods and services are concerned, but that it should remain a possibility that is available to smaller public authorities and not a compulsory system that could result in needs not being given the consideration they deserve, an extension in time frames, a reduction in choice and even a reduced likelihood of contracts being signed with local players.

Recommendation 9. Centralise the purchasing of standard goods and services wherever possible; create competition between entirely independent and professional central purchasing bodies; give public buyers the option of decentralising their purchases for the purposes of ensuring maximum flexibility where it is required.

Increasing control over the largest contracts

In order to ensure that the three cornerstones of “transparency”, “competition” and “expertise” increase the efficiency of

³⁵ In accordance with the *Code général des collectivités territoriales* (Local and Regional Authorities Code), deliberative assemblies must make a decision based on the principle of each public service delegation. Authorities are therefore required to examine and compare the costs, advantages and drawbacks of owner-managed operation with those of operation by means of delegated management. The studies performed must be impartial and exhaustive. The conditions under which these provisions are implemented do, however, vary greatly, as the *Cour des comptes* observes on a regular basis.

the public procurement system, the recommendations outlined above must be accompanied by greater monitoring of the public purchase both upstream and downstream where the largest contracts are concerned, in which case more costly monitoring and supervision is justified. Upstream, it is important that a prior evaluation be systematically performed, including the full cost and anticipated advantages for each project, in accordance with the public procurement tool selected. These prior evaluations, limited to projects exceeding a certain threshold, will make it possible to identify the most appropriate form of contract to meet the public need and to better comprehend the overall cost of the contract in question.³⁵

Such control should be extended downstream by means of renegotiation monitoring. In addition to the relevant players being held accountable, this control will make it possible to compare the conditions under which contracts are executed with the conclusions drawn from studies performed at the pre-contractual stage and that have resulted in one method of organisation being chosen over another. All such evaluations should be carried out by an agency, which would also facilitate the centralisation of data and results and the possibility of comparing the best contractual practices.

Recommendation 10. Entrust the upstream and downstream evaluation of all of the public procurement tools to an agency in the case of amounts exceeding a certain threshold, such as EUR50 million.

This threshold should be set realistically in accordance with the means allocated to the evaluation agency so as not to delay the progress of public investment projects.

Conclusion

The greater freedom that will be granted to French contracting authorities, notably at the selection stage but also at the contract execution stage, could potentially be beneficial, provided that this freedom is part of a broader move towards greater transparency, effective competition and the development of specific expertise. ●



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