BASIC PRINCIPLES AND OBJECTIVES OF PUBLIC PROCURMENTS

1.1. BASIC PRINCIPLES OF PUBLIC PROCUREMENTS

Due to diversity of living situations, legislation cannot establish norms for each legal situation; hence knowledge of public procurement basic principles is very important. It is necessary to understand legal regulations through certain principles guiding the contracting authority in its decision-making, and the tenderer in the assessment of its rights in public procurement procedures. In the area of public procurement as well, it is considered that, in addition to public procurement specific principles, principles having become common value criteria of our civilization and covering the whole legal system are to be taken into consideration Mužina and Vesel 2004: 102-103).

Public procurement system setup, development and implementation must be based on the principle of free movement of goods, the principle of freedom of establishment, and the principle of freedom to provide services, all deriving from the Treaty establishing the European Community (Official Gazette of the Republic of Slovenia No 7/04, hereinafter referred to as: EC Treaty) and on the principles of economy, efficiency and effectiveness, of ensuring competition among tenderers, of public procurement transparency, of equal treatment of tenderers, and of proportionality.

The basic principles are specified in Article 2 of Directive 2004/18/EC, as follows:

- principle of equal treatment,
- non-discrimination and
- transparency.

Treaty establishing the European Economic Community (hereinafter referred to as: EEC Treaty) provides the basic framework for public procurement legal regulation. This act was primarily aimed at establishing a relevant common internal market of Member States at prohibiting any national discrimination and any restriction in the selection of products and services including the free movement of goods exclusive of all customs duties, as well as at prohibiting quantitative limits (quotas) and measures having equivalent effect over customs duties and quotas among Member States. The objective of the EEC Treaty would be best attained also by prohibiting restriction placed to the free movement of labour force and services, capital, salaries and self-employment, as well as by the freedom of choice of establishment of enterprises in Member

States. The attainment of the Treaty objective is to include the development of European Community significant policies, notably in the areas of competition law, state aid and agriculture (Trybus 2006:7).

The EEC Treaty does not specifically mention public procurements, except in the context of funding Community contracts in overseas countries and when in relation to industrial policy, though provisions might be found in the EEC Treaty constituting a basis for public procurement system establishing. These are principally provisions referring to the free movement of goods (Article 28), the freedom of establishment (Article 43), and the freedom to provide services (Article 49) (Arrowsmith 2005: 182).{XE "Arrowsmith"} Other provisions are equally important relating to the prohibition of discrimination (Article 12) and to the issue of acquired undertaking (Articles 81, 86, and 87).[1]

{XE "Treaty establishing the European Community"}The regime of free movement of goods and services is the most important for the area of public procurement. Treaty establishing the European Community (hereinafter referred to as: EC Treaty) contains the basic objective of the public procurement acquis, meaning the opening of the public procurement market among Member States and allowing tenderers to participate in public contact awarding procedures beyond the frontiers of individual Member States. Since it would not be possible for Member States, on the basis of the EC Treaty, to establish more specific public procurement rules, public procurement directives have been adopted as a secondary legal source[2].Member States which, pending the adoption of directives, had not adopted any public procurement laws ((for instance, the United Kingdom), almost literally transposed these directives to their legislations.[3] Member States not having maintained long traditions of public procurement legislation, such as France with *»Code de Marches publics«* and Germany with *»Verdingungsordnungen«*, had to amend their legislation systems and harmonise it with the directives, which on the other hand gave rise to significant difficulties and problems since these countries had not properly implemented the content of the directives when they should have done so (Trybus 2006: 7). {XE

---

1 The order of Articles and decisions (*EC Treaty)* was renumbered as a result of the amendments to the 1957 Treaty of Rome as well as 1992 Maastricht Treaty and 1997 Amsterdam Treaty and 2001 Treaty of Nice.

2 92/50/EEC – relating to the coordination of procedures for the award of public service contracts,
93/36/EEC – coordinating procedures for the award of public supply contracts,
93/37/EEC – concerning the coordination of procedures for the award of public works contracts,
93/38/EEC – coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,
97/52/EC – amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC,
98/4/EC – amending Directive 93/38/EEC,
2001/79/EC – amending Directives 92/50EEC, 93/36EEC, 93/37EEC, 93/38/EEC, 97/52/EC and 98/4/EC.
According to Article 189(3) of the EEC Treaty, directives oblige the Member State in terms of the objective to be achieved; national authorities are free to choose the form and means. As regards the freedom to choose the form, it should be mentioned that this freedom is rather restricted, on the basis of experiences with pre-access and access to full membership.

3 This also refers to Slovenia when adopting the Public Procurement Act (PPA-1).

"Trybus"}Understanding basic principles and establishing thereof to a legislation system is even more significant in view of the fact that, though the implementation of the directives was not effective everywhere, the principles as such create a single core for interpreting and attaining objectives accompanying the public procurement system through founding contracts and relevant directives.

The principles have an important role to play, both in directing the legislator when adopting the content of legal norms and in the understanding of legal provisions, particularly in cases of imprecise determination thereof. Primarily proper understanding and interpretation of certain principles facilitates the interpretation of legal norms in terms of content, context, and purpose. Legal principles connect legal norms to a single whole providing such norms with the required content, particularly in cases where the flamboyance and diversity of accrual circumstances cannot always be covered by a legal norm. A legal rule needs to be understood by means of a specific principle constituting both the direction and the purpose of drafting a particular legal norm (Mužina and Vesel 2004: 102).

1. 1. 1. The principle of economy and efficiency in the use of public assets

The principle of economy, efficiency and effectiveness is effectuated in such a manner that the contracting authority must carry out public procurement so as to guarantee economic and efficient use of public assets and successfully attain the goals of its existence determined in line with regulations covering the usage of budget assets and of other public assets. If the subject of public procurement so allows and if that contributes to a higher level of economy and efficiency in the carrying out of a public procurement procedure, the contracting authority must compile the tender documentation in such a way so as to make possible offer submission following closure. In doing so, the contracting authority must provide for non-discriminatory treatment and thereby higher accessibility of public procurement to economic operators.

This principle obliges the contacting authority that, by carrying out public procurement and by tenderer selection, it must guarantee that it has made best economic use of funding allocated to it in terms of the ratio between the investment outlay and the benefit gained. One of the goals of the overall system of public procurements is also the rational usage of public finance; each contracting authority must be aware of responsibility when dealing with public assets it uses in a public procurement procedure.

The principle of efficiency requires the usage of funds allocated in such a manner that maximum goals be attained; the principle of economy, on the other hand, means the achieving of a desired effect with minimum volume of assets involved. Act on the Court of Auditors (Official Gazette of the RS No. 11/01) sets out that audits of operational appropriateness include checks in terms of economy, efficiency and effectiveness.

The following text includes definitions of notions taken over from European Union Decree and relating to its general budget. [4]**- Economy:** The principle of economy requires that resources used by an organization for the performing of its activities are available at the right time, under appropriate quantities and quality, and at best prices.

- Efficiency: The principle of efficiency is measured by the best proportion between used investment outlays and effects achieved.

- Effectiveness: The principle of effectiveness is measured by the attainment of specific determined goals and foreseen results.

Effectiveness is also determined as a ratio between investments and results or goals not determined financially (by income or by other profit with assets) in the public sector; this is why measurable goals need to be determined, specified by the mission of the institution disposing with public assets furthermore, the attainment thereof needs to be monitored though there is so much variety when it comes to goals in the public administration that it is hard to specify a single synthetic indicator to be fully demonstrating effectiveness (Andoljšek and Seljak: 2005: 164).

The contracting authority is hence required to balance the economic, the efficient and the effective (we shall further jointly name all these three "economy" or "economy-related"); economy expectations tend to be rather diverse and sometimes subjective. In the public procurement system, a relatively objective indicator of economy could be savings attained for better competitiveness, proportionality and appropriateness of conditions, criteria etc. Nonetheless, the economy of a contracting authority's behaviour needs to be treated in wider terms.

The dispatch of a public procurement includes not only the procedure itself, regulated by public procurement legislation, but also a pre-announcement stage when the contracting authority formulates a list of needs in terms of specific goods, services or civil engineering works. In this stage, drafting already represents an indicator of the contracting authority's care as a good prudent entity. The contracting authority must in a detailed and well-justified manner determine the subject of public procurement; whether it genuinely needs it or its activities merely represent

[4] Council Regulation-EC, Euratom, No. 1605/2002 of 25. 6. 2002 on Financial Decrees, applicable to the General Budget of the European Communities, Article 27.

a consequence of its desire to spend budget funds as fast as possible in the spirit of as high as possible realization of funds regardless of actual needs. As a rule, this happens towards year-end; in some cases, we cannot call this an exceptionally economy-related behaviour though some of the "quilt" for such behaviour could be attributed to the budgeting logic in terms of the "portion" of funds that the contracting authority has not used in the current year. It is important that, in addition to defining the subject of public procurement, the contracting authority also determines the most appropriate public procurement procedure whereby the best effect is to be achieved. In order to determine all this, the contracting authority needs relevant information on the market of the subject of public procurement, on potential tenderers i.e. bidders, on framework prices and, if possible, on technical features of the subject of public procurement. The contracting authority is limited when it comes to the selection of a public procurement procedure; it is not limited in particular in cases when it is required to develop such tender documentation that will enable the realization of the principle of economy.

Appropriate tender documentation is a needed and sufficient condition for successful realization of a public procurement procedure. Conditions and criteria must be proportionate to the subject of a public procurement; criteria must not be unjustifiably discriminatory or exclusive – they have to enable fair competition and offer all relevant information so that tenderers can prepare comparable offers the potential incomplete nature of which must not be attributable to poorly developed tender documentation. Tender documentation is one of the major instruments in the evaluation of the contracting authority's economy-related behaviour. Formulating criteria is the decisive moment in the realization of expectations in terms of the most favourable offer. This is why it is important to decide whether the price is to be selected as the only criterion or whether other criteria should be included as well. As it is not possible to modify or amend criteria in the course of the procedure itself, the contracting authority must know in advance what its expectations are; it must not find, once offers have been received, that other criteria would enable a better economy-related decision. This is why all relevant information as set out must be obtained before the formulation of criteria.

For economy determination and carrying out, another important thing is the stage following contract conclusion, as well as adhering to contractual provisions. On the very basis of execution of the work, the contracting authority may easily assess the effects of public procurement awarding; this is why it must pay special attention to the good execution of works, with permanent monitoring and surveillance of the tenderer's behaviour under contractual provisions.

Potential amendments to contracts, especially in terms of amended sections, need to be based upon appropriate factual and legal bases; there have been examples in practice when the final contractual price, with all amendments included, becomes higher than the highest offer value at the moment of contract conclusion – which unfortunately represents a threat to the principle of economy.

For successful realization of the principle of economy, there are several instruments, institutes, procedures, manners of procurement contained in the law; positive effects are possible to be expected with appropriate usage thereof. An important factor to ensure the principle of economy (and perhaps the most important one) is officers carrying out public procurement procedures. When officers see public procurement realization more as an obligatory official behaviour than as a possibility to reach good results, this may lead to unnecessary bureaucracy and cause overlooking of interests and awareness regarding all possibilities offered by the public procurement system for an efficient, economic and effective handling of public finance (Arrowsmith 2005: 5). Special attention needs to be paid to the education of officers which, through the public procurement system, dispose with almost one third of the state budget. These officers are highly responsible; they must possess appropriate knowledge and experience in the field and must understand the importance and purpose of public procurement wider than mere bureaucratic carrying out of procedures; yet, public procurement must not be understood as the "monopoly" game where at each announcement, fees are collected to one's own behalf. Public procurement represents an area where there is rather high risk of corruptive behaviour; this is why the integrity of such officers is even more important. Potential thinking needs to be eliminated that the principle of economy equals the principle of own property good managing. The need has to be stated of organized training for such officers exclusively in the public procurement field; this would enable such officers to obtain the title of "public procurement expert" as a kind of a license, something to enable trust in the work of these officers.

1. 1. 2. The principle of ensuring competition among tenderers

The contracting authority must not restrict competition among tenderers in a public procurement procedure; furthermore, in the course of public procurement, it must act in accordance with provisions on protection of competition and on preventing competition restricting. In addition, the contracting authority must not request the tenderer to engage certain subcontractors in the realization of the procurement or to perform another work, for instance export of certain goods or services, unless otherwise proscribed by a special act or international agreement.

The principle of ensuring competition among tenderers in its content thus represents prohibition of tenderers' actions the effect or consequence of which is the limitation of entrepreneurs' freedom in the field of public procurement award (Mužina and Vesel 2004: 117).

This is one of the major principles directly related with the principle of equal treatment of tenderers whereby the contracting authority is required to prohibit the restriction of competition among tenderers. The principle of ensuring competition has been set out also by recent Directives as one of the public procurement goals; this has also been done by the EU Court of Justice having determined this goal in several of its judgements. This was shown in the *Sintesi*[5] case on ensuring competition; this case judgement stated that it is not allowed to require, in terms of criteria, only the lowest prices as a precondition for awarding civil engineering works, and that the principle of ensuring competition represents one of the fundamental principles in the European public procurement legislation. The implication of this can be that the principle of ensuring competition develops to a basic principle – a principle having a status equal to the status of principles of transparency and of equal treatment. The goal of adopting this principle is to eliminate restrictions i.e. limitations during participation in public procurement procedures (Arrowsmith 2005: 433).

Principles of equal treatment, non-discrimination and transparency have been placed at the front in recent Directives; this does not go to the principle of ensuring competition. The exclusion of this principle is rather unusual in terms of judgements issued by the EU Court of Justice which places the principle of ensuring competition among basic principles-notions. As opposed to this, recent Directives include a prohibition of competition restricting, distorting and hindering in the context of framework agreements, electronic auctions and a dynamic public procurement system – which may represent an analogy to the adoption of the principle of competition.

Prohibition of competition restricting

The principle of ensuring competition among tenderers in its content represents a prohibition on contracting authorities' actions and behaviours the effect or consequence of which is the restriction of tenderers' entrepreneurs' freedom in the field of public procurement awards. Due to such restrictions, tenderers are not in legally equal starting positions as some of them do not have the possibility of taking part in procedures. This principle means that all interested and

[5] Example C-247/02, Sintesi ApA v Autorità per la Vigilanza sui Lavori Pubblici, 2005 Tc.m.l.r. 12, EJCem.

qualified tenderers must be enabled to do business with the public sector under equal conditions. Advantages to be ensured by competition do not only encourage economy-related usage of public finance, but also rational operation of economic operators themselves. Particular prohibition is placed on the potential tenderer restricting by unjustified usage of the procedure or by discriminatory criterion usage; furthermore, the contracting authority must act in accordance with regulations on competition protection and on competition hindering. Ensuring competition among tenderers appears as one of the major goals of public procurement regulation. It seems that this principle is effectuated only by means of respecting other public procurement principles; it represents a consequence of acting in accordance with the principles of transparency, of equal treatment of tenderers, of proportionality and, last but not the least, the principle of economy; as a principle, it can be realized and transformed only through a goal that is embodied in the whole idea process of the establishment of the European Community.

Public procurement rules primarily regulate public procurement procedures whereby relations between the contacting authority and the tenderers are determined. The relation between the contracting authority and tenderers contain a whole variety of links in which actions in both directions are impossible to exclude not implying signs of competition restricting. In the widest sense, within acquiring goods and services and within procuring civil engineering works, the State enters property legal relations with suppliers or contractors that may be legal or natural persons. Here, the State is obliged to respect certain procedural rules regulated by the public procurement legislation. The State primarily follows the goal of public finance rational use; in addition, it is obliged to enable all tenderers participating in a public procurement procedure to benefit from equal treatment and fair competition. The State must establish such relations in the market that will enable it, with the help of competition acting, to realize established public procurement goals and to ensure the respect of basic principles of public procurements. By its regulations, the State significantly influences market conditions. Competition mechanisms actually act independently from it, though within limits established by such regulations. Market conditions do not merely place limits; they also place rules of behaviour (Eržen 1998: 31).

In the course of a public procurement procedure, the contracting authority or a tenderer may behave in such a way that could easily imply restricting competition. The determination of the existence or the non-existence of competition restricting signs surely imposes the need to use competition law rules as basic regulation, these rules regulating prohibited competition restricting, competition protection and measures to be taken in case such restricting occurs, bodies in charge of competition protection, their competences, and the procedures of State bodies and parties in

connection with competition restricting. This applies not only to all economic operators but also to State and local communities, as well as to all forms of competition restricting that have not been regulated by other acts (Zabel et. al. 2000: 14).

In competition ensuring and advancing within the public procurement system, equal status of tenderers under equal conditions should be enabled. Only conditions and criteria determined in advance can be decisive in this regard. Competition law general rules apply also to the public procurement field, with respecting public procurement legislation provisions. Ensuring competition in public procurement procedures does not only underline the rational usage of contracting authority's funds; it also has numerous positive effects, for instance expenditure savings, competitive effect (making national companies lower their prices in competition with foreign companies), the effect of tenderer restructuring, savings for certain buyers – and finally, preserving mutual competitive capacity (Zabel 1997: 19).

Contracting authorities must adhere to this principle in all stages of the public procurement award procedure. It is also here that the stage is important of preparing tender documentation which must not be restricting and excluding in terms of tenderer competition. The carrying out of any public procurement procedure or manner must enable as wide competition as possible. The principle of competition is especially highlighted with the usage of framework agreements, technical specifications, electronic auctions, dynamic procurement systems - it must be practically effectuated in negotiating procedures without prior announcement. The respect of this principle must especially be maintained in competitive tendering procedures (low value tenders in the previous regime) where there are no specific procedural rules and where the principle of competition is actually tested.

Any behaviour on the part of a contracting authority which distorts competition represents a sufficient reason for filing a revision request.

1. 1. 3. The principle of public procurement transparency

The principle of public procurement transparency means that the tenderer must be selected in a transparent manner and according to a proscribed procedure. Procurement procedures are public which is ensured by free-of-charge public procurement announcements in terms of their value in the Official Journal of the European Union.

Transparency goal is to ensure visibility of the contracting authority's behaviour to the greatest extent possible. One of the major instruments ensuring this principle is the contracting authority's duty to announce public procurements in the Official Journal of the European Union.[6] This opens the dilemma on what the value limit should be from where on announcement is required in order to ensure as greater transparency as possible. European Directives determine value limits for announcements in the Official Journal of the European Union, obligatory for Member States; appropriateness of the value level limit, from where on announcement on the portal is required, in terms of which there is no obligation in Directives - is shown in practice, particularly from the aspect of evaluation on the transparency level achieved.

Treaty establishing the European Community (EC treaty) sets out as a main goal the increase of transparency in public procurement award procedures, the intention being to enable foreign tenderers i.e. tenderers from Member States to have equal opportunities as local tenderers to obtain the procurement contract on the basis of fair competition. The goal of European law means encouraging efficient competition in public procurement procedures beyond national frontiers. Ensuring the principle of transparency is a key prerequisite for the attainment of this goal.

Procurement procedure public nature and visibility

The principle of transparency refers to the legality, transparency, and publicity of public procurement awarding procedures. Timely and proper notices of opening procedures and on public procurement awards carried out, as well as equal criteria and conditions known in advance, contribute to the implementation of this objective. Appropriate notice hence represents the pivot of transparency. Contracting authorities must issue public notice of certain facts, conclusions and decisions or otherwise enable interested persons to obtain knowledge thereon. Significant data thereby becomes known to the general public and hence transparent. This enables the transparency of events within a procedure and the benchmarking of decisions adopted which retains public confidence as well as the confidence of all participants in the correctness and fairness of the procedure itself.

[6] As already discussed, and in accordance with provisions contained in the Public Procurement Act-1, the integrated information portal was to be established by 30 January 2005; yet, this did not happen, hence the Court of Auditors of the Republic of Slovenia carried out a revision of the information portal issue. For more information on the findings of this revision see the chapter on electronic public procurements in this text and on the relevant site of the Court of Auditors (www.rs-rs.si).

The obligation for procurement publication, covered as such by directives, and thereby public transparency of the procurement, has proved itself to be one of the biggest achievements regarding the attainment of the single market.[7] Contracting authorities are obliged to publish the invitation to tender in the Official Journal of the European Union or to send it in electronic form to the European Public Procurement System, called TED, always and as a must, when public procurement value is subject to provisions contained in European Directives. As indicated in the case law of the European Court of Justice, the principle of transparency and thereby of publication represents a fundamental obligation; non-compliance with this requirement means infringement of the European legislation each Member State national legal order should be harmonized with.

From the offset, Directives have been aimed at increasing the transparency of public procurement open procedures; they established the open and specified procedure as a priority (i.e. providing for free competition); in addition, both procedures contain, as a general rule, the requirement for the contracting authority that, should it chooses none of the mentioned procedures, only in exceptional cases, in certain cases and circumstances, it may use a third, non-competitive procedure, namely the negotiating procedure. Not only the number and practice of direct conclusion of agreements in the area of public procurement were restricted by the required introduction of public transparency; economical use of public assets was also improved. Transparency was enhanced also by the publication of information at the European institution level and by delivering information to tenderers before and after public procurement award.

The institute of previous publication or of notification involving previous announcement of a public procurement procedure is also aimed at transparency principle implementation.

The implementation of public procurement notices is the simplest indicator of the implementation of directives within European frames. The strength of transparency is best indicated in terms of public procurement tenders; it is becoming one of the key criteria when it comes to the success of European area integration; on the basis of the growth index with such notices, the Commission determines the degree of implementation of the single EU market. Increased flexibility and thereby increased transparency have become more than visible with the introduction of competitive dialogue feasible between the contracting authority and tenderers,

---

[7] This is also confirmed by examples of the European Court of Justice such as case C-24/91 *European Commission v Spain*, case C-199/85 *European Commission v Italy* etc..

primarily in the case of technologically more demanding and more complex public procurements. This contact between the two sides was not allowed previously; this is shown in the judgements of the European Court of Justice in the public procurement area; earlier rules on public procurements did not allow this practice in public procurement procedures; this also went for the Slovenian public procurement law. Improved determination of the subject of public procurement, clearer conditions and more appropriate criteria, precise elaboration of technical specifications; prompt, more comprehensive and earlier familiarization of tenderers with relevant information – all allow a bigger possibility for economic implementation of procurement procedures influenced by transparency as an essential and indispensable requirement.

Transparency guarantees that all participants and potential participants in the public procurement will in advance be informed about the public procurement procedures and its rules, but also about the tender documentation. A significant test for the transparent operation of a contracting authority is the public opening of bids since tenderers have the possibility to check the information on competitive bids and subsequently to assess the justifiability of the contracting authority's decision on the selection of the successful tenderer.

The selection of the public procurement procedure also reflects the importance of the principle of transparency. The public procurement system placing the open procedure in its centre, as well as placing the restricted procedure in front of the negotiating procedure, is transparent since the negotiating i.e. bargaining procedure opens the biggest space for favouring a specific tenderer.
Competition is undoubtedly a function of transparency. Guaranteeing wide competition on the offer side means cost-effective public procurement and thereby public asset savings. At the same time, the publication of public procurements to European tenderers in written and electronic forms also present a challenge to national tenderers to participate in international public procurement procedures in which they have taken part to a lesser extent, which is why transparency is key for the prompting of and search for possibilities for participation of our tenderers at European markets.

Transparency in public procurement procedures decreases also the costs of the carrying out of such procedures. The European Court of Justice, by its decisions, has introduced the transparency as one of the fundamental postulates-principles.[8] However, it considers that, in case of a dilemma or a problem resulting from each trial, specific general objectives or principles or

[8] For instance, C-275/98, Unictron Scandinavia, 1999, and C-324/98, Teleaustria, 2000.

concepts are to be abstracted from practical needs that are required for the creation of certain favourable and universal understanding of public procurement objectives. The problem occurs when a set of demands is created within a specific principle not necessarily being mutually compatible, after which the concept may become so abstract that it may represent a various concept for various people or users in terms of their expectations and concepts regarding the content of a specific notion, name, principle. Even transparency only represents a denomination[9], even though primary objectives of public procurements are detected within it, though the understanding of mechanisms for the attainment of such a goal may vary with participants in a public procurement procedure. The understanding of this principle by contracting authorities means they operate within the line of their duties; as tenderers depend on the realisation of this principle in practice, without appropriate notices on planned public procurement programmes and procedures to be maintained by the contracting authority, they are not able to effectuate their own expectations during their participation in these procedures. Transparency may be understood as a mechanism for achieving other public procurement objectives and principles which means transparency is not necessarily either an objective or a principle, but a tool to achieve objectives and to comply with principles. [10]

The European Court of Justice found that transparency represents a principle supporting directives relating to equal treatment. Transparency rules may refer to any public procurement principle. We here mention several cases of the European Court of Justice relating to transparency. In the *Walloon Buses*[11] case the European Court of Justice judged that, in cases of non-compliance of requirements by a contracting authority, it is necessary to determine best offer evaluation criteria, in which case the minimum price becomes the contract award criterion. *Embassy Limousines*[12] is one of the earlier cases of transparency use; the court of first instance judged that contracting authorities must promptly inform all tenderers participating in a procedure about its course. Another example is the *Universale-Bau*[13]case, where the European Court of Justice requested that the methodology for selection of tenderers be presented, though the directive did not include explicit requirements regarding the disclosure of selection criteria, but of public procurement award criteria. The Courts have applied the transparency principle by extending requirements to other decisions/cases by analogy.

---

9 This also applies to other public procurement principles and objectives.

10 Transparency and transparency requirement are expected by at least three parties: the government, which within the public procurement system realises public expectation for efficient, economic and effective action; the State and its institutions in relation to the private sector‘ the contracting authority and the tenderer (For more details about such expectations in terms of transparency principles, see Trybus 2006: 28)

11 Judgement C-87/94 of 25 April 1996.

12 Judgement T-203/96 of 17 December 1998.

13 Judgement C-470/99 of 12 December 2002.

1. 1. 4. Principle of equal treatment of tenderers

This determines that the contracting authority must guarantee that non-discrimination is maintained among tenderers in all stages of the public procurement procedure and regarding all elements, and that account is taken of mutual recognition and proportionality of contracting authority's requirements in relation to the subject of the procurement. The contracting authority must also guarantee that it will not create circumstances which mean locational, material or personal discrimination of tenderers, discrimination originating from the classification of activities performed by the tenderer, or any other discrimination.[14] The principle mentioned determines the requirement for equal treatment of all tenderers, expressed at all levels of public procurement award, from the formulation and specification of criteria, conditions and criteria - to the stage of offer evaluation on the basis of such criteria.

In terms of the equal treatment in the widest context - no tenderer may be excluded from the procedure for reasons not important for the public procurement itself. This is yet another reason for the existence of a prohibition of giving preference to national tenderers. (Kranjc 2004: 73-76).

Equal treatment of tenderers and prohibition of tenderer discrimination

In terms of formulating criteria and conditions, examples may be found in the practice of public procurement procedures where contracting authorities formulated criteria and conditions in a way excluding the possibility of tenderer participation in the procurement or when the possibility of succeeding was equal to zero as a result of discriminatory criteria. The forms of tenderer discrimination and thereby of competition restricting may generally be classified to the so-called:

- locational discrimination[15]

---

[14] In the case of a public procurement including design of works, the selected design engineer may not participate in the competition for the execution of works unless he has received written consent from the minister responsible for finance; such consent is delivered in cases where the design engineer who is at the same time a tenderer for the execution of works in the procurement is the owner of a specific technological or construction solution for project execution, a fact which, because of a lower price or higher quality of the project represents his competitive advantage not possessed by other tenderers.

[15] Locational discrimination is permitted where the contracting authority has among other eligibility requirements listed, for instance, tenderer seat meaning that tenderers having their seats outside a specified municipality or another geographical region may not participate in the public procurement. Such discrimination is

- subject discrimination[16] and
- personal discrimination[17].

Tenderer discrimination is not limited only to the so-called locational, subject or personal discrimination; it is also expressed in a contracting authority's actions in the course of public procurement procedures in a way that specific information is provided only to certain tenderers or certain data are provided to specific tenderers even before the publication of the procurement; thus enabling them to start the preparation of their offer earlier than their competitive tenderers. Nonetheless, public procurements present a high risk of discriminatory treatment by contracting authorities towards tenderers and, to a certain extent, also regarding tenderers' behaviour, a thing that may mean restriction of competition.

---

also present in the establishing of criteria. The contracting authority, for instance, better evaluates tenderers having seat nearer to it, thus giving priority to »domestic" tenderers. Notwithstanding the above mentioned, locational discrimination is allowed under justifiable circumstances, yet it must be appropriately justified; for instance, vicinity of a tenderer's seat is a necessary condition for the execution of works because of, for instance, expected exceptionally short response time.

16 We speak about procurement subject discrimination when a contracting authority indicates, already in the tender documentation, that it seeks to obtain a particular trademark, origin, patent, model etc. Public procurement legislation explicitly prohibits indication of trademarks, patents, types etc., which could as such mean giving priority to a particular tenderer or would exclude certain tenderers without justified reason. This reference is permitted in cases where it is not possible to otherwise describe the subject of procurement; such reference is accompanied by words "or equivalent". Such discrimination is found in practice relatively often, primarily in the initial period of public procurement regulation. For example, when procuring computer equipment, a contracting authority states in its tender documentation that computers and printers are to be of a specific trademark, which in itself constitutes sufficient ground for revision request. When determining technical elements for procurement of vehicles or other subjects of public procurement there are also cases where, through technical specifications, priority is given to a certain type or model of the subject of public procurement.

17 Personal discrimination can be detected with conditions for participation. A contracting authority includes a clause to conditions whereby it determines in advance, as a condition of participation, the status of legal entities, or it excludes the participation of natural persons. A contracting authority, for instance, procures goods offered by both legal and natural persons, but within conditions of participation, it determines conditions that may be met by legal persons only. Contracting authorities sometimes overlook the fact that natural persons can also be potential tenderers (otherwise rarely occurring in practice) and that they should formulate tender documentation adequately to such a fact.

The formulation of criteria, by its nature, falls within the dispositive behaviour of a contracting authority, yet only by the level at which such criteria or conditions become tools for illegal discrimination or for restriction of competition. The contracting authority is autonomous in the determination of criteria; yet, such criteria must be specified, described or evaluated so that they guarantee objective evaluation of offers, but also represent a test for proper selection of the successful tenderer. The criteria must not be discriminatory and must be logically related with the public procurement content. The possibility is not allowed of preferential treatment for certain tenderers that, on the basis of certain information, prepare an offer more appropriate to the »subjective opinion« of the contracting authority.

The European Court of Justice has on several occasions stated its assertion of the principle of equal treatment. The principle of tenderer equal treatment was first introduced in the *Storebaelt case (Commission against Denmark)*[18], related to procedures within the framework of the directive on public procurement in the construction field. In this example the European Court of Justice claimed that, regardless of the fact that, in that period, the equal treatment principle was not specially mentioned in the Directive, »the duty to abide by this principle rests at the very heart of that Directive«. The Court judged that compiling an offer not meeting basic requirements determined by the contracting authority represents a breach of the equal treatment principle.

In the *Commission against France*[19] case, the European Court of Justice judged that the principle was to be applied »in all stages of the public procurement procedure« and not only when the tenderer submits the offer. The Court judged that the impossibility of presentation/publication at the EU level of a tender related to a given project breaches the principle, despite the fact that certain works are not covered by directives, since the tenderers are not able to adequately specify the prices of their offers without having knowledge of all available works. The Court applied the principle in several different situations, yet it did not specify general criteria that would determine what really tenderer equal treatment means.

The principle is probably a form of the principle of equal treatment of the EU legislation. While being determined as a key principle of the EU legislation, the equal treatment principle does not represent a general principle prohibiting discrimination in all circumstances. The principle of equal treatment in different contexts requires that similar use be made of this principle in similar

[18] Judgement C-243/89 of 22 June 1993.
[19] Judgement C-16/98 of 05 October 2000.

situations or that it is not used equally in different situations except if different treatment is justified. This formulation of equal treatment was adopted for public procurement directives in *Concordia Buses*[20] (Arrowsmith 2005:426).

Similarly- there is no unequal treatment in cases where selection conditions and criteria or where technical specifications for some tenderers make easier, and for other tenderers make harder, the road to obtaining the job. In these cases, tenderers are not in a similar situation due to their different competences to meet the demands of the contracting authority. The principle of equal treatment does not prevent the contracting authority to exclude certain enterprises from the procedure and allow other enterprises to participate in cases where this is based on justified and previously known criteria.[21]

Article 2 of Directive 2004/18/EU specifies that the contracting authority »shall treat all economic operators equally and in a non-discriminatory manner«. These are two separate principles - one of equal treatment, and the other of non-discrimination. Equal treatment refers to the wider principle of equal treatment developed by the European Court of Justice within the framework of directive; non-discrimination refers to non-discrimination based on nationality. The latter principle is probably a more specific expression of the first one. As such it serves merely as a warning that discrimination based on nationality is not allowed and that the existence of such discrimination should be determined on the basis of the agreement.

The principle of proportionality means that public procurement must be performed in accordance with the subject of public procurement, primarily in terms of the selection, determination and use of conditions and criteria which must be related *mutatis mutandis* with the subject of the public procurement.

The incorporation of proportionality in the fundamental principles was primarily imposed by the need of additional underlining of the relevance of proper formulation of conditions and criteria.

---

[20] Judgement C-513/99 of 17 September 2002, Concordia Buses Finland. Tenderers are not in a comparable position when the competitive procedure is such that a certain tenderer can submit a better offer than other tenderers. In the *Concordia Buses* case, the Advocate-General alleged that no different treatment had occurred of comparable situations in this case, where criteria in the procedure had given advantage to gas-powered buses, on which offers could have been submitted only by few tenderers (including national tenderers). Those who satisfied the contracting authority's conditions were in a position different from the position of those who were not able to meet these conditions. The Advocate-General conclusion that no breach of the principle of equality had occurred here was confirmed by the European Court of Justice.

[21] In this case we may underline admissibility of justifiable discrimination.

The formulation of appropriate conditions and criteria is one of the essential elements of the tender documentation. The contracting authority must inform potential tenderers on criteria and conditions as early as at the moment of publication of the public procurement and/or in the tender documentation; this excludes the possibility of additional establishment of criteria and conditions in relation to offers already submitted. Thus, everyone knows in advance excluding and differentiating benchmarks reflecting the expectations and evaluation of the contracting authority in terms of the necessity and importance of the works and circumstances needed for good performance of the work, all related with the expected offers and tenderers regarding the subject of the public procurement. It is important to add here that all criteria and conditions must be related with the very subject of the procurement and not with a specific tenderer. The relation of conditions and criteria with the subject means that these should be formulated from the aspect of a specific need, also taking into account information on the relevant market on the part of the tenderers in terms of the subject of the public procurement.

The implementation of the proportionality principle would mean that the contracting authority formulates the conditions in a manner in which the set of established conditions indicates the expected level to be achieved by each offer if evaluation is not done on the basis of criteria, in which case conditions and criteria are not placed at too high a level, on a level excluding or restricting potential competition.

Theoretically, it is also possible that such behaviour be justified in view of the demanding nature of the procurement. Being too demanding or too excessive while establishing conditions is not justified if the purpose of such behaviour is to limit and exclude competition and if the contracting authority would otherwise award the public procurement even under significantly less demanding conditions. Being excessive may also mean that the contracting authority demands more than what is realistically needed for good performance of the work. Proportionality hence expresses a compromise between a contracting authority's expectations and wishes on one side and the situation in the relevant market on the other side. We can refer to full compliance of the proportionality principle once it has been achieved.

The principle is also founded in the acting in accordance with the principle of economy and efficiency. It originates from the proportionality principle in the European law, which (within the frames of European law) governs public operators, in a way that their measures are *necessary* and *appropriate* for the achieving of the desired objective. States should hence, while adopting

measures, be careful to avoid causing thereby hindrances in the area of a specific economic activity, to an extent more than what is really needed; in its essence, this also goes to the regulation of public procurements. In terms of the recent practice of the State Audit Commission which has often (justifiably) linked its decisions to arguments submitted by both tenderers and contracting authorities regarding the violation of fundamental principles, it may be concluded that the scope of this principle is difficult to foresee; applicants of audit requests have in the recent practice justified their non-compliance with specified criteria or conditions by the principle of equal treatment of tenderers (Mužina and Vesel 2007: 55).

2. 2. CONFLICT OF PRINCIPLES IN PRACTICE THROUGH VALUES, NORMS, AND RELATIONS

Proper understanding of public procurements is important for contracting authorities also in terms of awareness on the limitation of rights while using public assets for public procurement purposes, which must not be directed towards the attaining of personal benefit or of the benefit of specific groups, rather to the meeting of the public interest *»in largo sensu«*..[22] The importance of principles also reflects itself in their restrictive state function within its regulatory attributes.

An interesting question occurring with the presentation of fundamental principles is whether these principles are mutually equal in rank, whether they are placed in a subordinate-superior order, whether they are mutually exclusive or complementary, and whether they support public procurement objectives to a same direction. So far, the relation between the principle of formality and the principle of economy (often opposed to each other) has shown itself to be a problematic one. Contracting authorities especially understand this conflict in cases when, due to formal reasons, an offer must be rejected which is not regular due to a missing document that is actually non-essential for good performance of the work but has been demanded by the contracting authority in the documentation - and that particular offer is most appropriate according to tender documentation criteria. Such an offer must be rejected in order to abide by the formality principle in terms of the practice of control institutions, though a decision in favour of this offer would be in accordance with the principle of economy. Then where is the boundary in the weighing between significance and relation when these two principles are racing? Is it even possible to place them within a system of values which would, in a relatively objective manner, establish in advance boundaries and circumstances under which one of the principles becomes more appropriate than the other - or should the formality principle be simply placed above the

[22] In a broader sense.

principle of economy not taking into account any economic implications? It would be ideal if we could offer an answer; yet, unfortunately, it cannot be given till the time wider consensus is reached among various institutions on the importance of a specific principle in relation to other principles. While solving this problem, we could consider as an initial point the case law of the Constitutional Court of the Republic of Slovenia in the process of its evaluation of proportionality, when significance is weighed against the intervention with a specific right in the case of a right tending to protect itself against such intervention, and when it judges there has been more severe intervention proportionate to the higher level of such right being affected. If the Constitutional Court finds that the importance of the right which is to be protected by intervention prevails over the importance of the intervention to the right in question, the intervention will undergo this aspect of the proportionality test.

A certain form of a proportionality test could be established also in the case of public procurements, when an attempt is made to protect a principle by violating another principle this may occur in cases where, for example, for the purpose of protection of the principles of economy, efficiency and effectiveness, the formality principle is violated under assumptions determined in advance, on the basis of which the proportionality test could be examined.

A certain right (in our theoretical, case the principle of formality) may be limited only in cases where it is necessary for the purpose of protection of other rights (in our theoretical case, protection of the principle of economy)[23], where it is necessary to respect the constitutional principle of proportionality[24], this meaning that it is obligatory to fulfil three conditions for admissibility of those limitations or interventions: urgency, adequacy and proportionality in the narrow sense. The intervention to the constitutional right is allowed only in cases where such intervention is necessary (inevitable) for the protection of other human rights, which means that a legislative objective cannot be achieved with one more lenient intervention in the constitutional right or without it. The intervention must be appropriate for achievement of a desired, constitutionally allowed objective (for example, protection of the rights of others or of public interest, where the protection of the public interest represents a constitutionally allowed objective.). The intervention should not be excessive, this meaning that only the mildest of all possible interventions is allowed whereby a constitutionally allowed and wanted objective can be achieved, as well as protection of equally important rights of others. Within the frames of

[23] Such position derives from the Constitutional Court decisions No U-I-47/94.1 and U-I-276/96.

[24] Article 15 of the Constitution of the Republic of Slovenia *inter alia* states that restrictions of constitutional rights are permitted only if in accordance with the so-called principle of proportionality.

proportionality, the importance of the intervention should be also assessed compared with the importance of the right which is to be protected by the intervention[25].

Of course, we do not make direct equation between public procurements and constitutional rights; some of them may even be derived from the use of public procurements or are violated for the purpose of misuse or limitation through legal or executive acts, or by decisions of certain institutions or authorities. In spite of this, mentioned conditions allowing interventions to constitutional rights could, in a reasonable adjustment, create assumptions and basis for assessment of the admissibility of the limitation and exclusion of one fundamental principle of public procurements for the purpose of implementation of another principle. Not only necessity, but also adequacy and proportionality, may be considered input elements in the test of proportionality in the area of public procurements, in which case we would also have to assess the nuisance of the implications of violation of one of the principles in view of the benefit and objectives which are to be achieved through the implementation of another principle and which must be based on the Law. In this way, determined formal insufficiency or violation would not necessarily mean the exclusion of a tenderer from a procedure, in case such insufficiency or violation would not have any negative or adverse implications on other principles of public procurement (the principles of equal treatment of tenderers, non-discrimination etc.), this disregard would then enable the selection of an offer that would mean implementation of the principle of economy for the purpose of economically most advantageous conditions, appropriate relationship between investments, and obtained value. The disregard of the principle of formality on behalf of the principle of economy in this case would also be necessary, appropriate, and proportional.

The above discussed could represent a consideration regarding the formulation of the proportionality test in the area of public procurements, which would represent an important and necessary step ahead in view of recent practice, both for contracting authorities and institutions monitoring regularity and deciding on violations in public procurement procedures, as well as on violations of fundamental principles. One of the more difficult tasks of legal regulation and practice is to find an appropriate ratio between fundamental principles of the public procurement. We can say that no principle can be excluded, but no principle can also be definitely implemented.

[25] Equally, decisions of the Constitutional Court of the Republic of Slovenia No U-I-158/95 and VII, 56.

OVERVIEW OF SOME TERMS USED

SLOVENIAN	ENGLISH
javno naročilo	public procurement
pogodba	treaty
evropska skupnost	European community
uraden list	Official Gazette
evropska gospodarska skupnost	European Economic Community
učinkovitost	efficiency
zagotavljati	ensuring
sodišče	Court
racunsko sodišče	Court of Auditors
enakopravnost	equal treatment
nediskriminacija	non-discrimination
transparentnost	transparency
sorazmernost	proportionality
konkurenca	competition
uspešnost	effectiveness
postopek	procedure
razpisna dokumentacija	tender documentation
pogodba	contract
ponudnik	tenderer
sodelovanje	participation
omejevanje	prohibition
prestrukturiranje	restructuring
preglednost	visibility
Pogodba o Evropski skupnosti	Treaty establishing the European Community
	legality
objava	pivot
naročnik	contracting authority
pomembni podatki	significant data
odločba	decision
direktiva	directive
kršitev	infringement
omejen	specified
okoliščina	circumstance
področje	area
javna sredstva	public assets

integracija	integration
trg	market
konkurenčen dijalog	competitive dialogue
elastičnost	flexibility
dopusten	allowed
opredelevanje	determination
nujen	essential
pogoj	requirement
udeleženec	participant
delovanje	operation
izbir	selection
sistem javnih naročila	public procurement system
spodbujanje	prompting
stroški	costs
primarni cilj	primary objective
doseganje	achieving
kriterij	criteria
določa	determine
vzajemno priznavanje	mutual recognition
prepoved	prohibition
krajevno diskriminacijo	locational discrimination
predmetno diskriminacijo	subject discrimination
osebno diskriminacijo	personal discrimination
avtonomen	autonomous
priviligiranje	preferential
mnenje	opinion
nezmožnost	impossibility
neenakopravnost	unequal treatment
ključno načelo	key principle
podjetja	enterprise
prilagajanje	establishment
uveljavitev	implementation
izključevanje	exclude
utemeljeno	justifiably
javnopravni subjekt	public operator
ustrezni	appropriate
norma	norm

vrednostni sistem	system of values
posledica	implication