Legal Perspective: Is Best Value Procurement achievable within the framework of the ARW 2005?

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This paper discusses the legal implications of using the elements of the Performance Information Procurement System (PIPS) procedure in the Netherlands. The article proposes the pros and cons of the potential compliance of these elements, in the form adopted in a test case with the municipality of ‘s-Hertogenbosch who attempted to meet the requirements of Aanbestedingsreglement Werken1 (hereafter: ARW) 2005. The author proposes that the national restricted procurement with pre-selection prescribed by the ARW 2005 may raise potential issues of interpretation and may therefore be too strict for the efficient application of the elements of the American methodology. Based on the legal discussion of the test case, the author is proposing to choose a more flexible policy for the public works contracts, which can benefit from the application of the American methodology.

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Background

The practice in the Netherlands with the procurement of public works

In 2001, a fraud scandal in the construction sector unraveled in the Netherlands. It was then determined that private market parties regularly made illegal arrangements regarding the price and the distribution of public contracts and that in consequence, the public authorities paid too much for their works contracts (Van Romburgh 2005). This resulted in an atmosphere of distrust between the private market and the contracting authorities (VNG Editor 2009).

The Final Report of the Dutch Parliamentary Investigation Commission concluded that there was a need for harmonized procurement policy for all public contracts in the construction sector, whether above or below the threshold set by the European Directive 2004/18/EC (the threshold for the application of the Directive 2004/18 is EUR 4,845,000). This initiative translated into the ARW 2005, which extends the application of the procedural requirements of the Directive 2004/18 to the public works contracts below the above mentioned threshold and brings some additions to the European rules for the procurement of public works. (De Bouw uit de schaduw 2002).

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1 Aanbestedingsreglement Werken is the Dutch terminology for Procurement Regulations for Public Work contracts.
The major points of ARW 2005

On the one hand, the ARW 2005 was mainly intended to deregulate and simplify the legislative framework by reducing the number of different procurement rules, through the application of one regulatory background for all contracts irrespective of their value (Toekomstperspectief bouwsector 2003). The regulation therefore offers a user-friendly format and avoids excessive references (Arrowsmith 2005). The ARW 2005 is divided between provisions for national procurement procedures (below the threshold) and provisions for the European procurement procedures (which are above the threshold and fall within the scope of the European Directive 2004/18 as implemented into the national legislation Besluit aanbestedingen voor overheden (Bao))\(^2\). The rules for the national procedures almost completely replicate the more rigid rules for the European procurements. By doing that, the ARW 2005 restricts the room for adjusted procedures and for communication with the contractors in procurements falling outside the scope of application of the European Directive (for national procurements).

The restrictive effect of the ARW 2005 is also due to the fact that many public authorities (such as the municipality of ‘s-Hertogenbosch whose pilot project is discussed in this paper), for which the application of the regulation is voluntary, have adopted the ARW 2005 in their procurement policies and are applying it in all their procurements of public works\(^3\).

On the other hand, the ARW 2005 implements the amendments of the latest European Procurement Directive of 2004 and of recent jurisprudence of the European Court of Justice. Moreover, the ARW 2005 introduces a supplement to the European procurement rules, which constitutes a direct effect of the fraud scandal. This is the Model K Declaration, which requires the bidder to declare that his offer was not formulated on the basis of an understanding with (some of) his competitors, as forbidden by the European and Dutch competition rules. The executive(s) of the bidding company must sign the declaration. If the declaration is not submitted or not signed, it leads to the exclusion of the offer from the procurement procedure.

In practice, after 2001, a lack of communication and collaboration between the contractor and the public authority characterized this sector. At the same time, the contracting authorities continued to use detailed technical specifications and to award works contracts on the basis of price to contractors who could guarantee a minimum level of quality. There is though a demonstrated correlation between the price-based procurement methodology and low performance in the construction sector (Butler 2002, Doree 2004, Chong et al. 2007). Kashiwagi proposes that minimum standards when coupled with price based awards continually drive value and quality down and degrade the ability of the construction industry to accomplish meaningful training programs. This causes a constantly diminishing pool of experts who can plan a project from beginning to end with an accurate budget. It also creates a situation where there is no motivation of the less qualified to become fully qualified.

Given this background and despite the expectations of the contracting authorities to obtain high performance, the procurement of works contracts in the Netherlands led to competition on the

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\(^2\) The European Union knows two main types of legislation: directives and regulation. Regulations are automatically applicable in the member countries, while directives need to be transposed into national legislation in order to be applicable.

\(^3\) The provisions in the ARW 2005 on the European procurement procedures are mandatory on all the public authorities when they procure public works contracts. The provisions on the national procurement procedures are only mandatory for the central government departments.
basis of prices, while contractors offered minimum quality levels in order to maximize their
profits.

Moreover, as works projects are often performed in environments which involve multiple
stakeholders (for example in urban areas) and their successful completion requires the
contractors to communicate effectively with diverse stakeholders and have an adequate level of
project management skills, the micromanagement approach adopted by the contracting
authorities led to a very reactive, non-responsive approach by contractors causing delays and
exceeded budgets. Consequently, works projects often cost the public authorities (the client)
more than initially agreed, and often involve a great coordination and control effort by the
client’s representatives.

Recent approaches to the procurement of public works

As a reaction to the current practice, there has been a growing interest for improving the
performance of the works projects procured by public authorities. At the end of 2003, the
Ministries of Economy, Environment and Transport and Public Works detailed the need for
changes in the construction sector (Toekomstperspectief bouwsector 2003). Subsequently, the
program Process and System Innovation in the Construction Sector (PSIB) was set up to identify
innovative procurement procedures and instruments which lead to improved results in the
construction projects, in terms of time, budget and quality. In parallel, the Dutch Ministries
created the Knowledge Center for Procurement (PianoO), intended to improve the procurement
practice of the Ministries in the construction sector and to promote the accumulated good
practice.

Studies carried out within the PSIB program identified some success factors for the procurement
of works contracts, including the benefits of evaluating the Past Performance of the bidders and
their capacity to manage risks (Jansen et al. 2007, Gunnen op waarde 2007), the need for the
allocation of risks to the party most suitable to deal with them (Crama et al. 2004, B van der
Veen et al. 2005) and the cost efficiency of detailing the bids only with the winning tenderer
(Steenwijk 2005) etc. One of the first programmes within the PSIB analysed three pilot
procurements conducted through the best value Performance Information Procurement System
(also called PIPS or best value PIPS) and concluded that the application of this methodology can
provide added-value if the project is (Muhren and van Duren 2007):

1. Above few hundreds of thousands of euro; AND
2. Fairly complex; AND
3. Concerns construction, installation, delivery and maintenance tasks.

Based on the above mentioned pilot projects and on other studies carried out within the
framework of the PsiBouw programme (Bakens et al. 2004, Plantinga 2008) and beyond (Chao-
Duivis 2005), an ambitious initiative was taken in 2007 to set up a centralized database which
would contain information on the Past Performance of companies in previous public works
contracts. Unfortunately, this database is not yet operational⁴.

⁴ See for more information: http://www.pianoo.nl/Aanbestedingspraktijk/Past_Performance_in_de_Bouw
Best value PIPS

Best Value PIPS was developed by Professor Dean Kashiwagi, Director of the Performance Based Studies Research Group (PBSRG) at Arizona State University, and has been under testing since 1994 with great success in the US (Hawaii Report 2002). PIPS is based on the Information Measurement Theory (IMT) which states the following:

1. Management, direction, and control of an individual or organization is a sign of inefficiency and increases cost and decreases quality and value. It is much more efficient to identify performers and allow the performers to use their skill to perform the work.
2. An organization has many levels of performance, as they are unable to control their personnel to make them all capable of the same level of performance.
3. It is impossible to efficiently control another entity. When contractors or individuals are controlled and directed, they become reactive, take no accountability for their actions, and cannot become highly skilled, capable of adding value and proactive in their actions.
4. Contractors should measure their own performance and the performance measurements should be used to identify their level of skill or capability to perform.

Test case with the municipality of ‘s-Hertogenbosch

In practice, several public authorities started to apply elements of the best value PIPS in their procurement procedures in order to identify added value and to ensure a greater predictability of a qualitative result of their works projects (s-Hertogenbosch weegt verleden mee 2009).

One of them is the municipality of ‘s-Hertogenbosch, who decided to change its approach to the procurement of works contracts. It decided to capitalize on the knowledge and capability of the private market in order to increase the level of performance in works projects. Thus, the municipality intends to focus more on the quality of the offers and of the contractors and less on the price. At the same time, the municipality intended to minimize direction and control such as to allow the contractors room for innovation and creativity, to stimulate them to adopt a collaborative approach and to direct their efforts towards finding solutions for unexpected problems during the execution of the contract (Koenen 2009).

To this end, the municipality decided to adopt a Best Value Procurement method based on the best value Performance Information Procurement System (PIPS). Three elements of this methodology were identified by the municipality as crucial to ensure the successful execution of the works contracts: Past Performance Information, Interviews with the key personnel and the Pre-Contractual detailing of the value-added plan and of the risk assessment with the best scoring tenderer.

The municipality decided in 2008 to put this procedure into practice in a pilot procurement of the design, installation and management of retention settling tank (a subterranean tank for the temporarily storage of sewage water). The project entails several complex aspects, such as the need to protect the trees and the foundations of the houses in the surrounding area. Moreover, the project will be executed in an urban area and will therefore require efficient communication with
the local population. These aspects increase the risks for the successful realization of the project and make the project suitable for the application of the above mentioned procedure.

The pilot project chosen by the municipality for the application of this procedure, has a value under the threshold and does not require the application of the European procedures. This means that the municipality would be allowed more discretion in adjusting the procurement procedure in order to introduce the above mentioned elements. However, the municipality was obliged by internal policies to apply the ARW 2005 and moreover did not want to create a new procedure, as permitted by the experimental provision of art.11.1, ARW 2005. As a consequence, the municipality faced the challenge to fit the elements of the PIPS methodology into the legal framework of the national restricted procedure with pre-selection as prescribed by ARW 2005, without diminishing the positive impact of PIPS on the results of the project.

This paper begins by describing the PIPS methodology, as well as the US federal legislative provisions in the context of which the methodology is applied, and underlines the main differences with the legal framework applicable in our target project. Because the ARW 2005 prescribes procedures which do not substantially differ from the procedures prescribed by the Directive 2004/18/EC, references to the European legal framework will encompass the ARW 2005.

Subsequently, the paper describes how the municipality of ‘s-Hertogenbosch intends to adapt the elements of this procedure to its project in order to stay in compliance with the ARW 2005. In this context, the author draws conclusions on the compatibility of the elements introduced in this pilot project with the ARW 2005 chosen procedure, and questions the efficiency of the elements of ARW 2005 in their perceived modified form. The argument is proposed that the legal framework imposed by the ARW 2005 may be too strict for the efficient application of the elements of the American PIPS methodology. Based on the results of this pilot project, the municipality may need to choose for a more flexible policy for the works contracts under the threshold.

Terminology

This paper uses the European terminology for public procurements. The selection phase in Europe corresponds with the pre-qualification in the US, while the award phase defines the selection of the winning bid in the US.

The Best Value Procurement in the US

Performance Information Procurement System (PIPS)

PIPS represented the major inspiration for the municipality ‘s-Hertogenbosch to attempt to fine-tune its procurement methods. This methodology was developed by Professor Kashiwagi as an alternative to the award of construction projects in the US on the basis of lowest price and according to management, direction, and control technique of detailed specifications method, which led to construction projects not being delivered on time and within budget. Best Value
PIPS was developed within the Performance Based Studies Research Group (PBSRG), a non-profit research group at Arizona State University. Since 1994, the PBSRG has applied this method in different public and private organizations.

PIPS is based on the premise that the most successful execution of projects is realized when the contractor is put at the “center of the universe” (Sullivan et al. 2007). This presupposes that the contractor is the expert and he should be allowed to evaluate the price and duration of a project based on the desired outcome of the project, and not on detailed specifications. Moreover, the contractor will deliver the best performance when he is put in control of the execution of the project, and required to identify, manage and minimize the technical risks. For these reasons, even though PIPS can be used in design-bid-build (DBB) projects, it is most efficient and effective in such contracts as design-build, construction management at risk, indefinite delivery, indefinite quantity, and design-build-operate, private-public partnerships.

On the one side, PIPS works as an instrument to improve efficiency in a procuring organization, as well as its capability to award to the best value contractors. On the other side, it uses measurement and accountability systems to instill in the contractor’s organization a culture of preplanning, risk identification and mitigation, along with performance and continuous improvement.

PIPS is divided between six so-called ‘filters’ which are applied gradually to select the best contractor for the project (Chong et al. 2009):

1. Past Performance Information;
2. Proposal & RAVA Plan (Risk Assessment Plan and Value Added Plan);
3. Interviews with the key personnel of the bidder;
4. Prioritization (or identification of the best value);
5. Pre-Planning Phase (which includes the setting up of the risk management plan (RMP));
6. Weekly Risk Report (WRR) and the performance metrics used during and after the project.

Within PIPS, the element of Past Performance plays an important role in setting the environment of performance and measurement. Contractors in the United States have stated that their performance record is very critical to their approach to contracting. Past Performance of the main contractor and of the key personnel (the project manager, the superintendent, etc.) is considered the best indicator of the capacity to complete the project successfully (Chong et al. 2009). But the RAVA plan and the interviews play, in practice, a much more significant role than past performance in ensuring performance on the specific project being awarded.

The risk assessment and the value added plan, which are required from the bidders as part of their proposal, constitute a critical filter. The risk assessment plan does not only require the contractors to identify the technical risks which fall under their sphere of control, but most importantly it requires the contractors to show that they are capable of identifying the risks that are outside of their control, and of indicating how they will manage and minimize these risks. This approach leads to a complete plan to deliver the project, as the expert contractors can more accurately identify the initial conditions of the project, including the client’s constraints and risks.
of the local population (Kashiwagi 2008). Moreover, the risk assessment offers the possibility to the participating companies to distinguish themselves by identifying specific risks in the current project and by indicating how they will manage and minimize these risks. In the value added plan, the contractor identifies modalities to make the project even more efficient (in terms of quality, time or costs). On the basis of this rationale, the estimation of the scope and cost of the project is left to the contractor. The contractor may sometimes come up with a higher cost estimation than the budget of the client, based on objective justifications. In such cases, the client may decide at the pre-award stage to reduce the scope of the contract, to increase the budget, to share some of the risks or to modify some aspects of the solution.

At the award stage (selection stage in the U.S.), PIPS provides for interviews of the key project personnel of the bidders, as a double check of their Past Performance record. Once the winning contractor is identified he will refine his proposal in collaboration with the procuring authority and put together a Risk Management Plan (RMP) on the measures adopted or proposed to minimize technical risks during the execution of the project. Subsequently, during the execution of the contract, the contractor delivers weekly risk reports (WRR) on the occurred risks (whether foreseen or unforeseen) with the accompanying cost and time deviation. The contracting authority monitors the performance of the contractor using the WRR and benchmarks/rates it at the end of the project (Kashiwagi 2004). The creation of databases of Past Performance Information, which may be used by contracting authorities in their future procurement procedures, constitutes a major stimulus for the contractors to perform at high levels of quality, in order not to minimize their opportunity to win future contracts.

*The Federal Acquisition Regulation (FAR)*

Although the US federal legislation for public procurement initially focused on avoiding any corrupt practices, and to this end, prescribed the award of contracts on the basis of price, the concept of ‘best value’ gained ground and in 1997, and the Best Value Procurement method was legislated at federal level. The FAR provides for the use of the lowest responsible bidder method when the subject matter of the procurement is capable of exact specification, and of the Best Value method when the opposite holds true (FAR 15.101 2010). In the procurement of construction contracts, the FAR recommends sealed bids (based solely on price.) However, if the use of sealed bids cannot effectively deliver the best value, the contracting authority may apply other award criteria than price (FAR 36.103b and 6.04(b)(1) 2010).

There are some major differences between the FAR and the European legal framework for public procurement (FAR 1.102-4 (e) 2010). Most importantly, the current FAR specifically allows greater flexibility to the public authorities than the European legislation. For example, FAR allows the public authority to apply a different procedure than the ones outlined therein, if it is in the best interest of the Government. Moreover, the FAR encourages contracting officers to take the lead in encouraging business process innovations (FAR 2010). In addition, the contracting authority is allowed more leeway in gathering detailed information about the bidders and communicates with them during the procurement.

PIPS was one of the first applications of the concept of the best value procurement in the US. After the amendment of the FAR in 1997, PIPS has been brought in compliance with the federal
legislation. Two of the PIPS elements, namely the Past Performance and the Oral Presentation are addressed in the FAR.

**The past performance criteria**

The Past Performance criterion is envisaged by FAR as a way to identify the quality of the work executed in previous projects (FAR 8.405-1(c)(3)(i), 12.206, 13.106, Subpart 15.3 2010). This is considered especially important in the case of negotiated procedures (source selection procedures) and is made therefore mandatory for these procedures when above a certain threshold (FAR 15.304(c)(3)(i) 2010). For these procedures, the FAR allows the public agency to consider relevant Past Performance of the predecessor company, of key personnel, of subcontractors, in relation to the portion or type of effort that each company will perform within the present contract (FAR 15.305(a)(2)(ii)-(iii) 2010).

The European legal framework allows in principle the consideration of the experience of subcontractors only when the bidder relies on the experience of the subcontractor in the respective procurement procedure. Moreover, the evaluation of the past experience of the key personnel of the main contractor is not allowed (see section 3 (b)(i)) (ECJ 1982, ECJ 2000).

Another major difference between the two systems is the moment of evaluation of the past performance criteria. European legislation and case law distinguish between the selection (pre-qualification in the U.S.) and the award phases (selection phase in the U.S.) and prescribe the evaluation of the experience of the contractor at the selection phase. This implies that within the European legal framework, a bidder cannot compensate for weaker Past Performance with a lower price (Chao-Duivis 2005). The FAR, on the other hand, does not make such a distinction and the past performance may be evaluated at the award stage. The practice shows though that most procuring authorities in the U.S. use past performance only as a prequalification, and not to give contractors the competitive advantage at the award stage.

Past Performance under the FAR may be required from the bidders or may be collected by the procuring authority through tapping existing databases such as Past Performance Information Retrieval System (PPIRS), and by using questionnaires, telephone interviews, and site visits (Guide to Collection 2003). A major difference with PIPS and other best value processes, is that PIPS:

- Allows the vendors to select their own references for past performance of both their company and critical components.
- Uses the PPIRS as a prequalification, go/no go, and the vendor’s selected past performance as a award criteria.

Unlike in the Netherlands and in Europe, a contractor’s performance in construction projects must be evaluated and recorded in the US for all public contracts exceeding a certain threshold (FAR 42.1502 and 36.201 2010). The selection team may supplement the information provided by the bidders with questionnaires addressed to the references indicated by the bidder (Guide to Collection 2003). Thus, a common approach is to conclude by calling those who respond to the questionnaires with pertinent information in order to obtain more detail or clarification. The best
practice is to contact the references who have the most relevant experience with the contract, such as the Contracting Officer or the Program Manager.

_The oral presentations_

The Federal Acquisition Regulation allows oral presentations during the competitive negotiated procedures (FAR 15.102 2010) or in indefinite-delivery contracts (FAR 16.505 2010). Thus, part of the proposal may be submitted through oral presentations. Information pertaining to areas such as an offeror’s capability, Past Performance, work plans or approaches, staffing resources, transition plans, or sample tasks (or other types of tests) are considered suitable for oral presentations.

The contract documents still need to indicate which elements will have to be presented through presentations and the evaluation factors. The contract documentation will also indicate the scope and content of exchanges that may occur between the Government’s participants and the offeror’s representatives as part of the oral presentations, including whether or not negotiations will be permitted (FAR 15.306(d) 2010).

Against the need for the purchasing authorities to achieve efficient procurements, oral presentations have emerged in the US as one solution to saving time, staff resources, and money. Moreover, the use of oral presentations is considered advantageous as they often better convey technical and management information. The use of oral presentation in the US is also an opportunity for dialogue among the parties and for the contracting authority to evaluate the capabilities, experience and quality of the key personnel, which will be in charge of managing the desired works project. Oral presentations are considered most successful when the technical and management information requested is neither voluminous nor highly complex, as well as where the offeror's qualifications to perform the work, or the offeror's understanding of the requirement, are the prime evaluation criteria (Procurement Executives Association 2010).

In the US, significant improvements in acquisition lead times and resource savings have been reported by the agencies using oral presentation techniques (Chao-Duivis 2005).

**The Application of Best Value PIPS in the Current Pilot Project**

_Business Rationale of the Municipality’s Choices and Manner of Application_

The business rationale behind the municipality’s decision to apply the elements of PIPS is to enhance the capability to identify the right contractor, who will execute the contract on time, within budget and at the expected qualitative standards. The municipality did not want to create a new procurement procedure, but intends to apply the national restricted procedure of the ARW 2005. Therefore, the objective is to apply the criteria of Past Performance, the interviews and the pre-contractual detailing of the value-added plan and of the risk assessment within the legal framework of the ARW 2005 national restricted procedure with pre-selection. The project will be awarded under a fixed budget, and quality will weigh 70% at the award phase. The declared
objective of the municipality is to obtain the highest level of quality within the available budget (Selectieleidraad Gemeente ‘s-Hertogenbosch 2009).

The municipality is keen on applying the previously identified criteria for the following reasons. First the Past Performance has an added value as compared to the analysis of the technical experience. The fact that a contractor is able to show that it has experience with building similar works does not necessarily say something about the level of quality with which it is able to do so. Therefore, the use of the Past Performance criteria would enhance the potential of the municipality to identify the most qualitative tenderer. The candidates are required to identify three similar projects they have completed during the last 5 years and detail how they have managed certain difficult aspects during the projects. In addition, the candidates are requested to ensure that the same prior clients of the referenced projects fill out a performance questionnaire.

The evaluation of the anonymous information regarding the Past Performance is done by the Selection Commission members independently, and after the Core Team has ensured that the information on Past Performance are sufficiently anonymous. After the Core Team has tested the completeness of the information submitted by the candidates, compliance with the exclusion and selection criteria and with the minimum criteria regarding the financial and economic standing and professional ability are also considered. The Selection Commission is subsequently responsible for conducting the Past Performance evaluation to determine the best five candidates, who will be invited to make an offer. This evaluation methodology is meant to enhance the objectivity of the evaluation (Chao-Duivis 2005).

The municipality will not supplement the questionnaires with telephone or email interviews with the relevant personnel of the previous clients, although contact with the references has the advantage of completing or confirming the information regarding the candidates’ past performance. This aspect may need to be considered by the municipality in a future procedure.

Second, the municipality chose to conduct Interviews with the contractors and score them at the award stage. The criteria Interview will not be applied in the same way as in PIPS, but in an adapted form in order to comply with the requirements of the ARW 2005. Thus, the interviews will not be used to evaluate the quality of the key personnel, but will take the form of an oral presentation of portions of the offer (in our case, the quality of the management of the project). Nevertheless, the interviews will be conducted with the personnel in charge of executing the project and the intention of the municipality is to get a glimpse at the managerial qualities of these individuals. The municipality intends to pay special attention to the distinction between the criteria, which are allowed to be evaluated at the selection stage and the elements suitable to be evaluated at the award stage. Therefore, the interviews will not require information about the qualities of the tenderer, but will refer to the manner of executing/managing the project being considered. Furthermore, the information submitted through interviews will differ from the written portions of the proposals and the questions to be asked during the interview will be made available to all the parties in advance.

Finally, the detailing of the value-added plan and of the risk assessment is done only with the best scoring bidder before the definitive award decision, and aims to minimize the administrative burden for the other participating companies and for the municipality. The contracting authority
intends to apply extra caution not to enter into negotiations and to limit itself to the detailing of the planning and of the risk assessment within the framework of the award documentation. This accomplishes some of the same purpose of the pre-award period in the PIPS process, which requires only the best value contractor to detail their proposal prior to signing the contract.

**BVP elements – Compatible with the ARW 2005?**

The applicable legal framework sets limitations on the application of the PIPS elements. The chosen national restricted procedure with pre-selection of ARW 2005 leaves limited room for deviations from its prescribed stages and criteria, as the ARW 2005 national restricted procedure does not significantly deviate from the European rules. In this context, national as well as European jurisprudence is relevant.

**Past performance**

Of the three elements of PIPS chosen by the municipality, the weighing of Past Performance in the selection phase is the least problematic from a legal point of view (Chao-Duivis 2005). Thus, according to article 3.9 of the ARW 2005, the contracting authority is allowed to require as proof of the technical capability of the candidates a list of relevant works executed by the candidate company in the past 5 years. In addition, the contracting authority is allowed to request different certificates and other proof that show that the previous projects were executed in a qualitative manner and within the budget and the time framework. Arguably, the description of several aspects of the previous projects by the candidates and the performance questionnaires fall within the allowed proof.

According to European jurisprudence, the contracting authority is also free to decide the method of evaluation in the selection phase, provided that it is described in the announcement of the procurement or in the contract documents (ECJ 470/99 2002). Thus, the method chosen by the municipality to rank the candidates on the basis of their Past Performance after they have been checked against the exclusion and other minimum criteria is compliant with the European rules.

**Interviews**

The use of interviews for the evaluation of the ‘quality of management’ criteria remains the most risky claim, because the chosen ARW 2005 procedure leaves little room for communication with the candidates/bidders and imposes the same strict distinction between the selection and the award stage/criteria as the European restricted procedure with pre-selection.

For one, art. 3.18 and 3.28 of ARW 2005 make clear that the direct communication with the bidders is in principle only allowed with the scope of clarification of the offers.

Additionally, the European jurisprudence makes clear that the selection phase regards the capability of the bidder to execute the contract and the award stage regards the quality and price of the bid (HvJ EGC-532/06 2008). In consequence, the municipality is not allowed in principle

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5 The application of the Best value PIPS in the US encounter the same hurdle, as the FAR imposes the same obligation as the ARW 2005 to refrain from negotiations at this stage and makes it very clear that only clarifications are allowed.
to evaluate at the award stage the qualities of the key personnel of the bidder, in a written form or through interviews.

The rationale behind these legal restrictions lies in the premise that an individual may not be available for a specific project and that the procurement decision based on individuals does not sufficiently guarantee the necessary objectivity. Therefore, the European legal framework focuses more on the quality processes within a company, such as the manner to deal with risks, with quality guarantees, communication, etc (Jansen et al. 2007, Gunnen op waarde 2007).

Nevertheless, in this article, the proposal is being made that the individual experience and qualities of individuals are considered by public authorities and contractors in certain types of contracts crucial and are evaluated by contracting authorities regularly in the procurements of services or works, mostly in the form of presentations (Chao-Duivis 2008).

The national jurisprudence indicates that the contracting authority is allowed to evaluate the qualities of the bidder through presentations (can be comparable to Interviews) at the award stage, when the procurement procedures escapes the application of the European rules for public procurement and of the national rules, such as the ARW 2005 (Vrz Rb Rotterdam 2006, Presentatie als gunningscriterium 2008). In these cases, the contracting authority still needs to demonstrate the existence of ‘special circumstances’ due to which the personal qualities of the company’s personnel play such a crucial role that they need to be weighed at the award phase (Vrz Rb Maastricht 2006). Having a direct relationship to the objective of the contract is equally important for the criteria as the basis for which the presentations are evaluated (Vrz Rb ‘s-Gravenhage 2006).

In conclusion, because the national restricted procedure of the ARW 2005 is applicable to the pilot projects analyzed herein, the municipality is not allowed in principle, to communicate with the offerors except with the objective of clarification of the offer and it is not allowed to evaluate the qualities of the key personnel at the award stage. As formulated in the contract documentation, the ‘quality of management’ criteria regards the offer. It can be argued that, conducted in this form, the interview criterion is legally compliant. It will still offer the opportunity to the public authority to evaluate the quality of the personnel within the ‘quality of the management’ criteria, as the two aspects are intrinsically intertwined.

In any case, this paper proposes that the municipality should consider the adoption of more flexible procurement procedures for construction contracts falling under the threshold of the European Directive, than the procedures prescribed by the ARW 2005. In such a case, the municipality would have more flexibility to tailor the procurement to the needs of the project and apply elements of Best Value Procurement.

**Pre-contractual phase**

At the pre-contractual phase two aspects raise legal compliancy questions: direct communication with the bidder and the discussion of the terms of the offer.
Regarding the first aspect, the national jurisprudence indicates that communication with the best scoring bidder with the objective of detailing the content of the contract is in principle allowed, provided that this step is clearly explained in the contract documents, in accordance with the transparency principle (Vzr. Rb. Groningen 2004).

Regarding the second aspect, the EC principle of equal treatment, which in national procurement procedure is applicable through the principles of reasonable administration and of pre-contractual bona fides, does not allow the modification of the contractual clauses before the final award.

Thus, the pre-contractual phase used by the municipality to detail the value-added plan and the risk assessment should not change any essential or material elements of the bid, which –if known in advance- could have triggered the bidders to submit a substantively different proposal (HvJ EG 496/99 2004). The European jurisprudence confirms that the contracting authority needs to comply with the criteria it has formulated itself, until the end of the procurement procedure. A substantial change (such as the price) would be in breach of the principles of equal treatment and transparency, as these criteria will not be applied uniformly and objectively anymore (HvJ EG 454/06 2008). Thus, the municipality does not have the possibility to adjust the price of the contract, as sometimes is recommended by the best value PIPS structure to consider the value added items which are outside of the scope or requirement.

In practice, the pre-contractual communication with the winning bidders is usual. It is meant to check whether the parties are on the same line and when sufficient guarantees are put in place, it does not breach the general principles of procurement (Chao-Duivis 2008).

**Conclusion**

In the current project, the municipality intended to enhance its procurement practice, while at the same time stay in compliance with the national restricted procedure of the ARW 2005.

Both objectives were reached. The pilot project is at this moment finalized and the introduction in the procurement procedure of the Best Value PIPS elements discussed above, delivered the expected results. The selection team indicated that the interviews with the bidders were especially helpful in choosing the best contractor, who finalized the project within the expected quality levels.

The question of whether a paradigm shift was produced within the procurement practice of the municipality remains open. The municipality chose not to benchmark the performance of the contractors in the current project. This is an important pillar of the best value procurement in the US and a strong motivation for the contractors to improve performance at high levels of quality such as not to diminish their chances to win future contracts.

Regarding the question of legal compliancy, the use of Interviews at the award stage remains the most exposed aspect to legal claims. The national jurisprudence is not uniform regarding the use of presentations (whether regarding the bid or the qualities of the bidder) and the ECJ has not
shed light on this aspect yet. In order to limit the risk of legal claims, the municipality of ‘s-Hertogenbosch applies the Interview criteria in a modified form, under the name of ‘quality of management’. In practice though, the municipality will consider the capability of the key personnel to manage the project in question, as demonstrated during this Interviews. This criterion has substantial added value in construction projects and as applied in this project, could be considered compliant with the ARW 2005. In practice, contracting authorities often evaluate the experience of the individual personnel at the selection phase (by requiring CVs), and they also observe the qualities of the individuals, during the legally permitted instances of interaction, such as the clarification of certain aspects of the offer. Subsequently, the impression made by the individual personnel during these interactions is reflected into the evaluation of the offer. Particularly in projects procured on the basis of functional/performance-based specifications, contracting authorities feel a legitimate need to communicate with the bidders (Mühren and Duren 2007).

In most construction projects, the quality of the leading employees is crucial for the success of the project. The applicability of the ARW 2005 for projects such as the one discussed in this paper restricts the freedom of the procuring authority to enhance its procurement procedure according to its needs. For this reason, the municipality of ‘s-Hertogenbosch should consider following more flexible procurement procedures than those prescribed by the ARW 2005, for contracts with a value beneath the threshold.

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