

Integrity and Public Procurement in the Netherlands

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Introduction

Tasks of my Ministry, among others:

- **Constitutional affairs and legislation**
- **Local government organisation and finances**
- **Public sector management (BIOS)**
- **Public safety and security**

My place in the Ministry : Legal Advice Division

My function : Legal Adviser

Tasks:

- **advice on contracts and public procurement rules**
- **I participated in drafting the BIBOB law**
- **I am member of the (EU) Advisory Committee on Public Procurement**

Four situations of non-integrity

Distinction has to be made between:

1. Selection of a bidder who is a criminal
2. Selection of a bidder by way of a bribe
3. Selection of a bidder in compliance with the rules who later appears to be corrupt
4. Selection of a bidder in a subjective way not for the sake of personal private profit but for the sake of a special preference on the basis of good experiences in the past

Vulnerabilities in the procedure

Assuming that the procedure has started with a notice the vulnerability is situated in:

- the selection of the bidders
- the objectivity of the specifications
- the award criteria
- the evaluation of the offers.

Two aspects of integrity

1. The contracting authority has to be honest
2. The winning bidder has to be honest

The question is how to safeguard the integrity of the contracting authority (c.a.) and how to check the integrity of the private party.

Safeguarding the integrity of the c.a. is carried out by a wide variety of measures, some of them of a legal nature, others are instruments in the form of training and guidance.

Checking the integrity of the bidders can be carried out by using the BIBOB law and in the near future by demanding a declaration of Integrity.

BIOS

(Bureau Integriteitsbevordering Openbare Sector)

Bureau for Ethics and Integrity Stimulation in the Public Sector (BIOS) is launched by my Minister in March 2006. BIOS is part of the directorate-general Management Public Sector.

Aim of BIOS:

BIOS has the intention to promote that governmental organisations carry out a broad, straightforward and effective integrity-policy. At the same time the Governmental organisations have to see that measures form a coherent whole.

Tasks of BIOS

BIOS has five tasks:

- Stimulating and sustaining
- Development of integrity-policy and integrity instruments
- Gathering knowledge
- Exchange of knowledge
- Research

Model Code of conduct

- Gifts: accepting gifts is not allowed or only below € 50
- Extra duty: Notice of any extra duty that can be relevant, especially to avoid a conflict of interest
- Revolving door construction: leaving the civil service and immediately hired in for the same sort of activities is not allowed within two years after leaving the service
- Separation of responsibilities in the function of budget
- Prohibition for a civil servant to take part in a tender on the side of a private party

BIBOB

Bevordering Integriteitbeoordelingen
door het Openbaar Bestuur

Promotion of Assessment of the Integrity by the Public Administration.

Reach of this law: licenses, subsidies and public contracts in designated sectors

BIBOB provides for a legal ground to refuse a request for a subsidy or licence. BIBOB

provides not for a legal ground to exclude a bidder in the case of criminal involvement. The European public procurement Directive contains a restricted system of exclusion criteria. Creating a new national exclusion ground should be a violation of the European Directive.

Bureau BIBOB

The main instrument of BIBOB is the establishment of an investigation bureau with the power to search in restricted judicial and police registers, the right to get information about the payment of taxes and social security contribution. It also searches in open sources, such as the register of the Chamber of Commerce.

The BIBOB-bureau has not the power to exclude a bidder. It gives an advice to the contracting authority.

Task of Bureau BIBOB

The Bureau gives advice on:

- A conviction which has the force of res judicata concerning the professional conduct of the economic operator
- A grave professional misconduct proven by any means
- The possibility of being financed by criminal capital
- The chance that an economic operator in carrying out the public contract will commit an offence

The Bureau will not make a blacklist of economic operators who appeared to be in one of the above mentioned situations

Declaration of Integrity

This declaration is introduced in a new Act on public procurement.

The article is ruled in short as follows:

A contracting authority has the obligation to request economic operators to submit a declaration of integrity.

An economic operator who can not submit a declaration of integrity must be excluded (mandatory).

Definition of a declaration of integrity:

A declaration of the Minister of Justice that there have no objections risen against the economic operator on the basis of an investigation concerning the conduct of the economic operator in the past.

Article 45 Directive

Mandatory exclusion in three cases:

- Participation in a criminal organisation
- Corruption
- Fraud within Article 1 of the Convention relating the protection of the financial interests of the EU
- Money laundering as defined in Article 1 of Council Directive 91/308/EEC

Exchange of information

According to the BIBOB-law:

- Via the prosecutor of the State (art. 13)

The EU doesn't have a mechanism to exchange information on criminal offences, corruption, fraud, moneylaundering, etc. The EC has tried to setup an information point but most memberstates were not willing to support this initiative. This year the UK started the debate on this point anew. We have still to await if the EC places this subject on the agenda of the Advisory Committee.